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DEPT. OF WATER RESOURCES
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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

In Re: Amended Transfer No. 73969 –	)	Modified Transfer No. 73969
Water Right 37-21956	)	
	)	BRIEF IN SUPPORT OF EXCEPTIONS
ROBERT ROHE,	)	TO ORDER DENYING PETITION FOR
	)	RECONSIDERATION
Petitioner.	)	
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COME NOW the Petitioner, Robert Rohe., (“Rohe”) by and through his attorney of record, Fritz X. Haemmerle, Haemmerle & Haemmerle, P.L.L.C., and hereby files this Brief in Support of Exceptions to the September 18, 2009, Order Denying Petition for Reconsideration for Water Right Transfer No. 73969 for water right number 37-21956.

I. REQUESTED ACTION

The Petitioner seeks reconsideration of Condition of Approval 3 (hereinafter “Condition”) for Modified Transfer No. 73969, and as contained in Water Right 37-21956 (hereinafter “Transfer”). The Petitioner seeks the removal of the Condition. The

Petitioner is authorized under the Preliminary Order granting approval of the Transfer and under Idaho Code Section 67-5243(3) to file this Petition.

II. PROCEDURAL HISTORY

On August 7, 2009, the Idaho Department of Water Resources, (IDWR) approved transfer 73969, for the applicant, Robert Rohe ("Rohe" or "Petitioner"). The transfer The Idaho Department of Water Resources ("IDWR") placed conditions on the Transfer to mitigate for two minimum stream flows ("MSF") in the name of the State of Idaho. Those minimum stream flows are covered by water right numbers 37-7919 (priority date of June 19, 1981, diversion rate of 70 cfs) and 37-8307 (October 16, 1987, diversion rate of 119 cfs).

On August 21, 2009, Rohe protested the transfer alleging, among other issues, that conditions numbers 3 and 4 were not necessary or allowable, as a matter of fact and law. IDWR granted the Petition for Reconsideration as to conditions 2, 3 and 4.

On September 4, 2009, IDWR issued an *Order Granting Petition for Reconsideration in Part and Amending Approval of Transfer* ("Order"). At the same time, IDWR issued an Amended or Modified Transfer ("Transfer"). In the Order, IDWR determined that 0.08 cfs of the original right should be diverted into the Hiawatha Canal, where the amount shall be undiverted and used as conveyance loss. However, IDWR left the condition relating to subordination of the right to the MSF's in place. That condition is reflected in the Modified Transfer as condition 3 (hereinafter "Condition").

On September 16, 2009, the Petitioner filed a *Petition for Reconsideration*. On September 18, 2009, IDWR issued an *Order Denying the Petition for Reconsideration*. It is from this Order that Rohe files this Brief in Support of Exceptions.

III. FACTS

1. The MSF's cover an area between Warm Springs Creek downstream approximately 18 miles to the Bellevue Canal diversion. (*Preliminary Order Granting Petition for Reconsideration in Part and Amending Approval of Transfer* ("Preliminary Order"), ¶ 3).

2. The original water right's point of diversion was located roughly between Hailey and Ketchum, but above the Hailey gauge for measuring the minimum stream flows. (*Preliminary Order*, ¶ 6).

3. The transferred point of diversion is a groundwater source located just off of the Big Wood River, in the Gimlet Subdivision, said Subdivision located roughly between Hailey and Ketchum, but above the Hailey gauge.

4. The water right was not transferred outside of the minimum stream flows. (*Preliminary Order*, ¶ 8).

5. The water right being transferred, 37-21956, has a priority date of March 23, 1883. (*Preliminary Order*, ¶ 9).

6. The Petitioner did not consent to either mitigation or subordination for this right. (*Preliminary Order*, ¶ 10).

7. Prior to this transfer, IDWR has never subordinated any transferred right to the two MSF rights. (*Affidavit of Fritz X. Haemmerle*, Exhibit 1 – Letter from Kevin Lakey).

8. IDWR required the subordination condition to avoid injury to the MSF rights. As a matter of fact, there is no scientific way to calculate any injury to the MSF rights. (*Affidavit of Charles E. Brockway*, Ph.D., P.E., ¶ 4).

IV. ARGUMENT

A. The Condition violates the enabling legation for MSF's as set forth under Chapter 15, Title 42.

Pursuant to statutory authority, MSFs are authorized provided that any particular MSF does 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.” I.C. § 42-1503(a).

It is important to note that MSF rights in Idaho are not authorized, as they could have been, under the general appropriation statute that governs all other water rights in Idaho. In Idaho, new appropriations for all rights other than MSF rights are perfected only through the procedures set forth in Idaho Code § 42-201 *et seq.*. On the other hand, applications for MSF rights are perfected only through the procedures set forth in the Minimum Stream Flow Act (“Act”), Idaho Code § 42-1503, and for the purposes set forth in Idaho Code § 42-1501.

After declaring that MSF rights are in the public interest in Idaho, Section 42-1501 reads that “[i]t is, therefore, necessary that authority be granted to receive, consider, approve or reject applications for permits to appropriate water of the streams of this state to such beneficial uses **to preserve such water from subsequent appropriation to other beneficial uses** under the provisions of chapter 2, title 42, Idaho Code.” (Emphasis added). The concluding sentence of the general appropriation statute also makes certain that no minimum stream flow right can be perfected under Idaho Code § 42-203A in the guise of the public interest. The sentence reads: “Provided, however, that minimum

stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.”

The wording of the Act, as well as the wording for new appropriations of all other water rights in Idaho under the general appropriation statute, is clear. In interpreting statutes under the tenets of statutory construction in Idaho, Courts must give force and effect to the legislature’s intent in passing the statute.” *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994). The Courts also “must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.” *McLean v. Maverik County Stores, Inc.*, 142 Idaho 810, 813, 135 P.2d 756, 759 (2006). Finally, the plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless the plain meaning leads to absurd results. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990).

With respect to the wording of Section 42-203A, it is clear that MSF rights cannot be perfected as ordinary water rights under its provisions. With respect to Section 42-1501, it is also clear that MSF rights in Idaho have the explicit purpose of precluding “subsequent” (i.e. future) diversionary appropriations. Additionally, this reading of the plain language of Section 42-1501 also comports with the specific administrative limitation set forth in Section 42-1505 of the Act:

In his direction and control of the distribution of water from the streams of this state under the provisions of chapter 6, title 42, Idaho Code, the director shall consider any approved application for appropriation of minimum stream flow filed under the provisions of this act as a water right with priority date as of the date of receipt in the office of the director of a complete application. **Water shall not be deemed to be available to fill any water right of later priority date if diversion of such water would result in a decrease in the flow of the stream . . . below the minimum**

stream flow . . . specified in said approved application for appropriation of minimum stream flow at the locations described in said approved application.

(Emphasis added). This section reiterates that the express and limited purpose of a minimum stream flow right under the Act is to preclude future appropriations under the general appropriation statute that would diminish stream flows in the desired location of a minimum stream flow right.

Aside from the explicit language going directly to the purpose for which minimum stream flow rights can be created under Idaho law, Section 42-1503 expressly prevents “interference” with existing senior rights as opposed to precluding “injury” as that concept is used in Idaho’s general appropriation statute, Section 42-203A, and in Idaho’s water rights transfer statute, Section 42-222. In this regard, the general appropriation statutes in most western states articulate two basic conditions of approval, namely that unappropriated water is available to make the appropriation and that the appropriation would not impair or injure existing water rights.

In Idaho, these two concepts are rolled into one in under Section 42-203A, which allows approval of an application if “it will [not] reduce the quantity of water under existing water rights” The preclusion of injury aspect of the statute is also articulated in Idaho’s water rights transfer statute, Section 42-222, which provides that “[t]he director . . . shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby”

In contrast, under the Minimum Stream Flow Act, Section 42-1503 requires that “[a]pproval of any [minimum stream flow] application must be based” on five findings

peculiar to minimum stream flow rights in Idaho. *See*, Idaho Code § 42-1503(a)-(e). Section 42-1503(a) requires that the Director, in approving any application, must find that the minimum stream flow right “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 . . .”

The express standards of protection are categorically distinct in the two appropriation statutes. The criterion used in the general appropriation statute is the preclusion of injury as a consequence of a reduction of water supply for existing rights. In relation to MSF rights in Idaho, the standard is different – a minimum stream flow right cannot “interfere” with vested senior water rights. The legislature intentionally used this term and it must be given its plain meaning. In other words, the legislature, in only allowing appropriations of minimum stream flow rights under the Act if they do not “interfere” with vested senior water rights, has afforded a greater degree of protection to the senior rights by making it plenary and by extending that protection to the exercise of the senior rights under all circumstances.

Specifically, the Idaho Supreme Court has on more than one occasion pronounced that water rights are real property, which may be sold and transferred separately from the appurtenant lands as long as other water rights are not injured. The Board’s appropriation of a minimum stream flow should not in any way “interfere” with the exercise of this valuable real property right and such non-interference can only be accomplished if diminution of the minimum stream flow is not an issue in the transfer proceeding. The no interference standard should also prevent actions that might reduce

or eliminate the monetary value of a senior water right or, from the public interest perspective, reduce or eliminate the mitigation value of a senior water right by effectively advancing its priority date.

The no interference standard has also been recognized administratively. All of the Board's MSF rights on the Big Wood River contain the general condition that each of the rights "is subject to all prior water rights," a condition implicit in every new appropriation of a water right under Idaho's prior appropriation doctrine. They also include a specific condition that reads:

Use of water under this right shall recognize and allow the continued beneficial diversion of water under any prior existing water right established by diversion and application to beneficial use or by an application, permit, or license on file issued by the Director under provisions of Chapter 2, Title 42, Idaho Code, with the priority for the water right dated earlier than [the priority date of the minimum stream flow water right].

(See e.g., *Affidavit of Fritz X. Haemmerle*, Exhibit 3 – Water Right 37-8307).

The other MSF right, 37-7919, is even more clear as to how MSF rights are to be considered and applied to subsequent diversions. The conditions of approval for MSF 37-7919 state that the minimum stream flows "shall be considered in the evaluation of applications for permit to appropriate water from the Big Wood R. and Trib, filed after 6/19/81." (*Id.*, Exhibit 2). The remarks did not allow or provide for consideration of the MSF with respect to transfers with priority dates predating the MSF's.

Until recently, IDWR has implemented the intent of the Legislature in not subordinating transfers to MSF rights. The past policy of IDWR was reflected in a every single Memorandum Decision or Order issued by prior Directors addressing the applicability of MSF to water rights with earlier priority dates – the so-called "vested"

water rights. Included in these Orders is an order *Adopting Proposed Memorandum and Order*, signed by R. Keith Higginson, dated January 2, 19991, said Memorandum drafted by now acting Director Gary Spackman. "The proposed minimum stream flows will not interfere with any vested water right, permit, or other water right application with priority of right date earlier than the date of the minimum stream flow." (*Affidavit of Fritz X. Haemmerle*, Exhibit 5 – Backfile for 37-8307). The Decision did not authorize consideration of the MSF with respect to transfers. Again, this Decision is consistent with the enabling legislation behind the MSF's.

To summarize, the specific conditions under the MSF rights, 37-7919 and 37-8307, are not redundant of the general condition, and they comport fully with the added protection the legislature has given to senior diversionary water rights. By statute, MSF rights in Idaho and water rights perfected by permit under Section 42-203A are categorically distinct. The differences in the nature and purpose of the respective rights are clear in the statutory language, clear in terms of the public interest of protecting the integrity of water rights vested over 100 years ago, and apparently clear internally at IDWR until just recently.

Accordingly, the Director should exclude condition 3 as a matter of law.

B. If IDWR subordinates this transfer to the MSF in the Big Wood River, it will have to subordinate every transfer where there is a MSF, including MSF held by the United State of America.

Under a theory that MSF are treated like any other water right with respect to transfers, then IDWR will be compelled to apply the very same injury analysis to MSF rights held by the United States, or its agencies. If true, this would be a very large departure from previous IDWR policy.

C. Even if IDWR had the authority to subordinate water right to MSF, any subordination in this case, as a matter of fact, would be arbitrary and capricious.

As a matter of fact, there is no way to determine whether an injury can occur to the MSF because of the *de minimus* nature of the transferred right. Due to the *de minimus* nature of the amounts in question, 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*).

The typical accuracy of stream flow gauges on rated sections is at best +/- 5%, and is likely closer to +/- 10%. Dr. Brockway performed a statistical analysis of 235 field measurements of stream flow made by the U.S. Geological Survey at the Hailey Gauge. According to his study, the 95% confidence interval of the difference between the field measurement and the stream flow predicted by the rating curve, was +/-5.8%. The 95% confidence interval is an accepted means of expressing statistical accuracy. This analysis does not account for potential error in the field measurements, but does provide some indication of gauging error. (*Id.*)

In this case, the combined rate of the two MSF rights is 189 cfs. At this stream flow, the accuracy of the Hailey Gauge is no better than +/- 5%, or +/- 9.45 cfs (472.5 inches). The consumptive diversion rate of the right being transferred is 0.03 cfs (1.5 inches). In other words, the right being transferred is 0.3% of the amount of water contained in the margin of error of the Hailey Gauge for a stream flow of 189 cfs. Therefore, there is no scientific method to determine using the Hailey Gauge whether, when the gauge reads 189 cfs, diversion of water at the new location is in fact causing a violation of the MSF rights. (*Id.*, ¶ 7).

In the approval of Transfer No. 73969, IDWR made the implicit assumptions that: (a) the Hailey Gauge, correcting for major upstream diversions from the river, could accurately be used as a proxy for the stream flow in the MSF reach; and (b) when the gauge reads exactly 189 cfs or below, any and all upstream transfers, no matter how small, would result in injury to the MSF rights. (*Id.*, ¶ 8).

Any determination of injury should first be based on a quantifiable impact. The impact in the case of the MSF rights should be quantified based on a scientific determination of the magnitude and location of net impact to the stream flow. Net impact to the stream flow should consider changes due to the proposed transfer in the magnitude and location of diversion, consumptive use, and return flow to the river either via a surface path or aquifer-river exchange. The scientific determination of net impact should be based on actual measurements, analytical calculation, or numerical modeling. Based on information in the IDWR files, no such scientific determination was made in this case. (*Id.*, ¶ 9).

After quantification of actual impact on stream flow, any determination of injury should be based on the effect of the impact on the beneficial uses authorized by the water right. In this case, based on information in the IDWR files, no such analysis was performed. (*Id.*, ¶ 10).

To summarize, in Dr. Brockway's analysis, IDWR's conclusion that such a transfer would cause injury to the MSF rights is not well-supported by the scientific evidence. (*Id.*, ¶ 11).

D. Denial of Equal Protection - Taking.

Based upon the totality of the circumstances by which IDWR treated Rohe, it is clear that Rohe was treated differently than any other applicant transferring water within the Big Wood River. In cases where people are singled out in agency cases, both the Idaho and United States Supreme Court have created a cause of action recognizing “class of one” equal protection claims.

The United States Supreme Court has also provided a remedy for a “class of one” for those who suffer from arbitrary and capricious governmental action.

Our cases have recognized successful equal protection claims brought by a “class of one, where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that “[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents”

Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

Similarly, the Idaho Supreme Court held:

Even though a statute or regulation is valid under this analysis, selective or discriminatory enforcement of that statute or regulation may amount to a violation under either the Idaho or United States Constitutions, but only if the challenger shows a deliberate plan of discrimination based upon some improper motive like race, sex, religion, or some other arbitrary classification. **A “class of one” may successfully state an equal protection claim, even where challenged treatment does not follow suspect classifications or punish the exercise of constitutional rights, if he or she was singled out based upon a distinction that fails the rational basis test.**

Anderson v. Spalding, 137 Idaho 509, 50 P.3d 1004, 1009 (2002). (Emphasis added).

In this case, it is undisputed that Rohe was singled out as the only applicant for a transfer who had to subordinate his priority date. The policy of IDWR to subordinate

transfers to MSF's, after over twenty (20) years of not applying the policy, fails any rational basis test and, therefore, constitutes a denial of equal protection.

Futhermore, the subordination results in shifting the March 23, 1883, priority date to a priority date of June 3, 1884. (*Affidavit of Charles E. Brockway, Ph.D., P.E.*, ¶ 12-13). The result is that such a priority date would realize three weeks less of irrigation. (*Id.*). This loss of irrigation would significantly impact the value of the water right. (*Id.*).

The diminution in value results in a taking without just compensation. *See*, Art. XV, § 3, and Art. 14, § 1, Idaho Const.; Art. 5, United States Constitution. *See e.g.*, *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006).

V. CONCLUSION

For all these reasons, the Petitioner respectfully requests that the Director remove condition 3, the subordination condition, from the approved transfer.

RESPECTFULLY SUBMITTED this ^{9th} day of October, 2009.

HAEMMERLE & HAEMMERLE, P.L.L.C.


By: Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 2009, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

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XX By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

 By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

✓ By telecopying copies of same to said attorney(s) at the telecopier number _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.
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