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ISB #3862

Attorneys for Petitioner

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

In Re: Amended Transfer No. 73969 –	)	Modified Transfer No. 73969
Water Right 37-21956	)	
	)	
ROBERT ROHE,	)	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 Petition for Reconsideration ("Petition") of Water Right Transfer No. 73969 for water right number 37-21956.

LISTED REPRESENTATIVE: Fritz X. Haemmerle
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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

1. On August 7, 2009, the Idaho Department of Water Resources, (IDWR) approved transfer 73969, for the applicant, Robert Rohe ("Rohe"). 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).

2. 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.

3. 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").

III. GENERAL FACTS

4. The MSF's cover an area between Warm Springs Creek downstream approximately 18 miles to the Bellevue Canal diversion.

5. 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.

6. 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.

7. The water right was not transferred outside of the minimum stream flows.

8. The water right being transferred, 37-21956, has a priority date of March 23, 1883.

9. The Petitioner did not consent to either mitigation or subordination for this right.

IV. APPLICABLE LAWS AND FACTS

10. The Condition violates Art. XV, § 3, and Art. 14, § 1, of the Idaho Constitution, as well as Art. 5, of the United States Constitution, as the Condition amounts to a taking without just compensation.

11. The Condition also violates the ability of prior appropriators to divert water under "first in time, first in right" in violation of Art. XV, §§ 3, 4 and 5 of the Idaho Constitution.

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

13. 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." The remarks did not allow or provide for consideration of the MSF with respect to transfers with priority dates predating the MSF's. As such, and as a matter of fact, the application of this Transfer to the MSF violated the conditions of approval of the MSF's.

14. The conditions of approval for MSF 37-8307 state:

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 of the water right dated earlier than 10/16/87, the priority of this right.

The application of the MSF's to this Transfer violates this condition of approval of MSF 37-8307.

15. On or about October 20, 1994, the Director of IDWR, Keith Higginson, issued an Amended Memorandum Decision with respect to MSF 37-7919. In that Decision, the Director stated that MSF 37-7919 would be considered only with respect to "the evaluation of applications for permit to appropriate water from the Big Wood River and tributaries filed after June 19, 1981." The Decision did not authorize consideration

of the MSF with respect to transfers. This Decision is consistent with the enabling legislation behind the MSF's.

16. The enabling legislation, IDWR's prior agency Decisions and the conditions of approval on the MSF's express a clear intent to subordinate the MSF's to all water rights with earlier priority dates.

17. Before this Transfer, it is the belief of the Petitioner that IDWR has never required subordination of water rights with superior priority dates, to the MSF's, as a condition of approval for a transfer. The requirement of subordination at this date amounts to a violation of the Petitioner's Equal Protection rights, guaranteed under the Idaho and United States Constitutions.

18. Furthermore, it is believed that IDWR has only one measuring device, located near Hailey. Because there is only one measuring device, IDWR, or its agents, have no way to gauge when the minimum stream flows are being met. Accordingly, any attempt to subordinate rights to these MSF would result in a futile act. Also, any attempt to administer the rights would result in arbitrary and capricious action.

V. DESIRED RELIEF

19. The Petitioner requests removal of conditions 3 from the Amended Transfer, and similar conditions placed on water right 37-21956.

RESPECTFULLY SUBMITTED this 16th day of September, 2009.

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



By: Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of September, 2009, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

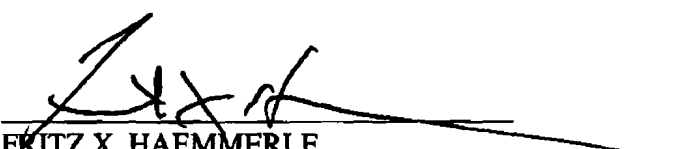
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XX By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

 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.


FRITZ X. HAEMMERLE