



State of Idaho
DEPARTMENT OF WATER RESOURCES
1341 Fillmore Street, Suite 200; Twin Falls ID 83301-3380
Phone: (208) 736-3033 FAX: (208) 736-3037 www.idwr.idaho.gov

C.L. "BUTCH" OTTER, Governor

GARY SPACKMAN, Interim Director

September 4, 2009

ROBERT ROHE
PO BOX 2288
KETCHUM ID 83340-2288

RE: Transfer No. 73969, (Water Right No. 37-21956)

Amended Transfer Approval Notice

Dear Water Right Holder and Other Interested Persons:

The Department of Water Resources has issued the enclosed *Amended Approved Transfer of Water Rights*. Please be sure to thoroughly review the conditions of approval and remarks listed on the approval document.

The Transfer of Water Rights is a PRELIMINARY ORDER issued by the Department pursuant to Section 67-5243, Idaho Code. It can and will become a final order without further action by the Department unless the APPLICANT petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet.

ANY PERSON aggrieved by any decision, determination, order or action of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Department and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

If the transfer approval includes a condition requiring measuring and recording devices, such devices shall comply with specifications established by the Department. Detailed specifications are available on the Department's homepage on the Internet, or you can request a copy by contacting any office of the Department. Please be sure to thoroughly review the specifications to avoid unnecessary costs for reinstallation or modification due to non-conforming or improperly installed devices.

Please note that water right owners are required to report any change of water right ownership and/or mailing address to the Department within 120 days of the change. Failure to report these changes could result in a \$100 late filing fee. Contact any office of the Department or visit the Department's homepage on the Internet to obtain the proper forms and instructions.

If you have any questions, please contact me at 208-736-3033.

Sincerely,

Allen Merritt
Regional Manager

Enclosures

cc: FISHER & ASSOCIATES, HAEMMERLE & HAEMMERLE, BIG WOOD CANAL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2009 I mailed a true and correct copy, postage prepaid via Regular U.S. Mail, of the foregoing Preliminary Order Granting Petition for Reconsideration in Part and Amending Approval of Transfer to the persons listed below:

ROBERT ROHE
PO BOX 2288
KETCHUM ID 83340-2288

HIAWATHA CANAL WATER USERS
ASSOCIATION OF LATERALS
PO BOX 669
HAILEY ID 83333

FISHER & ASSOCIATES
6640 HWY 200 E
MISSOULA MT 59802

HIAWATHA CANAL WATER USERS
ASSOCIATION OF LATERALS
C/O FRITZ X. HAEMMERLE
HAEMMERLE & HAEMMERLE
PO BOX 1800
HAILEY ID 83333

SOUTH COUNTY ESTATES LLC
C/O JAMES R. LASKI
LAWSON LASKI LAW FIRM
PO BOX 3310
KETCHUM ID 83340

BIG WOOD CANAL COMPANY
C/O CRAIG HOBDEY
PO BOX 176
GOODING ID 83330

HIAWATHA CANAL CO
PO BOX 1615
HAILEY ID 83333



Mary Baldwin
Administrative Assistant

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES (To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

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)	PRELIMINARY ORDER
)	GRANTING PETITION FOR
)	RECONSIDERATION IN PART
)	AND AMENDING APPROVAL
)	OF TRANSFER

This matter is before the Department of Water Resources (Department) on a petition to reconsider the preliminary order of the Department approving water right transfer No. 73969. The Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On August 7, 2009, the Department approved Application for Transfer No. 73969 (transfer) as a preliminary order (order) of the Department pursuant to Idaho Code § 67-5243 and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730). The order was mailed to Robert Rohe (applicant or petitioner) on August 7, 2009.
2. On August 21, 2009, the Department received a timely Petition for Reconsideration of the order (petition) pursuant to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a) from the applicant's attorney, Fritz X. Haemmerle.
3. The minimum stream flow (MIF) rights 37-7919 and 37-8307 cover the reach of the Big Wood River between Warm Springs Creek downstream approximately 18 miles to the District 45 Canal diversion.
4. Water right 37-21956 has historically been diverted into the Hiawatha Canal located between Hailey and Ketchum within the MIF reach described above.
5. The transferred point of diversion for the Rohe site is a ground water source located just off the Big Wood River and hydraulically connected to the Big Wood River.
6. The transferred point of diversion for the Rohe site is in the Gimlet Subdivision, said subdivision is located between Hailey and Ketchum within the MIF reach described above and also above the Hiawatha Canal diversion.

7. 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 MIF rights reach described above.

8. The water right transfer is totally within the MIF rights reach described above and does not attempt to move diversion of water outside of the MIF rights reach described above.

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

10. The applicant did not consent to mitigate or subordinate for injury to the MIF rights.

11. The existing rights considered by the Department that may be injured as a result of the transfer if no special conditions are imposed include:

- a. rights that have historically relied on and shared conveyance losses in the Hiawatha Canal with right 37-21956.
- b. minimum stream flow (MIF) rights 37-7919 and 37-8307 in the name of the Idaho Water Resource Board in the reach between the Hiawatha Canal and the Rohe project.

12. The Department placed conditions 2, 3 and 4 on right 37-21956 to prevent injury to existing rights as a result of the transfer and to mitigate for the approval of permit 37-22385.

13. Condition 2 states: "To prevent injury to other water users caused by approval of transfer 73969 the watermaster shall deliver a 0.03 cfs portion of this right for irrigation into the Hiawatha Canal where it shall remain undiverted and used for conveyance loss. The other portion authorized for irrigation (0.02 cfs) shall be diverted from ground water from the pond located in Lt1 (NWNENE) S6, T3N, R18E used to irrigate 0.9 acres."

14. The Department has determined that 0.03 cfs is a reasonable rate for conveyance loss of the original right in the Hiawatha Canal and is the minimum rate necessary to leave in the Hiawatha Canal to protect existing right holders in the Hiawatha Canal.

15. The application for transfer proposed 0.08 cfs of the right being moved be left in the Hiawatha Canal to avoid injury to existing rights.

16. Rohe is purchasing right 37-21956 from Cropper and the sales agreement

between Cropper and Rohe required 20% (0.03 cfs) be left in the Hiawatha Canal and is the basis for condition 2.

17. Condition 3 states: "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, which ever 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. "

18. 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.

19. Condition 4 states: "The 0.06 cfs portion of this right listed as mitigation use shall remain undiverted to compensate for the evaporation losses necessary to maintain the pond authorized under right 37-22385 and to mitigate potential injury to rights 37-7919 and 37-8307."

20. Evaporative loss for the pond authorized under right 37-22385 also utilized as a part of the diversion system under right 37-21956 pursuant to this transfer is found to be 0.01 cfs.

21. The 0.05 cfs portion of the 0.06 cfs identified in Condition 4 does not mitigate for injury to rights 37-7919 and 37-8307 because the additional water would only be available below the point where injury to the MIF would occur.

22. The petition seeks removal of conditions 3 and 4 from right 37-21956 imposed as conditions of approval of Transfer No. 73969.

ANALYSIS

The movement of water rights 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 MIF rights if flows drop below those protected by the MIF rights (189 cfs). 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 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.

The movement of water rights out of the Hiawatha Canal will decrease the flow in the canal and place an additional burden on the rights left which have historically relied on the flows of the right being moved to share in conveyance loss. The application for transfer proposed to leave 0.08 cfs of the right being moved in the Hiawatha to avoid injury to existing rights. Rohe is purchasing right 37-21956 from Cropper and the sales agreement between Cropper and Rohe required 20% (0.03 cfs) be left in the Hiawatha Canal and is the basis of Condition 2. The original approval of this transfer was based on the sales agreement, but if the applicant has proposed as stated on the application to leave 0.08 cfs in the Hiawatha Canal this is reasonable and the approval should be amended.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 which governs the transfer process provides in pertinent part: "The director of the department of water resources 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"

2. Neither chapter 15, title 42, Idaho Code, which provides for the establishment of MIF rights, or the conditions of approval of rights 37-7919 or 37-8307 preclude the need to assess and address the potential injury to these specific rights or type of rights that may result as a consequence of transferring rights vested at the time of establishment of the MIF rights.

3. The Department must condition rights involved in transfers to avoid injury to all other existing rights regardless of the priority date of the other rights or deny the transfer.

4. The Department can modify or amend a preliminary order before it becomes final.

5. To address conveyance loss on the Hiawatha, Condition 2 should be modified from 0.03 cfs to 0.08 cfs as a portion for irrigation into the Hiawatha Canal.

6. Condition 4 should be modified from 0.06 cfs to 0.01 cfs to compensate for evaporation losses.

7. Condition 3 should remain unchanged to protect MIF rights.

ORDER

IT IS HEREBY ORDERED that the preliminary order granting approval of Transfer 73936 is **AMENDED** as described on the attached "Amended Transfer of Water Right No 73969, dated September 4th 2009.

Dated this 4th day of September, 2009.



ALLEN MERRITT
Southern Region Manager