

HAEMMERLE & HAEMMERLE, P.L.L.C.
400 SOUTH MAIN STREET, SUITE 102
P.O. BOX 1800
HAILEY, IDAHO 83333
VOICE (208) 578-0520
FAX (208) 578-0564

FACSIMILE TRANSMITTAL SHEET

TO:
GARY SPACKMAN
ALLEN MERRITT

FROM:
FRITZ X. HAEMMERLE

COMPANY:

DATE:
AGUST 24, 2009

FAX NUMBER:
(208) 287-6700
(208) 736-3037

TOTAL NO. OF PAGES
INCLUDING COVER:

PHONE NUMBER:

SENDER'S REFERENCE:

Contains: Protest and Petition for Reconsideration Transfer 73969, Water Right 37-21956

WARNING
THIS DOCUMENT IS A PRIVILEGED COMMUNICATION
INTENDED SOLELY FOR THE BENEFIT OF THE
ADDRESSEE.

FRITZ X. HAEMMERLE, ESQ
HAEMMERLE & HAEMMERLE, P.L.L.C.
 400 South Main Street
 P.O. Box 1800
 Hailey, Idaho 83333
 208/578-0520
 Fax: 208/578-0564
 ISB #3862

Attorneys for Petitioner

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

In Re: Transfer No. 73969 – Water Right	)	Transfer No. 73969
37-21956	)	
	)	
ROBERT ROHE,	)	HIAWATHA CANAL WATER USERS
	)	ASSOCIATION OF LATERAL OR
Applicant.	)	LATERALS PROTEST AND PETITION
	)	CONTESTING TRANSFER
	)	
	)	
	)	
	)	
	)	
	)	

COME NOW the Petitioner, HIAWATHA CANAL WATER USERS ASSOCIATION OF LATERAL OR LATERALS, ("Canal Company"), by and through their attorney of record, Fritz X. Haemmerle, Haemmerle & Haemmerle, P.L.L.C., and hereby files this Protest and Petition ("Petition") contesting of Water Right Transfer No. 73969.

LISTED REPRESENTATIVE: Fritz X. Haemmerle
 HAEMMERLE & HAEMMERLE, P.L.L.C.
 P.O. Box 1800
 Hailey, ID 83333
 (208) 578-0520
 (208) 578-0564 (fax)
 e-mail: fxh@haemlaw.com

I. REQUESTED ACTION

The Protest involves Conditions of Approval, Conditions 3 and 4 (hereinafter "Conditions") for Transfer No. 73969, and as contained in Water Right 37-21956 (hereinafter "Transfer"). The Petitioner seeks the removal of the Conditions. The Petitioner is authorized under the Preliminary Order granting approval of the Transfer, 421701A(3) and IDAPA 37.01.01.230 to file this Petition.

II. GENERAL FACTS

1. 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. The MSF's cover an area between Warm Springs Creek downstream approximately 18 miles to the Bellevue Canal diversion.
3. 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.
4. 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.
5. The water right was not transferred outside of the minimum stream flows.
6. The water right being transferred, 37-21956, has a priority date of March 23, 1883.

III. APPLICABLE LAWS AND FACTS

7. The Conditions violate Art. XV, § 3, and Art. 14, § 1, of the Idaho Constitution, as well as Art. 5, of the United States Constitution, as the Conditions amount to a taking without just compensation.

8. The Conditions also violate 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.

9. The Conditions violate the enabling legislation 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).

10. 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.

11. 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.

12. 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.

13. 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.

14. Before this Transfer, it is the belief of the Petitioner that IDWR has never required mitigation, nor have they subordinated water rights with superior priority dates, to the MSF's. The requirement of mitigation and subordination at this date amounts to a violation of the Petitioner's Equal Protection rights, guaranteed under the Idaho and United States Constitutions.

15. 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.

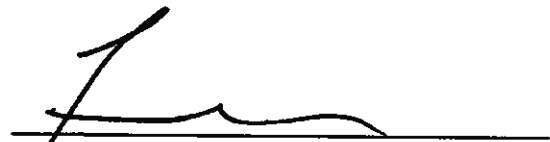
IV. DESIRED RELIEF

16. The Petitioner requests removal of conditions 3 and 4 from the Transfer, and similar conditions placed on water right 37-21956.

17. The Petitioner requests a hearing before the Director as allowed under Idaho Code Section 42-1701A(3).

RESPECTFULLY SUBMITTED this 24th day of August, 2009.

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


By: Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2009, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

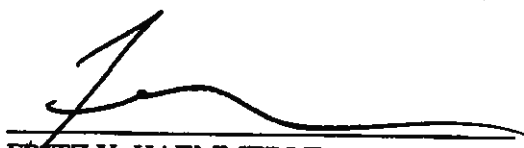
Gary Spackman
Director, Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
FAX: (208) 287-6700

Allen Merritt
1341 Fillmore St., Suite 200
Twin Falls, ID 83301-3380
FAX: (208) 736-3037

Ed Lawson
Erin Clark
LAWSON, LASKI, CLARK & POGUE, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

Robert Rohe
P.O. Box 2288
Ketchum, ID 83340

- 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

**FRITZ X. HAEMMERLE, ESQ
HAEMMERLE & HAEMMERLE, P.L.L.C.
400 South Main Street
P.O. Box 1800
Hailey, Idaho 83333
208/578-0520
Fax: 208/578-0564
ISB #3862**

**RECEIVED
AUG 25 2009
DEPT. OF WATER RESOURCES
SOUTHERN REGION**

Attorneys for Petitioner

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

In Re: Transfer No. 73969 – Water Right 37-21956	) Transfer No. 73969
	)
	)
ROBERT ROHE,	) HIAWATHA CANAL WATER USERS
	) ASSOCIATION OF LATERAL OR
Applicant.	) LATERALS PROTEST AND PETITION
	) CONTESTING TRANSFER
	)
	)
	)
	)
	)
	)

COME NOW the Petitioner, HIAWATHA CANAL WATER USERS ASSOCIATION OF LATERAL OR LATERALS, ("Canal Company"), by and through their attorney of record, Fritz X. Haemmerle, Haemmerle & Haemmerle, P.L.L.C., and hereby files this Protest and Petition ("Petition") contesting of Water Right Transfer No. 73969.

LISTED REPRESENTATIVE: Fritz X. Haemmerle
HAEMMERLE & HAEMMERLE, P.L.L.C.
P.O. Box 1800
Hailey, ID 83333
(208) 578-0520
(208) 578-0564 (fax)
e-mail: fxh@haemlaw.com

I. REQUESTED ACTION

The Protest involves Conditions of Approval, Conditions 3 and 4 (hereinafter "Conditions") for Transfer No. 73969, and as contained in Water Right 37-21956 (hereinafter "Transfer"). The Petitioner seeks the removal of the Conditions. The Petitioner is authorized under the Preliminary Order granting approval of the Transfer, 421701A(3) and IDAPA 37.01.01.230 to file this Petition.

II. GENERAL FACTS

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

3. 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.

4. 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.

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

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

III. APPLICABLE LAWS AND FACTS

7. The Conditions violate Art. XV, § 3, and Art. 14, § 1, of the Idaho Constitution, as well as Art. 5, of the United States Constitution, as the Conditions amount to a taking without just compensation.

8. The Conditions also violate 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.

9. The Conditions violate the enabling legislation 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).

10. 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.

11. 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.

12. 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.

13. 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.

14. Before this Transfer, it is the belief of the Petitioner that IDWR has never required mitigation, nor have they subordinated water rights with superior priority dates, to the MSF's. The requirement of mitigation and subordination at this date amounts to a violation of the Petitioner's Equal Protection rights, guaranteed under the Idaho and United States Constitutions.

15. 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.

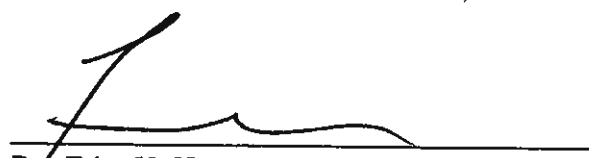
IV. DESIRED RELIEF

16. The Petitioner requests removal of conditions 3 and 4 from the Transfer, and similar conditions placed on water right 37-21956.

17. The Petitioner requests a hearing before the Director as allowed under Idaho Code Section 42-1701A(3).

RESPECTFULLY SUBMITTED this 24th day of August, 2009.

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



By: Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2009, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

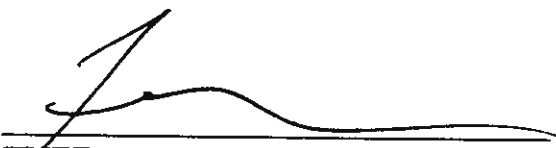
Gary Spackman
Director, Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
FAX: (208) 287-6700

Allen Merritt
1341 Fillmore St., Suite 200
Twin Falls, ID 83301-3380
FAX: (208) 736-3037

Ed Lawson
Erin Clark
LAWSON, LASKI, CLARK & POGUE, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

Robert Rohe
P.O. Box 2288
Ketchum, ID 83340

- 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