

BEFORE 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 REJECTING PROTESTS
AND PETITIONS CONTESTING
TRANSFER APPROVAL AND
DENYING REQUESTS FOR HEARING**

This matter having come before the Department of Water Resources (Department or IDWR) as a result of the filing of protests and/or petitions contesting a transfer approval and requesting a hearing, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On August 2, 2007, the Department received application for transfer no. 73969 ("transfer application") in the name of Robert Rohe ("applicant"). The purpose of the transfer application was to change the point of diversion and place of use for water right 37-21956 from the Big Wood River.
2. 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 The protest was conditionally withdrawn on March 30, 2009.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.
3. The Department approved the transfer application on August 7, 2009 and issued the approval as a preliminary order of the Department pursuant to Section 67-5245, *Idaho Code*.
4. The applicant has not requested a hearing to contest the transfer application approval.¹
5. 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"). South County cited IDAPA 37.01.01.230 as its basis of authority for the petition, asking for removal of certain conditions of the transfer application approval and requested a hearing on the matter before the Director pursuant to Section 42-1701A(3), *Idaho Code*.
6. 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

¹ The applicant has filed a timely petition for reconsideration in the matter to contest conditions of the transfer application approval, but a final decision has not been issued by the Department. A decision by the Department is subject to appeal to the Director by the applicant which may include a request for hearing pursuant to Section 42-1701A(3), *Idaho Code*, to contest the action of the Director.

of Hiawatha Canal Water Users Association of Lateral or Laterals (“Hiawatha”). Hiawatha cited IDAPA 37.01.01.230 as its basis of authority for the petition, asking for removal of certain conditions of the transfer application approval and requested a hearing on the matter before the Director pursuant to Section 42-1701A(3), *Idaho Code*.

CONCLUSIONS OF LAW

1. Section 42-222(1), *Idaho Code* provides in pertinent part:

Upon receipt of such [transfer] application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon.

(emphasis added)

2. 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 or an application for an extension of time within which to resume the use of water as provided in this section, 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)

3. Section 42-1701A(3), *Idaho Code* provides in pertinent part:

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

(emphasis added)

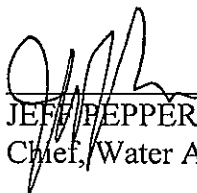
4. The Department's Procedure Rule 5 (IDAPA 37.01.01.005) defines a party as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party."
5. The Department's Procedure Rule 155 defines a protestant as "persons who oppose an application or claim or appeal and who have a statutory right to contest the right, license, award or authority sought by an applicant or claimant or appellant..."
6. The Department's Procedure Rule 156 defines intervenors as "persons, not applicants or claimants or appellants, complainants, respondents, or protestants to a proceeding, who are permitted to participate as parties..."
7. 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)
8. South County and Hiawatha did not timely protest the transfer application during the period authorized under Section 42-222, *Idaho Code* to provide for their opportunity to participate in a formal hearing to contest the conditions of the transfer application approval. South County and Hiawatha are not parties to the formal proceedings initiated by the transfer application.
9. South County and Hiawatha cannot petition to intervene in the formal proceedings initiated by the transfer application unless a formal hearing is requested by the applicant in the proceeding.
10. The Department should reject the protests and petitions to the transfer application approval and deny the requests for hearing filed by South County and Hiawatha.

ORDER

IT IS HEREBY ORDERED that the protests and petitions contesting the transfer application approvals filed by South County and Hiawatha are **REJECTED**.

IT IS FURTHER ORDERED that the requests for hearing before the Director to contest the transfer application approvals are **DENIED**.

Dated this 4th day of September, 2009.



JEFF PEPPERSACK
Chief, Water Allocation Bureau