

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5400 IN THE NAME OF)
L & S PARTNERS)
_____)

**PRELIMINARY ORDER
RESCINDING
TRANSFER APPROVAL**

This matter having come before the Department of Water Resources (Department) as a result of a Request to Correct a Water Right Transfer Approval, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On February 9, 1999, the Department received an application for transfer from Scott Campbell, attorney, on behalf of L & S Partners (applicant). The Department identified the application as Transfer No. 5400 (application). The application proposed to change the point of diversion and place of use for Water Right No. 34-4035C. Water Right No. 34-4035C is a decreed water right authorizing use of ground water for irrigation purposes in Township 7N, Range 24E, Sections 34 and 35, near the Big Lost River, approximately six miles downstream from Mackay Dam. The application proposed to change the location of the point of diversion and place of use to Township 7N, Range 22E, Section 1, approximately three miles west and upstream of Mackay Reservoir.
2. The Department caused notice of the application to be published in the *Challis Messenger* and in the *Arco Advertiser* on March 4 and March 11, 1999. The application was subsequently protested by Mark T. Gates, David and Mary Stoecklein, and 6X Ranch, LLC (protestants).
3. On October 12, 1999, the Department received a Stipulation, Settlement, and Joint Motion for Order from the applicant and protestants, agreeing to withdraw the protests and requesting an order from the Department accepting the terms of the stipulation and settlement.
4. On November 18, 1999, the Department issued an order accepting the withdrawal of the protests to the application and accepting the remaining terms of the stipulation and settlement.
5. On March 23, 2000, the Department approved the application as a Preliminary Order of the Department and sent notice of the approval to the applicant. The Department did not send notice of the approval to Scott Campbell, attorney for the applicant.
6. On October 30, 2006, the Department received a letter and documentation from Scott Campbell suggesting that the approval for Transfer No. 5400 was incorrect. The documentation included a copy of an amended application for Transfer No. 5400 (amendment). The amendment proposed to change the location of the point of diversion and place of use for Water Right No. 34-4035C to Township 8N, Range 22E, Sections 6 and 7, approximately 10 miles northwest and upstream of Mackay Reservoir. There is no evidence of the amendment in the Department's water right files;

however, the copy submitted by Mr. Campbell shows that the amendment was date-stamped received by the Eastern Region office of the Department on June 14, 1999.

CONCLUSIONS OF LAW

1. Idaho Code §42-222 provides in pertinent part as follows:

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 thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code; ...

2. There is reason to rescind approval of the application because the Department did not consider the amendment to the application. In addition, the Department did not give notice to the applicant's attorney to provide him with an opportunity to review the Preliminary Order approving the application.
3. The Department should rescind the approval of the application. The Department should perform the appropriate review of the amendment and cause notice of the amendment to be published prior to taking any further action on the application.
4. The Department should notify the protestants to the original application that the approval dated March 23, 2000 is being rescinded and that protestants will have opportunity to protest the amendment. The Department may rescind, in part, the order of the Department dated November 18, 1999, if it's determined to be necessary to process the amendment.

ORDER

IT IS HEREBY ORDERED that Transfer No. 5400 approved on March 23, 2000 is **RESCINDED**, and the application will be reconsidered based on the amendment received by the Department on June 14, 1999.

IT IS FURTHER HEREBY ORDERED that the Department shall cause notice of the amendment to be published and shall provide notice of the amendment to the protestants to provide opportunity to protest the amendment. The Department will retain jurisdiction to rescind, in part, the order of the Department dated November 18, 1999, if it's determined to be necessary to process the amendment.

Dated this 6th day of December, 2006.


GARY SPACKMAN
Chief, Water Allocation Bureau