

BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 71132 IN THE	)	
NAME OF TIMOTHY P. DEEG	)	ORDER GRANTING
	)	PETITION FOR
IN THE MATTER OF PERMIT TO	)	RECONSIDERATION AND
APPROPRIATE WATER NOS. 41-7076	)	ORDER GRANTING
AND 41-7081	)	REQUEST FOR HEARING

On June 17, 2005, the Idaho Department of Water Resources (IDWR) issued a Preliminary Order approving Transfer No. 71132, in the name of Timothy P. Deeg (Deeg) changing the place of use and point of diversion for water right nos. 41-7030, 41-7034, and 41-7071. The Preliminary Order was issued because the application was protested, and IDWR had held a hearing for the contested case.

The hearing officer determined that development and beneficial use of water authorized by permit nos. 41-7076 and 41-7081 were inextricably linked to earlier transfers and use of water under water right nos. 41-7030 and 41-7034. Because of the similar issues of fact and law, and because IDWR staff had previously examined the beneficial use for water right licensing for permit nos. 41-7076 and 41-7081, the hearing officer decided elements of permit nos. 41-7076 and 41-7081 that were linked to issues of whether water right nos. 41-7030 and 41-7034 might be limited in a transfer approval. The hearing officer granted 15 days for the filing of a request for hearing for any portion of the preliminary order related to permit nos. 41-7076 and 41-7081. In addition, other procedural remedies after a hearing of a contested case were available to the parties.

On June 28, 2005 (by facsimile) and on June 30, 2005 (by U.S. Mail), Deeg filed a document titled "Petition for Reconsideration." The petition was timely filed. In addition, in the text in the middle of page 2 of the petition, Deeg requested a hearing before IDWR regarding elements of permit nos. 41-7076 and 41-7081 decided by the Preliminary Order.

In his petition for reconsideration (and request for hearing), Deeg disagrees with procedural and factual components of the Preliminary Order:

(1) Deeg argues IDWR inappropriately broadened the scope of the transfer proceeding by "default actions" that validated "conditions and elements of the beneficial use test dated August 27, 1997" for permit nos. 41-7076 and 41-7081. Deeg argues that IDWR must only consider the water rights sought to be transferred because the licensing of permits and consideration of an application for transfer are separate and distinct processes, and that protestants to the application for transfer are not parties to the licensing process.

(2) Deeg argues IDWR "placed an undue burden on Deeg" by "staying the transfer until all such administrative proceedings are resolved."

(3) Deeg argues that Finding 4 is an incorrect statement of fact because Deeg initially submitted an application to amend permit nos. 41-7076 and 41-7081 “but that application was rejected by IDWR”

(4) Deeg argues that IDWR erred in limiting the total authorized irrigated acreage to 793.5 acres.

ANALYSIS

At the close of the March 31, 2005 hearing, the hearing officer informed the parties he would consult and use, if relevant, the documents in the files of permit nos. 41-7076 and 41-7081. After reviewing the information in the permit files, and evaluating the timing of irrigation development of the Deeg property, the hearing officer concluded that a determination of how the water rights sought to be transferred would be recognized required an analysis of both the permits and the water right licenses. The analysis was possible because the licensing of the permits had been informally stayed pending consideration of application for transfer no. 71132.

The proof of beneficial use – licensing process is different from the transfer process. The licensing process results in issuance of a preliminary order, however. Rule 0005.07. of IDWR’s Rules of Procedure define a contested case as a “proceeding which results in the issuance of an order.”

Rule 556 of IDWR’s Rules of Procedure states that IDWR “may consolidate two or more proceedings for hearing upon finding that they present issues that are related and that the rights of the parties will not be prejudiced.” While a hearing was not held regarding the beneficial use of water under permit nos. 41-7076 and 41-7081, the opportunity for a hearing was afforded in the order. Finally, prior to rendering a decision, the hearing officer could have issued an order augmenting the record and broadening the scope of evidence considered, including requiring a hearing for presentation of additional evidence. Determining elements of the permit may delay the final outcome of the application for transfer, but Deeg’s rights will not be prejudiced.

Ignoring the water right permits when both the permits and the licenses dovetailed together to authorize irrigation of the Deeg property from a single well would exalt form or substance.

The preliminary order stated that “A request for hearing will automatically stay the proceedings for this application for transfer until after all contested issues are resolved.” The intent of this condition was to insure that, if a hearing were requested, the proof of beneficial use licensing and the application for transfer would remain consolidated. Furthermore, because it was not final, a preliminary order did not authorize the use of water proposed by the application. IDWR has discretion to initiate enforcement proceedings against a water user who uses water in a manner not authorized by a water right.

Because the issues raised by Deeg may change the approval of application for transfer no. 71132, the original protestants remain protestants, and may participate in all proceedings in the

consolidated case. The hearing officer may restrict the protestants' participation if he finds that a particular issue relates only to the proof of beneficial use – licensing issues.

ORDER

IT IS HEREBY ORDERED that Deeg's motion for reconsideration is **Granted**.

IT IS FURTHER ORDERED that Deeg's request for a hearing is **Granted**.

IT IS FURTHER ORDERED that the proceeding for application for transfer no. 71132 and the proceeding for proof of beneficial use – licensing of permit nos. 41-7076 and 41-7081 are **Consolidated**.

IT IS FURTHER ORDERED that **the June 17, 2005 Preliminary Order is Withdrawn** and is no longer effective until resolution of these consolidated proceedings.

IT IS FURTHER ORDERED that the record for the contested case for Transfer no. 71132 **shall be augmented** with additional evidence presented at the hearing requested and granted above.

IT IS FURTHER ORDERED that the parties to the original contested case shall remain parties in all matters of the consolidated proceedings unless limited by the hearing officer.

IT IS FURTHER ORDERED that, within 28 days of the date of this order, Deeg may file an application to amend permit nos. 41-7076 and 41-7081 if necessary to be consistent with application for transfer no. 71132.

IT IS FURTHER ORDERED that the applicant shall propose a schedule for augmenting the record and holding the requested hearing.

DATED this 18th day of July, 2005.



GARY SPACKMAN
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2005, the above and foregoing ORDER GRANTING PETITION FOR RECONSIDERATION AND ORDER GRANTING REQUEST FOR HEARING was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

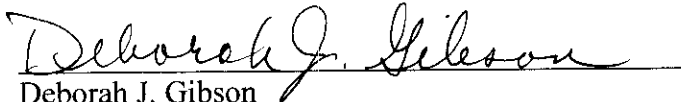
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