

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 70904 IN THE)
NAME OF ROBERT OR DONNA)
BYBEE)
_____)

PRELIMINARY ORDER

This matter having come before the Idaho Department of Water Resources ("Department") in the form of an application for transfer, the Department proposes to enter the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. Water right no. 31-11443 was decreed in the Snake River Basin Adjudication ("SRBA") on February 22, 2002. The right is currently described as follows:

Source:	Ground water
Priority:	May 14, 1976
Rate of diversion:	0.66 cubic feet per second ("cfs")
Point of diversion:	NE1/4NW1/4NW1/4 Section 36, T7N, R35E, B.M.
Use:	Irrigation
Place of use:	33 acres within the NW1/4SW1/4 Section 25, T7N, R35E, B.M.

Conditions of Approval:

Use of the rights listed below is limited to the irrigation of a combined total of 152 acres in a single irrigation season. Combined right nos. : 31-11443, 31-11604, 31-11688, 31-11689. If right 31-11443 is changed through the statutory transfer procedure so that it is no longer appurtenant to the NWSW, Sec. 25, T7N, R35E, then the number of acres irrigated under 31-11604, 31-11688 and 31-11689 shall be reduced by up to 33 acres to comply with the 152 acre limit described above.

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the court at a point in time no later than the entry of a final unified decree. I.C. Section 42-1412 (60).

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. On May 22, 2003, Robert or Donna Bybee ("applicant") filed an Application for Transfer ("application") with the Department proposing to change the point of diversion, place of use and nature of use for a portion of water right no. 31-11443. The proposed place of use is located in Sections 23 and 26 of T13N, R42E, B.M. The proposed point of diversion is located within Section 24 of T13N, R42E, B.M.

3. The applicant proposes to dry up 6 acres of irrigated land in Jefferson County approximately 4 miles east of Mud Lake within the Eastern Snake Plain Aquifer ("ESPA") and change the point of diversion and place of use to a location just north of Island Park Reservoir in Fremont County within the Upper Henry's Fork Basin and outside of the ESPA. The applicant proposes a change from irrigation use to a 3.75 acre pond for recreation use.

4. The application included a hydrologic analysis prepared by Rocky Mountain Environmental Associates, Inc. indicating that the proposed change would not result in overall impacts to surface waters greater than impacts from the existing water right.

5. Department staff completed a separate hydrologic review summarized in a memo dated August 11, 2003 indicating that all water in the Upper Henrys Fork Basin is discharged through the Henrys Fork of the Snake River and ground water underflow into the ESPA is considered negligible to non-existent. The review concluded that the proposed change would have a negative impact to the Henrys Fork and positive impacts to other reaches of the Snake River. In addition, the review concluded that flow at Milner on the Snake River would be reduced by approximately 13 acre-feet per year.

6. On April 25, 2003, the Department corresponded with the applicant indicating that the proposed change would result in diversion of water from a different aquifer, would amount to a new appropriation of water, and could result in injury to water right holders within the proposed source. The Department provided the applicant 30 days to allow submittal of a withdrawal or amendment or any additional information to support the application. The applicant has not responded.

CONCLUSIONS OF LAW

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

(1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. ... (Emphasis added).

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; ... (Emphasis added).

2. The change of water use to a new source as proposed in the application is not provided for under Idaho Code, constitutes a new appropriation of water, and could cause injury to existing water right holders in the proposed source.

3. The Department should deny the application.

ORDER

IT IS THEREFORE hereby ORDERED that Application for Transfer No. 70904 in the name of Robert or Donna Bybee is **DENIED**.

Signed this 13th day of November, 2003.


GARY SPACKMAN
Chief, Water Allocation Bureau