

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 71080 IN THE NAME OF)
F. JAMES WHITTAKER OR PAULA J.)
WHITTAKER)

**PRELIMINARY ORDER
RESCINDING
TRANSFER APPROVAL**

This matter having come before the Department of Water Resources (Department) as a result of an application for transfer of a water right, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On March 30, 1998, James and/or Paula Whittaker filed Application for Transfer No. 5244 proposing to change the location of the point of diversion and place of use for Water Right Nos. 74-56 and 74-1103 to a location 3 or 4 miles downstream from the original locations on Big Timber Creek.
2. The Department caused notice of the application to be published and the application was subsequently protested.
3. On April 7, 1999, the Department conducted a hearing on the application. On May 17, 1999, the hearing officer issued a Recommended Order denying Transfer Application No. 5244.
4. On June 7, 1999, James and/or Paula Whittaker filed "Applicants' Exceptions to Proposed Memorandum Decision and Order" with the Department.
5. On December 20, 1999, the Director of the Department issued a Final Order to deny Application for Transfer No. 5244. In the order, it was concluded that the applicant's use of water as proposed would increase consumptive use, would decrease return flows to Big Timber Creek, and would injure other water rights on Big Timber Creek.
6. The Final Order of the Department denying Application for Transfer No. 5244 was appealed to the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Lemhi on January 13, 2000.
7. On January 18, 2002, James and/or Paula Whittaker filed a Motion to Dismiss Appeal with Prejudice. The court dismissed the appeal with prejudice on January 23, 2002.
8. On February 9, 2004, James or Paula Whittaker (applicant) filed Application for Transfer No. 71080 (application) proposing to change the location of the point of diversion and place of

use for Water Right Nos. 74-56 and 74-1103 to a location 5 or 6 miles downstream from the original locations on Big Timber Creek tributary to the Lemhi River in Lemhi County.

9. The application proposed changes that were very similar to the changes proposed and denied under Transfer Application No. 5244.
10. The Department caused notice of the application to be published in the *Recorder Herald* on April 15, 2004 and April 22, 2004.
11. The Department did not receive any protests in connection with the application.
12. On May 6, 2004, the Department issued a preliminary order approving the application.

CONCLUSIONS OF LAW

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

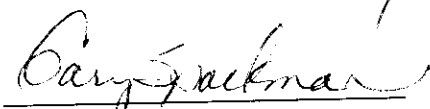
The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, 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. In approving the application, the Department did not consider the potential for increase in consumptive use, the decrease in return flows to Big Timber Creek, or the injury to other water rights that may result from the applicant's use of water as proposed in the application.
3. Approval of the application is not valid because the legal preconditions for approval were not met.
4. The Department should rescind the approval of the application and perform the appropriate review prior to taking any further action on the application.

ORDER

IT IS HEREBY ORDERED that Transfer No. 71080 approved on May 6, 2004 is **RESCINDED**, and the application will be reconsidered based on all the information available to the Department.

Dated this 13th day of May, 2004.



GARY SPACKMAN
Chief, Water Allocation Bureau