BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 70627 IN THE NAME OF ROBERT OR DONNA BYBEE	)	**FINAL ORDER**

This matter is before the Director of the Idaho Department of Water Resources ("Department" or "IDWR") in the form of a request for hearing in connection with a Preliminary Order served on November 3, 2004, approving Transfer No. 70627 in the name of Robert or Donna Bybee.

On August 30, 2004, the Department issued an Interlocutory Order Dismissing Protest and also made related changes to water right no. 31-7014 in the name of I M Family Limited Partnership and to water right nos. 31-11604, 31-11688 and 31-11689 in the name of Paul Gunderson. Based on the Director's understanding of the matter and of the law, the Director issues the following Findings of Fact, Conclusions of Law and Final Order:

FINDINGS OF FACT

1. On February 22, 2002, the Snake River Basin Adjudication ("SRBA") court issued a partial decree for water right **31-11443** as follows:

Owner:	Robert B. Bybee and Donna S. Bybee
Source:	Ground water
Priority:	May 14, 1976
Rate of diversion:	0.66 cubic feet per second ("cfs")
Annual volume:	99 acre feet ("AF")
Point of diversion:	NE1/4NW1/4NW1/4 Section 36, T7N, R35E, B.M.
Use:	Irrigation
Season of use:	April 1 to November 1
Place of use:	33 acres within NW1/4SW1/4 Section 25, T7N, R35E, B.M.

Conditions of approval:

- Use of water right nos. 31-11443, 31-11604, 31-11688 and 31-11689 is limited to the irrigation of a combined total of 152 acres in a single irrigation season.

- If water right no. 31-11443 is changed through the statutory transfer procedure so that it is no longer appurtenant to the NW1/4SW1/4 Section 25, T7N, R35E, then the number of acres irrigated under 31-11604, 31-11688, 31-11689 shall be reduced up to 33 acres to comply with the 152 acre limit.

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

2. On February 22, 2002, the SRBA court issued a partial decree for water right **31-11604** as follows:

Owner:	Paul Gunderson
Source:	Ground water
Priority:	December 31, 1976
Rate of diversion:	1.04 cfs
Annual volume:	182 AF
Point of diversion:	SWNWSW Section 25, T7N, R35E, B.M.
Use:	Irrigation
Season of use:	April 1 to October 31
Place of use:	152 acres within the NWSW Section 25, NESE, S1/2SE Section 26, all in T7N, R35E, B.M.

Conditions of approval:

- Use of water right nos. 31-11443, 31-11604, 31-11688 and 31-11689 is limited to the irrigation of a combined total of 152 acres in a single irrigation season.

- If water right no. 31-11443 is changed through the statutory transfer procedure so that it is no longer appurtenant to the NWSW Section 25, T7N, R35E, then the number of acres irrigated under 31-11604, 31-11688, 31-11689 shall be reduced up to 33 acres to comply with the 152 acre limit.

3. On February 22, 2002, the SRBA court issued a partial decree for water right **31-11688** as follows:

Owner:	Paul Gunderson
Source:	Ground water
Priority:	December 31, 1939
Rate of diversion:	2.09 cfs irrigation and stock water
Annual volume:	350 AF - irrigation and 14 AF - stock water
Point of diversion:	SWNWSW Section 25, T7N, R35E, B.M. NESE Section 26, T7N, R35E, B.M.
Use & season:	Irrigation - April 1 to October 31 Stock water - Year-round
Place of use:	152 acres within the NWSW Section 25, NESE, S1/2SE Section 26, all in T7N, R35E, B.M.

Conditions of approval:

- Use of water right nos. 31-11443, 31-11604, 31-11688 and 31-11689 is limited to the irrigation of a combined total of 152 acres in a single irrigation season.

- If water right no. 31-11443 is changed through the statutory transfer procedure so that it is no longer appurtenant to the NWSW Section 25, T7N, R35E, then the number of acres irrigated under

31-11604, 31-11688, 31-11689 shall be reduced up to 33 acres to comply with the 152 acre limit.

4. On February 22, 2002, the SRBA court issued a partial decree for water right **31-11689** as follows:

Owner:	Paul Gunderson
Source:	Ground water
Priority:	June 30, 1951
Rate of diversion:	2.31 cfs - irrigation and 0.04 cfs - stock water
Annual volume:	269.5 AF - irrigation and 5.4 AF - stock water
Point of diversion:	SWNWSW Section 25, T7N, R35E, B.M.
Use & season:	Irrigation - April 1 to October 31 Stock water - Year-round
Place of use:	152 acres within the NWSW Section 25, NESE, S1/2SE Section 26, all in T7N, R35E, B.M.

Conditions of approval:

- Use of water right nos. 31-11443, 31-11604, 31-11688 and 31-11689 is limited to the irrigation of a combined total of 152 acres in a single irrigation season.

- If water right no. 31-11443 is changed through the statutory transfer procedure so that it is no longer appurtenant to the NWSW Section 25, T7N, R35E, then the number of acres irrigated under 31-11604, 31-11688, 31-11689 shall be reduced up to 33 acres to comply with the 152 acre limit.

5. On February 22, 2002, the SRBA court issued a partial decree for water right **31-7014** as follows:

Owner:	I M Family Limited Partnership
Source:	Ground water
Priority:	October 21, 1968
Rate of diversion:	4.88 cfs
Annual volume:	917 AF
Point of diversion:	NWNWNE Section 7, T7N, R37E, B.M.
Use:	Irrigation
Season of use:	April 1 to November 1
Place of use:	262 acres within the N1/2 Section 7, T7N, R37E, B.M.

6. On May 22, 2003, Robert or Donna Bybee ("applicant") filed Application for Transfer No. 70627 ("application") with the IDWR proposing to change the point of diversion and place of use of water right no. 31-11443. More specifically, the application would change the place of use of 0.66 cfs and 99 AF of water right 31-11443 to lands owned by I M Family Limited Partnership providing for the irrigation of an additional 33 acres for a total of 262 acres within a 295 acre permissible place of use on the I M Family Limited Partnership property

located in the N1/2 Section 7, T7N, R37E, B.M. The application would also change the location of the point of diversion to a well in the NWNWNE Section 7, T7N, R37E, B.M.

7. The IDWR published notice of the application that was subsequently protested on September 22, 2003 by Paul Gunderson ("protestant"). The basis of the protest is that the applicant does not own the water right sought to be transferred.

8. Issues the IDWR can consider in connection with a protested application for transfer are as follows:

a. Whether the proposed changes will injure other water rights;

b. Whether the proposed changes will constitute an enlargement in use of the original right;

c. Whether the proposed changes are in the local public interest; and

d. Whether the proposed changes are consistent with the conservation of water resources within the state of Idaho.

9. On August 30, 2004, the IDWR issued an Interlocutory Order Dismissing Protest, since Gunderson did not provide any evidence to show that he owned water right no. 31-11443, did not show evidence of a competing water right and did not provide any other basis for his protest.

10. On October 28, 2004, the IDWR approved Transfer No. 70627 in the name of Donna S. Bybee and Robert B. Bybee and made related changes to water right no. 31-7014 in the name of I M Family Limited Partnership and to water right nos. 31-11604, 31-11688 and 31-11689 in the name of Paul Gunderson. The transfer and changes to related water rights was served on November 3, 2004.

11. On November 17, 2004, Gunderson filed a request for hearing with the IDWR objecting to the transfer approval and related changes to associated water rights.

12. On November 29, 2004, the IDWR acknowledged receipt of Gunderson's request for hearing and advised that the IDWR would consider the request as being filed pursuant to Section 42-1701A(3), Idaho Code. The IDWR also asked the parties to identify and briefly discuss all issues that are proposed for hearing in order to determine whether a pre-hearing conference is necessary, determine the nature of any hearing to be conducted, and to address other matters that may expedite orderly conduct and disposition of the proceeding in a timely manner. The requested information was due on or before December 17, 2004.

13. On December 17, 2004, Gunderson requested additional time in which to submit the requested information. On December 20, 2004, the IDWR granted an extension to January 15, 2005 to submit the information. Neither the applicant nor protestant provided any information to facilitate the scheduling and conduct of a hearing as requested in the IDWR's

November 29, 2004 letter.

14. The protestant did not provide any evidence to show that ownership of water right 31-11443 decreed to the applicant on February 22, 2002 is owned by the protestant or has been conveyed to the protestant. The protestant also did not provide any evidence to show that the changes to the protestant's water right nos. 31-11604, 31-11688 and 31-11689 shown in the November 3, 2004 Preliminary Order are not correct and/or are not supported by existing water right records.

15. The IDWR officially notices the following information as a part of the record in support of this Final Order:

a) The IDWR's file for Application for Transfer No. 70627.
b) The SRBA court partial decrees for water right nos. 31-11443, 31-11604, 31-11688, 31-11689 and 31-7014 and the SRBA court order disallowing claim 31-11331.

16. On January 27, 2005, the Director of IDWR issued an order pursuant to Idaho Code, Section 67-5245, delegating authority to issue a Final Order in this matter to L. Glen Saxton, Administrator of Water Management Division for IDWR.

ANALYSIS

The present contested matter appears to be a continuation of a past disputed contractual arrangement between the parties and/or their predecessors. As a result of the past arrangement, a dispute arose over the ownership of a water right used on the protestant's land. The parties periodically have sought interpretation of the contractual arrangement by the Department. The Department has declined to interpret the contract, instead advising the parties that interpretation of the contract was a civil matter that needed to be reviewed in district court.

The parties then engaged in litigation resulting in the matter being referred to the SRBA court for determination. Both the applicant and protestant filed a claim to the disputed water right with the applicant filing SRBA claim 31-11443 and the protestant filing competing claim 31-11331. Ultimately, on February 22, 2002, the SRBA court issued a partial decree, granting water right 31-11443 to the applicant for the irrigation of 33 acres of land owned by the protestant. The protestant's claim was disallowed.

The protestant, however, can still irrigate the NWSW Section 25, T7N, R35E, B.M., with water right nos. 31-11604, 31-11688 and 31-11689, provided that the total number of acres irrigated under the rights does not exceed 119 acres in the 152 permissible place of use consistent with the conditions of approval of the protestant's partially decreed water rights.

Although the protestant made a timely request for a hearing in this matter on November 17, 2004, the protestant has failed to respond to IDWR's deadline of December 17, 2004, later extended to January 15, 2005, for identifying and describing the issues to be addressed at the hearing. Due to the lack of a substantive response by the protestant, IDWR is issuing a Final

Order in this matter based upon the existing file record without conducting an evidentiary hearing. The dispute underlying this matter has a long history and further delay in providing a resolution of the dispute would not be to the benefit of the parties. The existing record in IDWR's files is thorough and extensive and provides an adequate basis for IDWR's disposition of the matter.

CONCLUSIONS OF LAW

1. Idaho Code, Section 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 42-202B, Idaho Code ... .

2. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Idaho Code, Section 42-222.

5. The applicant owns the water right sought for transfer, which was partially decreed to the applicant by the SRBA court on February 22, 2002, as water right no. 31-11443.

6. The partial decree to the applicant of water right no. 31-11443 and the lack of any contrary showing by the protestant constitutes a sufficient showing that the applicant owns the water right and is entitled to seek a transfer of the water right.

7. Using water right nos. 31-11604, 31-11688 and 31-11689, the protestant can irrigate the 33 acres located in the NWSW Section 25, T7N, R35E, B.M., provided the protestant does not irrigate more than a total of 119 acres in the 152 permissible place of use.

8. The proposed changes will not injure other water rights.

9. The proposed changes will not constitute an enlargement in use of the original right.

10. The proposed changes are in the local public interest.

11. The proposed changes are consistent with conservation of water resources within the state of Idaho.

12. The Department should issue a Final Order consistent with Transfer No. 70627 issued as a Preliminary Order by the Department on November 3, 2004.

ORDER

IT IS THEREFORE hereby ORDERED that consistent with the Interlocutory Order Dismissing Protest issued by the Department on August 30, 2004, the protest of Paul Gunderson is **DISMISSED**.

IT IS FURTHER hereby ORDERED that Transfer No. 70627 issued on November 3, 2004, in the name of Donna S. Bybee or Robert B. Bybee is **CONFIRMED** and is the Final Order of the Director.

Signed this 27th day of January, 2005.

KARL J. DREHER
Director

L. GLEN SAXTON
Administrator
Water Management Division

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 27th day of January, 2005, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

DONNA BYBEE
ROBERT BYBEE
2014 E 1800 N
TERRETON ID 83450

K PAUL GUNDERSON
1555 E 15000 N
HAMER ID 83425

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E W PIKE
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Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources