

**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 )  
\_\_\_\_\_ )

**INTERLOCUTORY ORDER  
DISMISSING PROTEST**

This matter having come before the Idaho Department of Water Resources ("Department") as a protest against approval of the above captioned application, the Department makes the following Findings of Fact, Conclusions of Law and Order:

**FINDINGS OF FACT**

1. On February 22, 2002, the Snake River Basin Adjudication ("SRBA") District Court issued a partial decree for water right no. 31-11443 as follows:

Current 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
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 the NW1/4SW1/4 Section 25, T7N, R35E, B.M.
Remarks:	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 Section 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.

2. On May 22, 2003, Robert or Donna Bybee ("Bybee" or "applicant") filed Application for Transfer No. 70627 ("application") with the Department seeking to change the place of use of 27 acres of the 33 acre decreed place of use of water right no. 31-11443. The proposed new place of use is 27 acres within Section 7, T7N, R37E, B.M. and the point of diversion is within the NW1/4NW1/4NE1/4 Section 7, T7N, R37E, B.M.

3. On September 22, 2003, Paul Gunderson ("Gunderson") filed a protest against approval of the application asserting that water right 31-11443 is not owned by the applicant, and that the water right should remain with the ground it is presently on, which is owned by Gunderson.

4. On February 27, 2004, Gunderson corresponded with the Department, through legal counsel, proposing to withdraw his protest to the Bybee transfer application if the Department modified condition of approval number 9 on Gunderson's recently approved water right permit no. 31-7338 so that mitigation is only required in years that no flood release water flows past Milner Dam.

5. On April 7, 2004, the Department responded by letter to Gunderson advising that mitigation in the amount of 1.6 acre feet of water per acre would be required each year under water right permit no. 31-7338 to allow continued irrigation of Gunderson's land after approval of Bybee's transfer application. The Department letter sought Gunderson's prompt review of the matter and withdrawal of the protest against Bybee's application. Gunderson did not act upon the suggestion to promptly withdraw his protest and to agree to mitigate his use of ground water within the NW1/4SW1/4 Section 25, T7N, R35E, B.M.

6. On May 14, 2004, the Department again corresponded with Gunderson asking for information to show that his protest, based upon a claim of ownership of the water right sought to be transferred, was not defective or insufficient with respect to the basis for the protest given that the SRBA District Court had decreed the water right to Bybee. The Department letter gave Gunderson 14 days to provide information supporting the claim of ownership of the water right as a basis for protesting the Bybee transfer. The letter stated that if information supporting the claim of ownership was timely submitted the matter would be set for hearing. The letter further stated that the protest would be dismissed if such information were not submitted.

7. The Department received letters from Gunderson dated May 26, June 3, and 9, 2004, in response to the request for additional information to support the basis of Gunderson's protest against the application. The May 26, 2004 letter requested until June 4 to submit a response.

8. In the June 3 and June 9 letters, Gunderson asserts several legal theories in support of his claim to ownership of the water right that Bybee seeks to transfer in this proceeding. Gunderson does not, however, directly challenge the validity of the February 22, 2002 partial decree for water right no. 31-11443 issued to Bybee by the SRBA District Court. Gunderson does not assert a claim to ownership of the water right arising after the date of issuance of the partial decree.

9. Gunderson had the opportunity to challenge Bybee's water right claim 31-11443 before the SRBA District Court but did not do so. Gunderson did file competing water right claim 31-11331 in the SRBA.

10. On March 4, 2002, the Department filed a Director's Report with the SRBA District Court recommending that claim 31-11331 be disallowed because the right claimed was being recommended pursuant to claim 31-11443. The last day to file objections to the Director's Report before the SRBA District Court was May 3, 2002. The SRBA District Court held a hearing on the uncontested recommendation on September 17, 2002. On the same date, the court entered a partial decree adjudging "that water right claim 31-11331 is hereby disallowed with prejudice and shall not be confirmed in any partial or in any final decree entered in the SRBA."

### CONCLUSIONS OF LAW

1. IDAPA Rule 37.01.01.304 (Rule of Procedure 304) provides that defective, insufficient or late pleadings may be returned or dismissed.
2. Gunderson has not produced information in response to the Department's request demonstrating a reasonable basis for his protest which claims that he owns the water right sought to be transferred by Bybee in this proceeding.
3. Gunderson has not otherwise claimed or shown a sufficient basis for his protest of the transfer application.
4. Gunderson's protest is defective or insufficient with respect to the basis for the protest given that the SRBA District Court issued a partial decree on February 22, 2002, decreeing the subject water right to Bybee as water right no. 31-11443.
5. Gunderson does not assert a claim to ownership of water right no. 31-11443 arising after the date of issuance of the partial decree.
6. Gunderson, who submitted a competing claim to water right no. 31-11443 in the SRBA, is a party to that court proceeding. Under the doctrine of judicial *res judicata*, Gunderson is bound by the SRBA District Court's final order decreeing water right no. 31-11443 to Bybee.
7. The Department should dismiss Gunderson's protest because a sufficient basis for the protest has not been shown to exist.

### ORDER

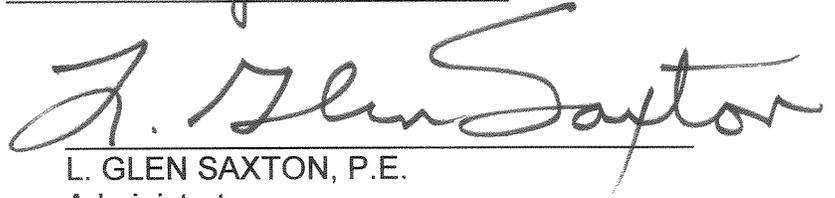
IT IS THEREFORE, HEREBY ORDERED that the protest of Paul Gunderson is **DISMISSED** in the above captioned matter for failure to provide information showing a sufficient basis for the protest.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, this is an interlocutory order that does not decide the substantive

issues presented in the above-captioned transfer proceeding and is not subject to review by reconsideration or appeal.

IT IS FURTHER ORDERED that Paul Gunderson shall be served with a copy of the subsequent Department order taking action upon the pending application for transfer, together with an explanation of the administrative remedies available.

Dated this 30<sup>th</sup> day of August, 2004.



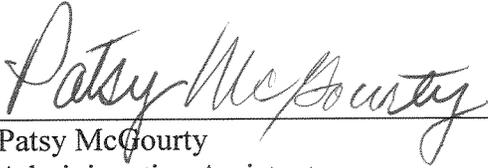
L. GLEN SAXTON, P.E.  
Administrator  
Water Management Division

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 30<sup>th</sup> day of August, 2004, the above and foregoing, 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:

E.W. PIKE  
PIKE SMITH  
PO BOX 2949  
IDAHO FALLS ID 83403-2949

ROBERT or DONNA BYBEE  
2014 E 1800 N  
TERRETON ID 83450

  
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Patsy McGourty  
Administrative Assistant  
Idaho Department of Water Resources