

FEB 08 2010

DEPARTMENT OF
WATER RESOURCES

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA) A. Subcase Nos 21-02100 21-10015
Case No. 39576)
_____)

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Lana Esplin, North Henry's Lake Homeowners Association

Winter Address: 4317 Windsong Way, St. George, Utah 84790

Summer Address: 3897 Teton Road, Island Park, Idaho 83429

Daytime Phone: Winter Home: 435-674-0712; Cell: 435-669-6643 ;
Summer Home: 208-558-7214

NEW EVIDENCE SUBMITTED FOR SUBCASES 21-02100 21-10015

Negotiations between the NHLHA and the IDFG on a proposed settlement agreement have fallen apart. The NHLHA is currently without legal council and have not yet had an initial hearing on the Motion to Set Aside Water Right 21-02100 with the SRBA. The NHLHA hereby petitions the court to schedule a hearing on the Motion to Set Aside Water Right 21-02100.

We also petition the court to disregard the IDFG Conditional Transfer #74584 for water right #21-02100 and the Order Granting Extension of Time to Complete Transfer. Both were based on wrong or withheld information given to Ernie Carlson and Shelly Keen. Certain conditions were not met in the proposed agreement between NHLHA and the IDFG, which should render any transfer or extension of time void.

October 29, 2008

An initial Discharge Measurement of Pittsburg Creek was requested by NHLHA, with Gail Blanchard taking the measurement on October 29, 2008 at the Highway culvert, with Mont Harris, NHLHA Water Commissioner, present. **This measurement shows there is not 4 cfs of water in Pittsburg Creek as claimed by the IDFG in their water right #21-02100 and was in fact less than ½ cfs.** Any transfer or use of this water by the IDFG would clearly injure the NHLHA water right #21-10015 and would not be in the public interest. The NHLHA uses water out of Pittsburg Creek both above and below the highway where the measurement was taken. In addition, water right #21-10015 has a priority date of 1904 and supercedes the IDFG abandoned water right #21-02100, priority date 1949.

See Exhibit A

February 23, 2009

The conditional transfer #74584 of water right #21- 02100 was signed by Ernie Carlson on February 23, 2009. This transfer was based on wrong or withheld information given to Mr. Carlson by Mr. Stanish who represents the IDFG. Lana Esplin later called Mr. Carlson and pointed out that the wording in the document violated a proposed agreement between the Fish

and Game and the NHLHA. Mrs. Esplin said the wording would injure NHLHA water right #21-10015 and was not in the public interest. Mr. Carlson informed Mrs. Esplin that Mr. Stanish had not given him a copy of the proposed agreement between the Fish & Game and NHLHA and ask her to email him a copy which she did.

See Exhibit B

May 11, 2009

Mr. Carlson later amended the conditional transfer on May 11, 2009. However the wording in that document was such that it would still injure the NHLHA water right and was not in the public interest. The transfer which is based on the amount of water reaching the mouth of Pittsburg Creek affects the Howe Spring portion of water right # 21-10015 which flows into Pittsburg Creek below the highway. The NHLHA uses water out of Pittsburg Creek both above and below the highway, so a measurement taken at the Highway would injure NHLHA also.

See Exhibit C

January 5, 2010

On January 5, 2009, Mr. Stanish sent a letter to Shelly Keen, IDWR requesting an extension of time to complete the conditional transfer.

See Exhibit D

January 7, 2010

Shelly Keen received Mr. Stanish's Form #222-Ext Request for Extension of Time to Complete Transfer dated January 5, 2010, which she signed on January 7, 2010.

See Exhibit E

January 8, 2010

On January 8, 2010, Shelly Keen signed an Order Granting Extension of Time To Complete Transfer #74584 for water right #21-02100.

The extension of time was listed as February 3, 2014, four years away. This extension should not be granted because the Conditional Transfer #74584 was based on wrong or with held information that would injure the NHLHA water right #21-10015. In addition, the IDFG had violated the proposed Agreement, resulting in no agreement which would void any transfer.

See Exhibit F

Dated February 5, 2010



Lana Esplin
NHLHA Representative

CERTIFICIFICATE OF MAILING

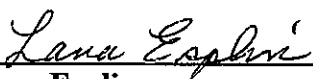
I certify that a true and correct copy of NEW EVIDENCE SUBMITTED FOR SUBCASE 21-02100 21-10015 was mailed on February 6, 2010 with sufficient first-class postage to the following:

**CLERK OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVENUE NORTH
PO BOX 2707
TWIN FALLS, ID 83303-2707**

**NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83411-4449**

**STATE OF IDAHO
DEPT OF FISH & GAME
PO BOX 25
BOISE ID 83707**

**DIRECTOR OF IDWR
PO BOX 83720
BOISE ID 83720-0098**



**Lana Esplin
NHLHA Representative**

EXHIBIT A

624-7011
Gail Blanchard
ST Anthony, ID

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
Water District 01
DISCHARGE MEASUREMENT NOTES

Meas. No. 1
Comp. by _____
Checked by _____

Sta. No. _____
Date 29 Oct 49 Party Pittsburg Creek
Width 2 Area 0.94 Vel. 0.44 G. H. None Disch. 0.415
Method _____ No. secs. _____ G. H. change _____ in _____ hrs. Susp. _____
Method coef. _____ Hor. angle coef. _____ Susp. coef. _____ Meter No. _____

GAGE READINGS					Type of meter _____
Time	Recorder	Inside	Outside		Date rated _____ for rod, other.
<u>15.30</u>	<u>AW</u>	<u>stop</u>			Meter _____ ft. above bottom of weight.
<u>15.40</u>	<u>AW</u>	<u>stop</u>			Spin before meas. _____ after _____
					Meas. plots _____ % diff. from rating _____
					Wading, cable, ice, boat, upstr., downstr., side
					bridge _____ feet, mile, above, below
					gage, and _____
					Check-bar, found _____
					changed to _____ at _____
					Correct _____
					Levels obtained _____
Weighted M. G. H. _____					
G. H. correction _____					
Correct M. G. H. _____					

Measurement rated excellent (2%), good (5%), fair (8%), poor (over 8%), based on following conditions: Cross section _____

Flow _____ Weather Partly Cloudy
Other _____ Air _____ °F @ _____
Gage _____ Water _____ °F @ _____
Record removed _____ Intake flushed L
Observer _____

Control _____

Remarks Mont Howard present
1 CFS = 50"

G. H. of zero flow _____ ft. Mont Howard who has

1-CFS = 50" of water - Gail Blanchard
624-7011

EXHIBIT B

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
TRANSFER OF WATER RIGHT
TRANSFER NO. 74584

This is to certify that: STATE OF IDAHO
DEPT OF FISH & GAME
PO BOX 25
BOISE ID 83707
(208)334-3700

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Change

<u>Right</u>	<u>Origin/Basis</u>	<u>Priority</u>	<u>Rate</u>	<u>Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
21-2100	WR/Decreed	02/03/1948	6 cfs	N/A	N/A	N/A	SHERWOOD SPRING, UNNAMED STREAM

Purpose of Transfer (Changes Proposed)

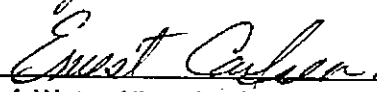
<u>Current Number</u>	<u>Split</u>	<u>POD</u>	<u>POU</u>	<u>Add POD</u>	<u>Period of Use</u>	<u>Nature of Use</u>
21-2100	NO	YES	YES	NO	NO	NO

Summary of Water Rights After the Approved Change

<u>Existing Right</u>	<u>New No. (changed portion)</u>	<u>Transfer Rate</u>	<u>Transfer Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>New No. (remaining portion)</u>	<u>Remaining Rate</u>	<u>Remaining Volume</u>	<u>Remaining Acre Limit</u>	<u>Remaining Total Acres</u>
21-2100	21-2100	6.0 cfs	N/A	N/A	N/A		N/A	N/A	N/A	N/A
COMBINED										
TOTALS		6.0 cfs	N/A	N/A	N/A		N/A	N/A	N/A	N/A

Detailed Water Right Description(s) attached

Dated this 23 day of February, 2009


for Ernest Carlson
Chief, Water Allocation Bureau

SUPPORT DATA

IN FILE # 21-2100

WATER RIGHT NO. 21-2100
As Modified by Transfer No. 74584

In accordance with the approval of Transfer No. 74584, Water Right No. 21-2100 is now described as follows.

Right Holder: STATE OF IDAHO
DEPT OF FISH & GAME
PO BOX 25
BOISE ID 83707

Priority Date: February 03, 1948

Source: SHERWOOD SPRING
HENRYS LAKE

Tributary: HENRYS LAKE
HENRYS FORK

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>
FISH PROPAGATION	01/01 to	12/31	6.00 CFS

LOCATION OF POINT(S) OF DIVERSION:

HENRYS LAKE	L2 (SESW)	Sec. 33 Twp 16N Rge 43E	FREMONT County
SHERWOOD SPRING	NWSE	Sec. 33 Twp 16N Rge 43E	FREMONT County

PLACE OF USE: FISH PROPAGATION

Twp Rge Sec	NE				NW				SW				SE				
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
16N 43E 33									X					X		X	

CONDITIONS OF APPROVAL

1. Diversion of water from the additional point(s) of diversion authorized under Transfer 74584 located in L2, SESW, Sec. 33, T16N, R43E shall not exceed a maximum diversion rate of 4.00 cfs.
2. Diversion of water from Henrys Lake is limited to those times water is available for diversion under this right and priority from Unnamed Stream at the original point of diversion in the NESE, S33, T16N, R43E, and to the amount of water that actually reaches Henrys Lake.
3. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 01.
4. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).
5. Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the department for measuring the flow from Unnamed Stream at the original point(s) of diversion, at the mouth of Unnamed Stream and at the point of diversion from Henrys Lake.
6. This right does not grant any right-of-way or easement across the land of another.

WATER RIGHT NO. 21-2100
As Modified by Transfer No. 74584

CONDITIONS OF APPROVAL

7. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture.
8. The right holder shall accomplish the change authorized by this transfer within one year(s) of the date of this approval.
9. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
10. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

This water right is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources.

Dated this 23 day of February, 2007

Ernest Carlson
Chief, Water Allocation Bureau



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Suite A • Idaho Falls, Idaho 83402-1718

Phone: (208) 525-7161 • Fax: (208) 525-7177 • Web Site: www.idwr.idaho.gov

EASTERN REGION

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

May 11, 2009

David I. Stanish
Deputy Attorney General
Natural Resources Division
PO Box 83720
Boise ID 83720

RE: Transfer 74584, 21-2100, Measuring Device

Dear David:

I am writing to advise you the Department approves your request to locate a measuring device at the Highway 87/287 culvert instead of at the mouth of the Unnamed Stream. This letter is your approval to make the change without further administrative action to amend transfer 74584. Below is a summary of the circumstances and conditions considered in making this decision.

In February 2009 the Department of Water Resources ("department") issued transfer no. 74584 approving a change in point of diversion for water right 21-2100. A condition of this approval reads: Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the department for measuring the flow from Unnamed Stream at the original point(s) of diversion, at the mouth of Unnamed Stream and at the point of diversion from Henrys Lake.

In April 2009 council for the Department of Fish and Game ("Fish and Game") requested moving the measuring device from the mouth of Unnamed Stream to a culvert where the Unnamed Stream flows under Highway 87/287. Fish and Game contends the culvert is the more appropriate/practical measuring location for the following reasons: (a) Fish and Game would have easy access to the highway culvert because it is located on a public right-of-way. Access to the mouth of the stream would require passing over private property. (b) The culvert creates a defined water conduit, providing for better measurement accuracy. (c) The culvert is located approximately 300 yards from the stream mouth, and there are no diversions between the culvert and the stream mouth.

In light of these reasons, consultation between me and other department staff concluded measurement at the culvert would be reasonably representative of what would otherwise reach the mouth and therefore maintains the spirit of the original condition of accounting for the quantity of water that reaches Henrys Lake from the unnamed stream. In addition, Fish and Game will still need to provide a means of measuring the flow from the Unnamed Stream at the original point of diversion and at the point of diversion from Henrys Lake.

Respectfully,

Ernest Carlsen
Water Resource Program Manager
emc

EXHIBIT D

#01-7-2000
SR4



RECEIVED

JAN 07 2010

DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

January 5, 2010

VIA STATEHOUSE MAIL

Shelley Keen
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

Re: 21-02100 – Request for Extension of Time to Complete Transfer

Dear Shelley:

I could not find the original Request for Extension that I emailed to Ernie back in October 2009, so I have enclosed both a copy of the earlier request in addition to a new version with an original signature.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Stanish".

David I. Stanish
Deputy Attorney General

DIS

w/ enclosures

JAN 07 2010

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

DEPARTMENT OF
WATER RESOURCES

REQUEST FOR EXTENSION OF TIME
TO COMPLETE TRANSFER

The holder of the water rights listed below requests an additional period of time in which to accomplish change(s) authorized by approval of Application for Transfer of Water Right(s) No. 74584 approved on February 23, 2009.
Water Right No(s). 21-02100

Number of Year(s) Authorized in which to Accomplish Change(s) X (1) (2) (3) (4) (5)

Number of Additional Year(s) Requested in which to Accomplish Change(s) (1) (2) (3) X (4)
(Not to exceed 5 years total from date of the approval.)

Name(s) of Right Holder: State of Idaho, Dept of Fish & Game

(If not the right holder of record, submit a Notice of Change of Water Right Ownership, appropriate fee and documentation.)

Mailing Address: PO Box 25

City Boise State ID Zip 83707

Phone No.: (208) 334-3700

Email:

Explain why additional time to complete transfer is needed and show a reasonable cause for the delay:

IDFG conducted an initial survey and evaluation of new POD and measuring locations in June 2009. IDFG contacted ITD and US Bureau of Reclamation to determine which permits are required to construct transfer works. IDFG is currently evaluating availability of engineering staff to develop and install works. Once cost estimates are determined, IDFG can move towards budgeting this project into the Department's annual budget. IDFG expects this project to be included in the Department's FY 2012 budget request. Henry's Lake Foundation has already pledged \$10,000 towards this transfer project.

Costing \$
Given budget and personnel constraints, IDFG requests additional 4 years to complete transfer.

[Signature]
(Signature) If other than right holder, Power of Attorney must be supplied.

1/5/10
(Date)

ACTION OF THE DEPARTMENT OF WATER RESOURCES

The Department approved the above referenced Application for Transfer with a condition that it be completed within 1 year(s).

The right holder has notified the Department that the transfer has not yet been accomplished.

The right holder has requested an extension of time for completion of the transfer and has shown reasonable cause for the delay.

IT IS, THEREFORE, HEREBY ORDERED that the right holder of Transfer No. 74584 is granted an extension to February 23, 2014 in which to accomplish the transfer. IT IS FURTHER HEREBY ORDERED that this extension does not stay the accumulation of the 5 year period associated with forfeiture of a water right for non-use.

OR Extension is not granted. (See correspondence in water right file.)

Signed this 7th day of January, 2010.

Shelley W. Keen



State of Idaho

EXHIBIT F

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

January 8, 2010

State of Idaho
Dept. of Fish & Game
PO Box 25
Boise ID 83707

Re: Order Granting Extension of Time to Complete Transfer
Transfer No. 74584 for Water Right No. 21-2100

Dear Water User,

I have enclosed an order granting an extension of time in which to complete Transfer No. 74584. The transfer completion date has been extended to February 23, 2014. We urge you to complete the necessary work related to the transfer of your right prior to this new extension date. Failure to complete the transfer by the new date may jeopardize your ability to continue use of your right.

Please contact this office if you have any questions or need further assistance regarding this matter.

Sincerely,

Shelley W. Keen, Manager
Water Right Permits Section

Enclosure(s)