

Kinzo H. Mihara
12329 N. Burdette Lane
Hauser, Idaho 83854

June 2, 2015

RECEIVED

JUN 04 2015

IDWR / NORTH

Mr. Chad Goodwin
Ms. Linda Werner
Idaho Department of Water Resources
7600 Mineral Drive, Suite 100
Coeur d'Alene, ID 83815-7763

Re: Withdrawal of Recommendation for Claim 95-16993
Parcel No. X-1400-00A-001-0

Dear Mr. Goodwin and Ms. Werner:

I am writing today to respectfully request that the recommendation for the water right be reinstated at your earliest possible convenience. Please let this letter follow up on telephone conversations I had with both of you, in May, 2015. It is my recollection we discussed the provision in the documents, already submitted in support of my claim, which purport to limit the water use by the then-owners (the Masons) to themselves and their children. We further discussed the concern of the Department in that there was no longer a structure on the property. There is currently, however, the remnant foundation of the structure which was, at one time, located on the property. I advised that I have been on the property and have observed remaining water delivery infrastructure. Please know that after I spoke with you, I also had a conversation with Ms. Meghan Carter, an attorney for IDWR in your Boise office. Ms. Carter requested that I send you a letter outlining my position and legal argument. To that end, please pass this letter on to her for her review.

I believe that the documents previously provided to your office in support of my original claim evidence a couple of things. First, they evidence a diversion of water and application to a beneficial use on the property not later than at least 1928.¹ Second, those documents evidence a continued diversion of water and application to a beneficial use from the 1920s to the 1940s. In the 1940s Mr. and Mrs. Mason owned the property. I believe it was my conversation with Mr. Goodwin in which he requested I take photos of the remaining infrastructure and submit them as evidence. Subsequent to that conversation, however, I have been able to speak with a neighbor at the property, as well as employees of the City of Hauser, Idaho who have given me additional information upon which to base my claim.

¹ The original claim was made for a priority date of 1925. Due to the somewhat illegible nature of the copy of document in my possession there is some question as to whether the date is 1925 or 1928. The right was originally recommended for a priority date of 1928.

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I have personally reviewed and checked the Kootenai County land records for the property. The following is the chain of title from the 1940s to the present:²

- (1) Mr. and Mrs. Mason to Mr. Shackleford – transfer date of 10/1/1954 (Book 158, pp. 254-55)
- (2) Mr. Shackleford to Mr. R.K. Sanders – transfer date also of 10/1/1954 (Book 158, pp. 253)
- (3) Mr. R.K. Sanders to Mr. W.A. Harrington – transfer date also of 10/1/1954 (Book 158, pp. 252)
- (4) Mr. W.A. Harrington to Mr. R.B. Carr – transfer date of 1/13/1964 (Book 195, pp. 359)
- (5) Mr. R.B. Carr to Mr. and Mrs. Soruwatari – transfer date also of 1/13/1964 (Book 195, pp. 360)
- (6) Mr. and Mrs. Soruwatari to Mr. and Mrs. James – transfer date of 6/21/1972 (Book 257, pp. 219)
- (7) Mrs. James is a widow, and my wife and I purchased our property from her this immediate past March. Our water rights claim was made shortly thereafter.

After I reviewed the land records for the property, I had an opportunity to speak with one of my neighbors at the property. My neighbor to the south, a gal by the name of Lindy, advised me that she moved into her residence approximately four (4) years ago. She told me that she also purchased her property from Ms. Noreen James. Ms. James not only owned the property of Ms. Lindy and I, she is also currently listed as owning two adjacent lots. At the time she took title to her property, Lindy told me, there were existing structures on my property. It stands to reason that at the time Ms. James sold her property, she utilized all of her then-existing property as all parcels are adjoining. Lindy told me that a year or two after she moved in, the City of Hauser issued a condemnation order for the above-referenced property which required the removal of the existing structure.

Based on my conversation with Lindy, I followed up with officials from the City of Hauser, Idaho. I requested any documents that may be on file with the City related to my property. The City employees sent me the documents I requested: Attached as Exhibit 1, please find the condemnation order from the City of Hauser to my immediate predecessor in title, Ms. Noreen James. Attached as Exhibit 2, please find a site evaluation from Panhandle Health District for the property.

These documents, along with the title information gleaned from the Recorder's office evidence several things. First, the land records evidence a continued ownership and use of the property from the 1940's to the present. Second the documents evidence the fact that as of at

² All book and page numbers noted are publically-available documents located in the Kootenai County Recorder's office. All transactions are for Lot 1, Block A, Cliff House Resort, Kootenai County, Idaho (Parcel No. X-1400-00A-001-0). The cost for duplication of the recorded deeds is \$1.00 per page, and hence they were not ordered.

least April 14, 2011, there was an existing structure on the property. *See* Exhibit 1. Third and lastly, the documents evidence the fact that the then-owner sought to rebuild on the property within 3 years after the existing structure had been demolished.³ *See* Exhibit 2. These facts give rise to two issues under Idaho law regarding the validity of claimed water rights: abandonment and forfeiture.

Under Idaho law, water rights may be abandoned, however, the burden of proof is on the party asserting abandonment, and the standard is high (“clear and convincing evidence”). Abandonment requires: (1) an intent to give up the right, and (2) an actual relinquishment or surrender of the right. *Jenkins v. IDWR*, 103 Idaho 384 (1982), *Sears v. Berryman*, 101 Idaho 843 (1981), *Gilbert v. Smith*, 97 Idaho 735 (1976).

The documents in the Kootenai County Recorder’s land records office, show that Ms. James has owned the above-referenced property since 1972. The documents received from the City of Hauser further show that the building(s) on the property were involuntarily removed, and within 3 years of removal, Ms. James (through her agent, Mr. Wes Smith) sought to replace the structure on that very same property. *See* Exhibit 2. Specifically checked on the Panhandle Health District documents are “surface water – Hauser Lake,” and “waterline” with the word “private” circled. *Id.*, p. 3. Such action is hardly tantamount to abandonment. In fact, I would argue, such action within a relatively short period of time evidences a specific intent to retain the water rights of the property.

Also under Idaho law, water rights may be forfeited, regardless of an owner’s intent, but again however, the burden of proof is on the party asserting forfeiture, and the standard is also very high.⁴ Idaho Code § 42-222(2)⁵; see also *Jenkins*, *supra*. Idaho courts have interpreted Section 42-222(2) as not to apply to water rights where the non-use results from circumstances beyond the right holder’s control. *Id.* This interpretation has likewise received legislative blessing. *See* Idaho Code § 42-223(6). Such a determination as to what constitutes a “circumstance beyond the right holder’s control,” however, is a question of fact – to be determined by the fact finder. *See Jenkins*, *supra*. Idaho courts are loathe to find forfeiture. *See McCray v. Rosenkrance*, 135 Idaho 509, 515 (2001). Based on the facts and the law, I would argue that a condemnation order to remove a building is a “circumstance beyond the right holder’s control.” Ms. James certainly didn’t remove the building voluntarily.

Even if the CSRBA court were to find that such action was not a “circumstance beyond the right holder’s control,” however, forfeiture requires a non-use of five (5) years. As evidenced by the documents attached hereto, there was an existing structure on the property within the past 5 years. *See* Exhibit 1 (existing structure as of at least April 14, 2011). Further, the 5 year statute is tolled during the pendency of a general stream adjudication, at least until a partial decree has

³ This fact would also tend to evidence the fact the owner intended to continue to use the property, including the existing water right.

⁴ Please note there is currently no objection to the water right claimed.

⁵ Currently I.C. § 42-223.

Mr. Goodwin
Ms. Werner
Idaho Department of Water Resources
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been issued. *See In Re SRBA*, Case No. 39576, Subcase Nos. 36-02708 et al. (*Facility Volume cases*) (Idaho Fifth Judicial Dist., May 2002) (Judge Wood presiding); *In Re SRBA*, Case No. 39576, Subcase No. 65-05663B (*Wood v. Trout*) (Idaho Fifth Judicial Dist. - SRBA, May 2002) (Judge Burdick presiding).⁶ In fact, "[o]nce the partial decree is issued for the water right, the non-user has five years within which to put the water to a beneficial use before the decreed right is subject to forfeiture. In Idaho a decreed water right is not insulated from forfeiture, however, it has long been established that once the decree is issued the statutory time period for non-use begins to run anew." *See Wood v. Trout*, supra, at 21.

In addition, and in fact, another exception to forfeiture is the "Resumption of Use Doctrine." *See Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937); *Carrington v. Crandall*, 65 Idaho 525, 532-32, 147 P.2d 1009, 1011 (1944); *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952). I can certify and attest that soon after taking title to the property, and in reliance upon my claimed water right, I have diverted and used water on the property at the diversion point at Hauser Lake noted in my claim forms.⁷ I have used such water for personal, household uses to include, but not necessarily limited to: mixing concrete for my dock anchors, washing my children off after they had finished swimming off of our dock, as well as hosed off my dock from leaves and tree debris. I have a portable water pump and generator which I use to divert the water. I would further give an offer-of-proof that I have witnesses who would be available to offer court testimony of current, actual water use on the property.

It is my hope that the documents attached hereto, the documents referenced from the Kootenai County Recorder's office, along with the facts alleged and contained herein, as well as the argument provided allay any concerns that there may not be a valid, existing water right for the above-referenced parcel of land. I am available to discuss any issue raised by this letter with either of you or Ms. Carter should any questions or concerns remain.

Sincerely and respectfully,



Kinzo H. Mihara

Encl: (1) City of Hauser, Idaho letter to Noreen James, dated April 4, 2015 (1 page).
(2) Panhandle Health District, Speculative Site Evaluation No. 14-28-128592 for parcel no. X-1400-00A-001-0 (3 pages).

Cc: File.

⁶ Roger S. Burdick is the current, sitting, Chief Justice of the Supreme Court of Idaho.

⁷ The original claim form noted an alternative point of diversion at Hauser Lake. This claim is buttressed by the existing piping found at that location on the above-referenced property. It is my information and belief that the piping at the noted diversion point at Hauser Lake runs to the existing, remaining foundation of the demolished building.

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EXHIBIT 1

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CITY OF
11837 N. Ha
Hauser, Id
Phone (208
Fax (208)

April 14, 2011

Ms. Norcen James
 P. O. Box 870521
 Wasilla, AK 99687

U.S. Postal Service		
CERTIFIED MAIL RECEIPT		
(Domestic Mail Only; No Insurance Coverage Provided)		
For delivery information visit our website at www.usps.com		
OFFICIAL USE		

Postage	\$ 50.44	0354
Certified Fee	12.21	02 Postmark Here
Return Receipt Fee (Endorsement Required)	52.30	
Restricted Delivery Fee (Endorsement Required)	50.00	
Total Postage & Fees	\$ 165.55	04/15/2011

Sent to	Ms. Norcen James
Street, Apt. No., or PO Box No.	PO BOX 870521
City, State, ZIP+4	Wasilla, AK 99687

NOTICE TO REMOVE UNSAFE STRUCTURE

Re: **Parcel Number X-1400-00A-001-0**
 Two Unsafe Buildings

A notice of "Unsafe Building" has been posted on each of the two buildings located on the above listed property (east side of Cliff House Road.) The notice to remove the structures is given because the structures are partially collapsed and in danger of further collapse therefore causing risk to the general public. Under Title 7, Chapter 1 of the Hauser Municipal Code, the City has adopted the 1997 edition of the uniform code for the abatement of dangerous buildings as published by the International Code Council.

To date, neither I nor the City of Hauser has heard from you in response to the posted notices. You are hereby given notice to demolish/remove the posted buildings within 180 days of this mandate.

You have the right to appeal my interpretation of the Hauser Municipal Code under Title 7, Chapter 1, Section 3.

If I do not hear from you within ten (10) days of this notice regarding your acceptance or rejection of the terms of this order, it will be turned over to legal counsel to institute the appropriate proceeding of law.

Brad Ziel by Anna Ray
 Brad Ziel
 City of Hauser Building Official
 Phone: 208-691-4638

BZ:dr

041411lrNJamesbyBZ
 Sent Certified-Return Receipt Request

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EXHIBIT 2

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Public Health
Prevent Promote Protect.
Panhandle Health District

Panhandle Health District I
Environmental Health Section

8500 N. ATLAS
HAYDEN, ID 83835

Owner:

NOREEN JAMES
PO BOX 870521
WASILLA, AK 99687

Applicant:

WES SMITH
2673 W BOLIVAR AVE
COEUR D ALENE, ID 83815

SPECULATIVE SITE EVALUATION

Speculative Site Evaluation # 14-28-128592

Report Date: 2/28/2014

Note: This Speculative Site Evaluation indicates potential suitability of soils for on-site sewage disposal. Approval to construct a sewage disposal system can only be granted by a valid Septic Permit.

Parcel # X-1400-00A-001-0

Township 51N Range 05W Section 01

Acres: 0

Site Summary –

On 2-18-14 Panhandle Health District evaluated two test holes on this property. The test holes did not meet the required surface water setback of 300 ft. (Hauser Lake). The slope of the site was approximately 42% with several rock outcrops throughout. The setback to the scarp on Cliffhouse Road is 75 ft from an upslope drainfield.

Analysis Performed by:


EHS Inspector

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TEST HOLE DATA

Test Hole#	Soil Profile	Soil Type	Comment	Latitude	Longitude
1	0-6 inches topsoil 6-20 in. loam (B-2) 20-35 in. sandy loam (B-1) 30% rock in test hole bedrock at 35 inches	B1			
2	0-6 inches topsoil 6-30 in. loamy sand mixed with decomposing granite (A-2b) 30-45 in. medium sand with decomp. granite (platty structure) bedrock at 45 inches 50% rock	A2	test holes does not meet surface water setback of 300 ft.		

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APPLICANT: PLEASE READ

A site evaluation is not an approval or a permit to install a septic system. Permit approval depends on the following: Site evaluation approval, the predicted maximum daily sewage flow; house size and location; well/spring location; changes to native soil (road cuts, grading, benching); distance to neighboring structures; proposed land use; other issues of concern.

Permits to construct a septic system are not granted until all such issues are addressed and/or submitted in writing as part of the plot plan/permit application AND found to be consistent with current regulations. ANY CHANGES TO THE SITE OR CONDITIONS OF THE APPLICATION AFTER ISSUANCE OF THE PERMIT MAY RENDER THE PERMIT INVALID.

Applicant's Name Wes Smith

Site Evaluation # 14-28-128592 Septic Permit #

☒ Surface water Hauser Lake

☐ Canals/ditches

☐ Well - public/private

☐ Spring

☒ Property line

☒ Slope% 42% (steeper slopes are present)

☐ Groundwater

☐ Easements

☐ Curtain drain

☐ Diversion ditch

☒ Waterline - public/private

☒ Neighboring dwellings

☒ Scarp

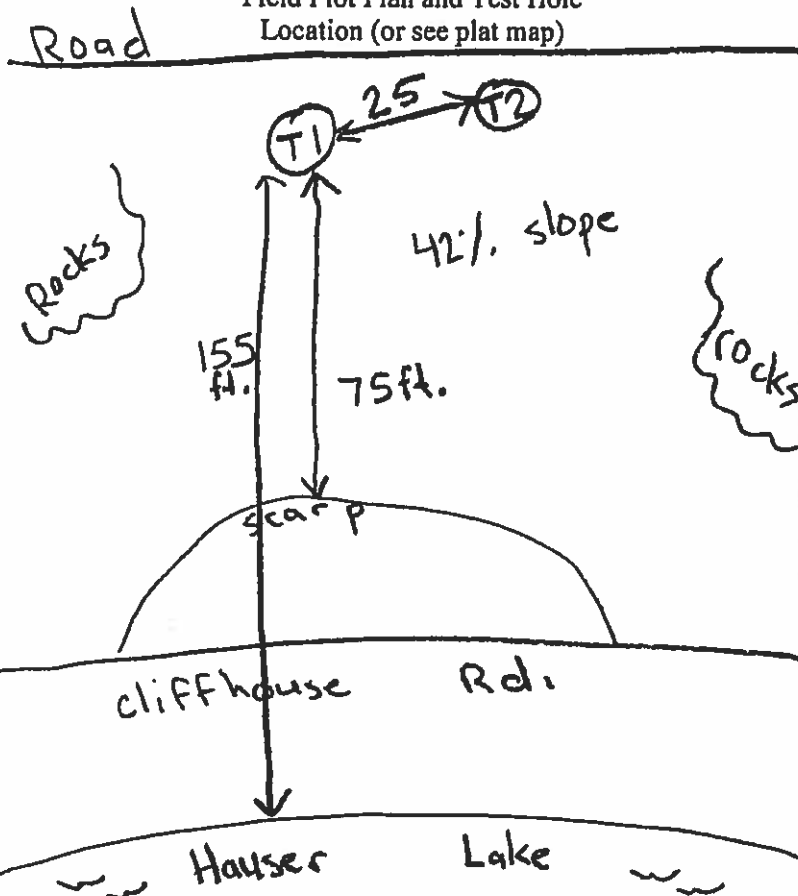
☒ Other rock outcrops

EHS Gary Joveland

Date 2-28-14

Field Plot Plan and Test Hole Location (or see plat map)

Test Holes



T1) 0-6 top
6-20 loam
20-35 sandy loam

T2) 0-6 top
6-30 loamy sand w/
dec. granite
30-45 med. sand w/ rock

*Sec Attached

*Steep slopes w/ several rock outcrops.

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