

Cefalo, James

From: Cefalo, James
Sent: Tuesday, February 23, 2021 11:48 AM
To: 'fredric_price@blm.gov'
Cc: 'merrill@plmw.com'
Subject: Application for Transfer 84613 (Merrill Ranch Partnership LLC)
Attachments: Stockton Creek Decrees.pdf; Files from WRs 13-57 and 13-885.pdf

Fred,

We recently received the BLM's protest against Application for Transfer 84613 filed by Merrill Ranch Partnership. Your primary concern is that the point of diversion for water right 13-57 is being changed from the NESW, Section 6, T13S, R39E to the SENW of Section 6. The SENW of Section 6 is BLM property. The other water rights included in the transfer already describe a point of re-diversion in the SENW of Section 6. These rights have been diverted at that location since at least the 1950s. These historical diversions are pre-FLPMA and would not require a recorded right-of-way.

This email is meant to provide some of the history of water right 13-57. I believe water right 13-57 has been diverted at the ditch in the SENW of Section 6 since at least 1950. Transfer 84613 proposes to correct the point of diversion description for water right 13-57 to reflect the actual location of the ditch heading.

Water right 13-57 was first described in a series of decrees from the late 1800s. The attached pdf (Stockton Creek Decrees) is the earliest record we have for water right 13-57. On pages 11-12 of the pdf (1898 decree), the court describes the land owned by Richard Hadley and states that Hadley's water right bears a priority date of 5/1/1873 and a diversion rate of 17 inches (0.34 cfs). On page 6 of the pdf (1899 decree), Hadley's water right is described with a diversion rate of 25 inches (0.50 cfs). Neither decree set forth a point of diversion for the Hadley water right.

The Cottonwood Creek water rights (13-885, 13-886, 13-887, 13-889) were first transferred into the Stockton Creek drainage in 1929. Water from Cottonwood Creek is dropped into the Stockton Creek drainage by way of a trans-basin ditch (Treasureton Canal). The 1929 transfer approval states that water would be re-diverted from Stockton Creek at the Allen Ditch, but does not provide a legal description for the Allen Ditch. The file for water right 13-885 (from Cottonwood Creek) also contains a 1929 agreement between H.H. and Reda Allen and L. Edgar and E. Lionel Merrill describing the construction of the ditch system to bring water from Cottonwood Creek into the Stockton Creek drainage. According to the agreement, water would be re-diverted at the "Allen Ditch" to serve the irrigated acres for both Allen and Merrill. The ditch located in the SENW of Section 6 must be the Allen Ditch.

E. Lionel Merrill and his wife Alda Merrill acquired the Rich Hadley property in 1943. The Merrill family has owned the properties described under water right 13-57 since that time. Although the original Hadley place of use could have been served by a ditch taking off of Stockton Creek at a lower elevation than the Allen Ditch, there is no evidence that such a ditch ever existed. The Allen Ditch is shown in the quad map, but there is no indication of a lower ditch. Glen Merrill, who has been associated with the property for his entire life, states that water right 13-57 has always been diverted in the SENW of Section 6.

In June 2011, Glen Merrill filed Application for Transfer 77356, proposing to change the nature of use for a portion of water right 13-57. Merrill had constructed a small reservoir on the property and wanted to have that use reflected on water right 13-57. The application noted that the point of diversion for right 13-57 was not described in the original decree and should be defined as part of the transfer approval. The point of diversion was described in the NWNESW of Section 6, T13S, R38E, but was clearly intended to identify the point of diversion for the Allen Ditch. The map filed with Application 77356 was at a scale so large that it is not possible to see the ditch. Transfer 77356 was approved on September 20, 2011.

The point of diversion defined in Transfer 77356 was in error. There is no headgate in the NWNESW of Section 6. Merrill and Department staff should have looked more carefully at the actual headgate location of the Allen Ditch. Transfer 77356 did not "change" the point of diversion for water right 13-57. Prior to Transfer 77356, there was no point of diversion defined for the right. I could not find any evidence in our files that water right 13-57 was diverted anywhere but at the Allen Ditch. The current application simply seeks to correct the legal description for the point of diversion. I think water right 13-57 should be treated the same way as the other rights in the Allen Ditch (13-885B, 13-886B, 13-887B and 13-889D). If those rights are considered pre-FLPMA, water right 13-57 should be treated the same way.

If this additional information addresses your concerns, you can file a withdrawal of protest by email. If the information does not address your concerns, let me know and we will move forward with scheduling a pre-hearing conference.

James Cefalo
Regional Manager
IDWR Eastern Region
(208) 525-7161

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
Certificate of Water Right
Transferred Right No. 475.

THIS IS TO CERTIFY That JOHN G. FOREMAN, of Cleveland, County of Blaine, State of Idaho, has a right to the use of the waters of Cottonwood Creek, for irrigation and domestic purposes, and that said right has been confirmed by decree of the District Court of the United States for the District of Idaho, Eastern Division, Frank S. Dietrich, Judge, in the case of Utah Power & Light Company, Plaintiff, vs. The Last Chance Canal Company, Limited, et al., defendants, wherein seven second feet of the waters of Cottonwood Creek, in Water District No. 5, were dedicated to 624 acres of land in Sec. 36, Twp. 12 S., R. 40 E., S. M., and Lots 3 and 4 and the E $\frac{1}{2}$ of SW $\frac{1}{4}$, Sec. 31, Twp. 12 S., R. 41 E., S. M., said right bearing dates of priority as follows:

5 second feet, with priority of June 1, 1873;
2 second feet, " " " June 1, 1879;

That said decree has been entered in the records of the Department of Reclamation of the State of Idaho, at Boise, in Book 4 of Decrees, at page 502;

That, upon the application of the said John G. Foreman for transfer of water right, made before the Commissioner of Reclamation of Idaho, and the said application having been granted, the right to the use of seven (7) second feet of the waters of Cottonwood Creek upon the lands above described is hereby abandoned and a description of the lands to be irrigated under such right and to which the water right hereby confirmed shall by this certificate become appurtenant, for irrigation and domestic purposes, is given below, said water to be limited at any given time to an amount actually needed and beneficially used for such purposes and shall not exceed the following amounts, to-wit:

5 second feet, with priority of June 1, 1873;
2 " " " " " June 1, 1879;

SE $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$ and W $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 13;
S $\frac{1}{2}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 24; NE $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ and the NW $\frac{1}{4}$, Sec. 25,
all in Twp. 13 S., R. 38 E., S. M.; NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ and the
SW $\frac{1}{4}$, Sec. 18; S $\frac{1}{2}$ SE $\frac{1}{4}$ and the SW $\frac{1}{4}$, Sec. 19; NW $\frac{1}{4}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$,
Sec. 30, all in Twp. 13 S., R. 39 E., S. M.

That the water to be transferred has heretofore been diverted from Cottonwood Creek at a point in the SW $\frac{1}{4}$ of Sec. 36, Twp. 12 S., R. 40 E., S. M., and conducted through the King Ditch and Caldwell Ditch, but will hereafter, by virtue of this certificate, be diverted at a point in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 8, Twp. 12 S., R. 39 E., S. M., and conducted through the Treasuraton Irrigation Company ditch, then down a natural channel of Stockton Creek to the Allen Ditch.

That no right to the use of water on the lands last above mentioned exists at the date of this certificate except as herein stated, and that the right to the use of the waters aforesaid, hereby confirmed, is restricted to the lands last above described, as provided by the laws of the State of Idaho.

WITNESS, The seal and signature of the Commissioner of Reclamation of Idaho, affixed at Boise, this 21st day of October, 1929.

5A
Trac 11:55-244

Abstract No.

M. H. Allen, Jr. and wife,
Reda Allen,

to

L. Edgar Merrill and E.
Lionel Merrill.

DECREE OF WATER RIGHT AND
AGREEMENT FOR CONSTRUCTION
OF RIGHTS OF WAY

Dated: December 13, 1929
Filed: December 31, 1929
at 4:19 P. M.
Instrument No.: 140663
Recorded: Book 62 Deed
Record Page 550

Recites:

That first parties are now owners of certain decreed water rights in Cottonwood Creek, a tributary of Bear River in Bannock County, Idaho, described as follows:

The following waters decreed by the District Court of the United States of District of Idaho, Eastern Division, on fourteenth day of July, 1920, in an action wherein Utah Power & Light Company, a corporation was plaintiff, and the Last Chance Canal Company Ltd. were defendants to-wit:

- (b) 1879, June 1, 2.0 c. f. s.
- (c) 1887, June 1, 1.5 c. f. s.
- (d) 1895, June 1, 1.4 c. f. s.
- (f) 1904, Jan. 1, 10 c. f. s.

That, second parties are desirous of purchasing a one-fifth interest in said decreed waters; and

That, the parties to this agreement are desirous of changing the place of use of said decreed waters above described, to certain real estate owned by parties in Swan Lake, Idaho; and

That the parties to this agreement have this day agreed upon a division of the cost of the construction of the canal to change the place of use.

Now Therefore, it is agreed as follows, to-wit:

That first parties for the sum of \$2015.00 paid by second parties to first parties, receipt whereof is hereby acknowledged, hereby grant, bargain and sell unto second parties, following described water rights.

Four tenths c. f. s. of water of priority date of June 1, 1879, three tenths c. f. s. of water of priority date of June 1, 1887, .20 c. f. s. of water of priority date of June 1, 1895 and 2 c. f. s. of water of priority date of Jan. 1, 1904, all of said waters being decreed from the above described Cottonwood Creek in the above entitled decree, together

Abstract No.

H. H. Allen, Jr. and wife,
Reda Allen,

to

L. Edgar Merrill and E.
Lionel Merrill.

DECREE OF WATER RIGHT AND
AGREEMENT FOR CONSTRUCTION
OF RIGHTS OF WAY

Dated: December 13, 1929
Filed: December 31, 1929
at 4:19 P. M.
Instrument No.: 148663
Recorded: Book 62 Deed
Record Page 550

Recites:

That first parties are now owners of certain decreed water rights in Cottonwood Creek, a tributary of Bear River in Bannock County, Idaho, described as follows:

The following waters decreed by the District Court of the United States of District of Idaho, Eastern Division, on fourteenth day of July, 1920, in an action wherein Utah Power & Light Company, a corporation was plaintiff, and the Last Chance Canal Company Ltd. were defendants to-wit:

- (b) 1879, June 1, 2.0 c. f. s.
- (c) 1887, June 1, 1.5 c. f. s.
- (d) 1895, June 1, 1.4 c. f. s.
- (f) 1904, Jan. 1, 10 c. f. s.

That, second parties are desirous of purchasing a one-fifth interest in said decreed waters; and

That, the parties to this agreement are desirous of changing the place of use of said decreed waters above described, to certain real estate owned by parties in Swan Lake, Idaho; and

That the parties to this agreement have this day agreed upon a division of the cost of the construction of the canal to change the place of use.

Now Therefore, it is agreed as follows, to-wit:

That first parties for the sum of \$2815.00 paid by second parties to first parties, receipt whereof is hereby acknowledged, hereby grant, bargain and sell unto second parties, following, described water rights.

Four tenths c. f. s. of water of priority date of June 1, 1879, three tenths c. f. s. of water of priority date of June 1, 1887, .28 c. f. s. of water of priority date of June 1, 1895 and 2 c. f. s. of water of priority date of Jan. 1, 1904, all of said waters being decreed from the above described Cottonwood Creek in the above entitled decree, together

BANNOCK TITLE-ABSTRACT COMPANY
PAGE NUMBER

666

Abstract No.

with all the rights and privileges appertaining thereto;

And the parties to this agreement in consideration of the mutual promises one to each other hereby agree that they will mutually construct such irrigation canals, and improve existing irrigation canals and natural waterways so as to transfer the waters from said Cottonwood Creek at a point in the Northeast corner of Southeast quarter of Section 8, Twp. 12 South, Range 39 E. B. M. through the Treasureton Irrigation ditch; thence down the natural channel of the Stockton Creek; thence down a certain ditch known as the Allen ditch; thence through ditches and laterals to be constructed through the property of parties to this agreement, to a point on the North boundary line of Southwest quarter of Section 19, Twp. 13 South Range 39 E. B. M., the exact point to be determined by a survey of the proposed canals.

Provided, however, that should Vernon Henderson, later become a part owner in said water and in said canals then the parties agree that they will mutually convey said water to a point three quarters of a mile further South.

It is further mutually agreed that in the construction and improvement and maintenance of said canals and waterways, that the first parties will bear four-fifths of the labor and expense necessary to construct and improve the said ditches, canals and waterways, and second parties will bear one-fifth of such labor and expense.

It is further mutually agreed that first parties will furnish free of cost, rights of way for said ditches and canals over the property belonging to them, and second parties likewise agree to furnish free of cost rights of way for said ditches and canals over the property belonging to said second parties.

H. H. Allen, Jr.
Reda Allen
L. Edgar Merrill
E. Lionel Merrill

Acknowledged: Cache County, Utah; December 13, 1929; by H. H. Allen, Jr. and wife, Reda Allen, L. Edgar Merrill and E. Lionel Merrill; before L. Tom Perry, Notary Public, in and for said County and State. Residing at Logan, Utah. (Notarial Seal) My commission expires 2/6/1931.

with all the rights and privileges appertaining thereto;

And the parties to this agreement in consideration of the mutual promises one to each other hereby agree that they will mutually construct such irrigation canals, and improve existing irrigation canals and natural waterways so as to transfer the waters from said Cottonwood Creek at a point in the Northeast corner of Southeast quarter of Section 8, Twp. 12 South, Range 39 E. B. M. through the Treasureton Irrigation ditch; thence down the natural channel of the Stockton Creek; thence down a certain ditch known as the Allen ditch; thence through ditches and laterals to be constructed through the property of parties to this agreement, to a point on the North boundary line of Southwest quarter of Section 19, Twp. 13 South Range 39 E. B. M., the exact point to be determined by a survey of the proposed canals.

Provided, however, that should Vernon Henderson, later become a part owner in said water and in said canals then the parties agree that they will mutually convey said water to a point three quarters of a mile further South.

It is further mutually agreed that in the construction and improvement and maintenance of said canals and waterways, that the first parties will bear four-fifths of the labor and expense necessary to construct and improve the said ditches, canals and waterways, and second parties will bear one-fifth of such labor and expense.

It is further mutually agreed that first parties will furnish free of cost, rights of way for said ditches and canals over the property belonging to them, and second parties likewise agree to furnish free of cost rights of way for said ditches and canals over the property belonging to said second parties.

H. H. Allen, Jr.
Reda Allen
L. Edgar Merrill
E. Lionel Merrill

Acknowledged: Cache County, Utah; December 13, 1929; by H. H. Allen, Jr. and wife, Reda Allen, L. Edgar Merrill and E. Lionel Merrill; before L. Tom Perry, Notary Public, in and for said County and State. Residing at Logan, Utah. (Notarial Seal) My commission expires 2/6/1931.

INSTRUMENT NO. 148663

DEED OF WATER RIGHT AND
AGREEMENT FOR CONSTRUCTION OF RIGHTS
OF WAY.

THIS AGREEMENT, made and entered into this 13th day of December 1929, by and between H. H. Allon Jr., and his wife Nedra Allen, of Swan Lake, Idaho, parties of the first part and L. Edgar Merrill, and E. Lionel Merrill, of Swan Lake, Idaho, parties of the second part,
WITNESSETH:

THAT WHEREAS, the parties of the first part are now the owners of certain decreed water rights in Cottonwood Creek, a tributary of Bear River, in Bannock County, Idaho, described as follows:

The following waters decreed by the District Court of the United States of the District of Idaho, Eastern Division, on the 14th day of July 1920, in an action wherein the Utah Power & Light Company, a corporation, was plaintiff, and the Last Chance Canal Company Ltd., were defendants, to-wit:

(b) 1879 June 1, 2.0 c.f.s. (c) 1887, June 1, 1.5 c.f.s;
(d) 1895, June 1 1.4 c.f.s. (f) 1904, Jan. 1, 10 c.f.s.

and,

WHEREAS, the parties of the second part are desirous of purchasing a one fifth interest in said decreed waters, and,

WHEREAS, the parties to this agreement are desirous of changing the place of use of said decreed waters above described, to certain real estate owned by the parties in Swan Lake, Idaho, and,

WHEREAS, the parties to this agreement have this day agreed upon a division of the cost of the construction of the canal to change the place of use. Now Therefore, it is agreed as follows, to-wit:

That the parties of the first part for the sum of \$2815.00, paid by the parties of the second part to the parties of the first part, the receipt whereof is hereby acknowledged, hereby grant, bargain and sell unto the parties of the second part, the following described water rights:

Four tenths c.f.s. of water of priority date of June 1, 1879;
three tenths c.f.s. of water of priority date of June 1, 1887; .28 c.f.s. of water of priority date of June 1, 1895, and 2 c.f.s. of water of priority date of Jan. 1, 1904, all of said waters being decreed from the above described Cottonwood Creek in the above entitled decree, together with all the rights and privileges appertaining thereto.

And the parties to this agreement in consideration of the mutual promises one to each other hereby agree that they will mutually construct such irrigation canals, and improve existing irrigation canals and natural waterways so as to transfer the waters from said Cottonwood Creek at a point in the Northeast corner of the Southeast quarter of Section 8, twp. 12 South Range 39 E.B.M., through the Treasureton Irrigation ditch, thence down the natural channel of the Stockton creek, thence down a certain ditch known as the Allon ditch, thence through ditches and laterals to be constructed through the property of the parties to this agreement, to a point on the North boundary line of the Southwest quarter of Section 19, twp. 13 South Range 39 E.B.M., the exact point to be determined by a survey of the proposed canals. Provided, however, that should Vernon Henderson, later become a part owner in said water and in said canals, then the parties agree that they will mutually convey said water to a point three quarters of a mile further South.

THIS INSTRUMENT, made this 7th day of December in the year of our Lord one thousand nine hundred and forty-three, between Rich Hadley and wife, Ervil M. Hadley of Swan Lake, County of Bannock, State of Idaho, the parties of the first part, and Edgar Lionel Merrill and wife, Alice M. Merrill of Swan Lake, County of Bannock, State of Idaho, the parties of the second part.

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of FIFTY-FIVE HUNDRED AND NO/100 DOLLARS, lawful money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell, convey and confirm unto the said part of the second part, and to their heirs and assigns forever, all of the following described real estate, situated in Swan Lake, County of Bannock, State of Idaho, to-wit:

The Northwest quarter of the Southeast quarter and the Southwest quarter of the Northwest quarter and the Southeast quarter of the Northwest quarter and lots 2 and 3, Section 14, Township 13 South of Range 38 East of the Boise Meridian, containing 162.25 acres.

Excepting 5.68 acres to be used for right of way purposes.

Together with all water rights belonging or in anywise appertaining thereto and especially including the primary right to 25 inches of waters of Stockton Creek.

(\$4.95 I.R.S. attached to Deed and cancelled)

The Grantee herein assumes and agrees to pay all taxes, both general and special, for the year 1937 and thereafter, and also that certain mortgage loan in the amount of \$1000 dated April 28, 1941 executed by Rich Hadley and others in favor of Utah Mortgage Loan Corporation, recorded May 9, 1941, Book 70 at Page 207, records of Bannock County, together with interest as therein specified and also the handling charge mortgage in the amount of \$98 in connection with said loan.

TOGETHER, with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents issues and profits thereof, and all estate, right, title and interest in and to the said property, as well in law as in equity, of the said part of the first part.

TO HAVE AND TO HOLD, all and singular the above mentioned and described premises, together with the appurtenances, unto the parties of the second part, and to their heirs and assigns forever and the said parties of the first part, and their heirs, the said premises in the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and will warrant and by these presents forever DEFEND.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered
in Presence of

Franklin D. Richards
Paula Nielsen
STATE OF UTAH)
County of Cache) ss.

Rich Hadley
Ercil M. Hadley
(SEAL)
(SEAL)

On this 7th day of December in the year 1943, before me Franklin D. Richards, a Notary Public in and for said State, personally appeared Rich Hadley and wife, Ervil M. Hadley known to me to be the persons whose names are subscribed to the within instrument, and