

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER)
NO. 77071 IN THE NAME OF)
DAVE GARSIDE LIVING TRUST)

**PRELIMINARY ORDER
RESCINDING TRANSFER**

This matter having come before the Idaho Department of Water Resources ("Department") as a result of an unaccomplished water right transfer, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On February 10, 2011, Dave Garside Living Trust ("Garside") filed Application for Transfer No. 77071, proposing to change the point of diversion and place of use for water rights 11-157, 11-7679 and 11-7681. The proposed point of diversion was a pump station to be constructed on the Thomas Fork in the NWNWNW of Section 26, T12S, R46E.
2. On February 20, 1902, Joseph C. Rich, a judge in the Fifth Judicial District of Idaho, issued a decree ("1902 Decree") setting forth the water rights in the Thomas Fork basin. *W.A. Fawsett and John M. Fawsett Partners as "Fawsett Brothers" et al. v. Thomas Fork Irrigation and Canal Co. et al.* (Idaho 5th Dist. 1902).
3. The 1902 Decree described water right 11-147 (the parent right for water right 11-7679) as follows: "JOHN BLECHERT, 1-3/5 second feet, being 80 miners inches of water, diverted from Taylor Canal, of date July 15th-1893." 1902 Decree, page 10.
4. The 1902 Decree described water right 11-149 (the parent right for water right 11-7681) as follows: "ARNOLD D. HIRSCHI, 4/5 second feet, being 40 miners inches of water, diverted from Muddy Canal, of date September 15th-1894." 1902 Decree, page 10.
5. The 1902 Decree described water right 11-157 as follows: "ARNO BOEHME, 3 second feet, being 150 miners inches of water, diverted from Thomas Fork, of date June 1st-1899." 1902 Decree, page 11.
6. At the time Application for Transfer 77071 was filed, the points of diversion of record for water rights 11-157, 11-7679 and 11-7681 were still those described in the 1902 Decree. The point of diversion of record for water right 11-7679 was the Thomas Fork through the Taylor Canal. The point of diversion of record for water right 11-7681 was an unspecified location on the Thomas Fork. The point of diversion of record for water right 11-157 was an unspecified location on the Muddy Canal.

7. The Department approved Transfer 77071 on May 19, 2011. The transfer approval included the following conditions on all of the water rights:

The right holder shall accomplish the change authorized by this transfer within five years of the date of this approval.

Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

8. On June 10, 2016, Widmer Ranch LLC (“Widmer”) filed a Notice of Change in Water Right Ownership, seeking to update the ownership records for water rights 11-157, 11-7679 and 11-7681. Widmer provided deeds demonstrating ownership of the land associated with the water rights.

9. Widmer asserts that the Thomas Fork pump station contemplated in Transfer 77071 was never constructed. Aerial photography available to the Department indicates there has been no development at the proposed point of diversion. According to Joel Teuscher, watermaster for the Thomas Fork Water District (11-F), the proposed Thomas Fork pump station has never been constructed.

CONCLUSIONS OF LAW

1. The Department has the authority to rescind a prior transfer approval if the conditions of approval are not satisfied.

2. The evidence available to the Department demonstrates the changes proposed in Transfer 77071 were never accomplished. Garside and its successors in interest, including Widmer, did not comply with the conditions of Transfer 77071 because the proposed Thomas Fork pump station was never constructed.

3. The Department should rescind Transfer 77071 for failure to comply with the conditions of approval. Water rights 11-157, 11-7679 and 11-7681 should be returned to their pre-transfer elements and conditions.

ORDER

IT IS HEREBY ORDERED that Transfer 77071, approved by the Department on May 19, 2011, is RESCINDED. The points of diversion and places of use for water rights 11-157, 11-7679 and 11-7681 shall revert to the locations existing prior to Transfer 77071. The elements and conditions of water rights 11-157, 11-7679 and 11-7681 shall also revert to those existing on the water rights prior to Transfer 77071.

Dated this 3rd day of January, 2018.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 3RD day of January 2018, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER RESCINDING TRANSFER, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

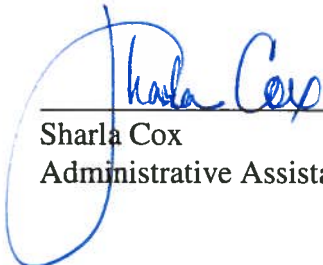
**Widmer Ranch LLC
Kirk and Janet Widmer
461 Widmer Lane
Geneva, ID 83238**

Courtesy copies sent via regular mail to:

**Taylor Canal Company
c/o Mike Saxton
5943 Center Lane
Geneva, ID 83238**

**Rob Harris
Holden Kidwell Hahn & Crapo PLLC
1000 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, ID 83405**

**Joel Teuscher
Watermaster, WD 11F
39 Teuscher Lane
Geneva, ID 83238**



Sharla Cox
Administrative Assistant

IDAHO DEPARTMENT OF WATER RESOURCES
Proof Report

12/27/2017

Water Right 11-157

Owner Type **Name and Address**
Current Owner WIDMER RANCH LLC
 461 WIDMER LN
 GENEVA, ID 83238

Priority Date: 6/1/1899

Basis: Decreed

Status: Active

Source
THOMAS FORK

Tributary
BEAR RIVER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
IRRIGATION	04/15	10/31	3.000 CFS	
	<u>Total Diversion</u>		3.000 CFS	

Source and Point(s) of Diversion

THOMAS FORK

Sec. 27, Twp 12S, Rge 46E, BEAR LAKE County

Place Of Use

IRRIGATION within BEAR LAKE County

			NE				NW				SW				SE				Totals
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
12S	46E	27	40.0	40.0	40.0	40.0													160.0

POU Total Acres: 160.0

Conditions of Approval:

1. Source = Thomas Fork
Point of Diversion not described in decree

12/27/2017

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	WIDMER RANCH LLC 461 WIDMER LN GENEVA, ID 83238

Status: Active

Tributary
BEAR RIVER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
IRRIGATION	04/15	10/31	0.400 CFS	
	Total Diversion		0.400 CFS	

[illegible]

IRRIGATION within BEAR LAKE County

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
12S	46E	27													40.0				40.0

POU Total Acres: 40.0

1. Point of Diversion = Taylor Canal

12/27/2017

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	WIDMER RANCH LLC 461 WIDMER LN GENEVA, ID 83238

Status: Active

Tributary
BEAR RIVER

Volume

0.270 CFS

Sec. 27, Twp 12S, Rge 46E, BEAR LAKE County

IRRIGATION within BEAR LAKE County

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
12S	46E	27														40.0			40.0

POU Total Acres: 40.0

1. Point of Diversion = Muddy Canal

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.