

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE OBJECTION TO)
THE CHANGE IN OWNERSHIP FOR)
WATER RIGHTS 25-14358 AND 25-14359)

PRELIMINARY ORDER
REJECTING OBJECTION

This matter having come before the Idaho Department of Water Resources ("Department") as the result of an Objection to a Notice of Change in Water Right Ownership, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On January 29, 1997, the Department issued water right license 25-7603, which bore a priority date of February 28, 1992 and authorized a diversion rate of 0.70 cfs and the irrigation of 35 acres. Kent Merrill was identified as the owner of record on the license.

2. At some point after 1997, Kent Merrill subdivided the 35-acre place of use for water right 25-7603 into 27 residential lots (Lots 1-15, Block 1 and Lots 1-12, Block 2) known as the Valley Estates Subdivision.

3. On June 16, 2010, the Department approved Transfer 76308, which split off and moved a 3.6-acre portion of water right 25-7603. The 31.4-acre remaining portion of the water right was assigned water right number 25-14247.

4. On March 24, 2011, Craig Clement filed a Notice of Change in Water Right Ownership, seeking to update the ownership records for a 1.0-acre portion of water right 25-14247.

5. Craig Clement provided a copy of two deeds to support the ownership change. One deed was a 2006 Quitclaim Deed from Kent Merrill (and others) to Upper Valley Cabinet, Inc. for Lots 1-15, Block 1 and Lots 1-12, Block 2 of the Valley Estates Subdivision in Jefferson County. The second deed was a 2007 Corporate Warranty Deed from Upper Valley Cabinet, Inc. to Craig Clement for Lot 8, Block 1 of the Valley Estates Subdivision. Neither of the deeds reserve or withhold any portion of water right 25-14247 (or 25-7603) from the sale of the property.

6. On March 25, 2011, Cory Clement filed a Notice of Change in Water Right Ownership, seeking to update the ownership records for a 1.2-acre portion of water right 25-14247.

7. Cory Clement provided a copy of two deeds to support the ownership change. One deed was the 2006 Quitclaim Deed referenced above. The second deed was a 2007 Corporate Warranty Deed from Upper Valley Cabinet, Inc. to Cory Clement for Lot 15, Block 1 of the Valley

Estates Subdivision. Neither of the deeds reserve or withhold any portion of water right 25-14247 (or 25-7603) from the sale of the property.

8. On October 26, 2011, the Department updated its records to reflect the ownership change notices filed by Craig Clement and Cory Clement. Craig Clement's water right was assigned number 25-14359 and authorized a diversion rate of 0.02 cfs and the irrigation of 1.0 acres. Cory Clement's water right was assigned number 25-14358 and authorized a diversion rate of 0.02 cfs and the irrigation of 1.2 acres.

9. On November 8, 2011, Kent and Diane Merrill ("Merrills"), through their attorney, filed an *Objection to Change in Ownership* ("Objection"), challenging the ownership of water rights 25-14358 and 25-14359. The Objection stated that it was filed pursuant to Idaho Code § 42-1701A(3) and proposed a hearing to be held at some point in the future. The Objection stated: "Prior to said hearing, Objectors intend to file a 'Quiet Title' action against Clement in order to establish that Clement has no property rights in said water rights." Objection, page 2.

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-248(1) states, in pertinent part:

All persons owning or claiming ownership of a right to use the water of this state, whether the right is represented by decree of the court, by claim to a water right filed with the department of water resources or by permit or license issued by the director of the department of water resources, shall provide notice to the department of water resources of any change in ownership of any part of the water right or of any change in the owner's mailing address, either of which occurs after June 30, 2000. Notice shall be provided within one hundred twenty (120) days of any change using forms acceptable to the director.

Idaho Code § 42-248(5) states, in pertinent part:

A notice of change of ownership of all or part of a water right shall be accompanied by evidence showing the basis for the change in ownership, and how the right is divided if the change divides the right among multiple owners.

Idaho Code § 42-1701A(3) states, in pertinent part:

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who

has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

Idaho Code § 55-101 states:

Real property or real estate consists of:

1. Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer.
2. That which is affixed to land.
3. That which is appurtenant to land.

Idaho Code § 9-505 states, in pertinent part:

In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

...

4. An agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Idaho Code § 6-401 states:

An action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim, provided that all actions to adjudicate water rights and obtain a decree as to water source, quantity, point of diversion, place of use, nature of use, period of use, and priority as against other water users shall be brought under the provisions of chapter 14, title 42, Idaho Code.

ANALYSIS

Water rights are real property and, as such, can only be conveyed in writing. Idaho Code §§ 55-101 and 9-505. If a water right is conveyed, the new owner has an obligation to notify the Department of the change in order to update the water right records of the state. Idaho Code § 42-248(1). The Department's role in updating water right ownership records is primarily clerical. The Department does not have the authority to quiet title to a water right. Such authority is granted to the Idaho courts. *See* Idaho Code § 6-401 (Title 6 of the Idaho Code describes various actions that may be filed in Idaho courts). The Department merely updates its water right records

to reflect the evidence of conveyance filed by the new water right owner (quitclaim deeds, warranty deeds, probate orders, etc.).

In this case, the notices filed by Craig Clement and Cory Clement were complete because they included copies of the relevant conveyance documents. The Department updated its records to reflect those documents. The Merrills acknowledge that the only way to quiet title to water right 25-14247 is through an action filed in district court. Objection, page 2. Over five years have passed since the Merrills filed their Objection. They have never notified the Department that a quiet title action has even been initiated. The Department should reject the Merrills' Objection. If the Merrills are ever successful in quieting title to water right 25-14247, or any splits therefrom, they can file a Notice of Change in Water Right Ownership. The Department will update its water right records to be consistent with any order issued by the court.

CONCLUSIONS OF LAW

The Objection filed by the Merrills is contingent on a future quiet title action and is therefore not ripe for any action by the Department. Therefore, the Objection should be rejected.

ORDER

IT IS HEREBY ORDERED that the Objection filed by the Merrills is REJECTED.

Dated this 5th day of June, 2017.

A handwritten signature in black ink, appearing to read 'J. Cefalo', written over a horizontal line.

James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of June 2017, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed to the following:

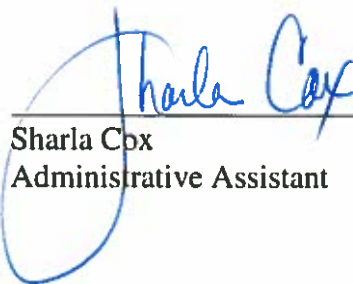
US MAIL

RE: PRELIMINARY ORDER REJECTING OBJECTION

**Jerry Rigby
Rigby, Andrus & Rigby Chtd.
25 N 2nd E
Rexburg, ID 83440**

Courtesy copy sent via regular US Mail to:

**Kristin Moore
Rocky Mountain Environmental Associates, Inc.
482 Constitution Way, Suite 303
Idaho Falls, ID 83402**



Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

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

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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, request 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 Rules of Procedure 302 and 303.

FINAL ORDER

The Department 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.