

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

|                               |   |                             |
|-------------------------------|---|-----------------------------|
| IN THE MATTER OF APPLICATION  | ) |                             |
| FOR TRANSFER NO. 78862 IN THE | ) | MOTION TO VACATE HEARING,   |
| NAME OF DONALD D. BROWN       | ) | DENY TRANSFER OR ESTABLISH  |
|                               | ) | BRIEFING SCHEDULE FOR       |
|                               | ) | ARGUMENT OF THRESHOLD LEGAL |
|                               | ) | ISSUES                      |

---

COMES NOW Cedars Subdivision Owner's Association, Inc., through counsel, and does herewith, pursuant to Rule 260, move for vacation of the hearing now set for April 8, 2014 on the basis that there are threshold legal issues that preclude the Department from considering this transfer.

The Department should deny the transfer or, alternatively, establish a briefing schedule so the threshold legal issues can be briefed, argued and ruled upon prior to the parties going to the time and expense of a hearing.

The threshold legal issues are:

1. Applicant has requested a change of source for his water right from a spring to Buck Creek. Idaho Code §42-222 does not grant the power to the Department of Water Resources to change the source of a water right.
2. While this Protestant believes the facts will show, contrary to the representations at the pre-hearing conference, that the Buck Creek channel was not diverted in any material way by the development of the Cedars (see attached Affidavit of Thomas J. Holmes with report from

Rocky Mountain Environmental Associates, Inc.), if it had been diverted, the statute of limitations to make claim to Buck Creek had long expired:

A. Mr. Brown filed the claim for a water right in 1983 based upon the source of water being a spring. To obtain rights to Buck Creek he would have had to have filed for a permit, which he failed to do.

B. The Partial Decree (attached) entered March 22, 2004 by the SRBA District Court entering a partial decree for water right 29-04391 states the source is a spring. Such Decree is res judicata and the source may not be re-litigated in a separate proceeding. The source has been decreed by the court.

3. The Department has no jurisdiction under the law or based upon the prior ruling of the SRBA District Court to hear this transfer.

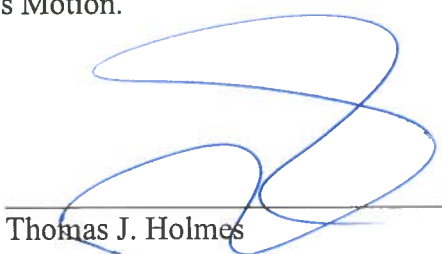
4. Based upon the Rocky Mountain Environmental Associates, Inc. Attached to the Affidavit of Thomas J. Holmes, and specifically paragraph 2), last full paragraph at the top of page 3, there may be a defect in the notification procedure for this transfer:

“Because the change in source was not represented on the transfer application nor advertised, downstream water users have not had an opportunity to protest this transfer and protect their interests.

5. The transfer should be denied and the hearing vacated. Alternatively the Department should order a briefing schedule for these matters to be briefed more fully if required by the Department.

6. Oral argument is not requested on this Motion.

DATED this 4 day of March, 2014.



---

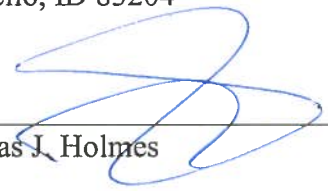
Thomas J. Holmes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MOTION TO VACATE HEARING, DENY TRANSFER OR ESTABLISH BRIEFING SCHEDULE FOR ARGUMENT OF THRESHOLD LEGAL ISSUES** was mailed this 4 day of March, 2014, in an envelope with sufficient first-class postage prepaid thereon to the following:

Donald D. Brown  
4285 Bannock Hwy  
Pocatello, ID 83204

Terry Walsh  
10 Cedar Hills Drive  
Pocatello, ID 83204

  
\_\_\_\_\_  
Thomas J. Holmes