



## Keen, Shelley

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**From:** Keen, Shelley  
**Sent:** Friday, February 14, 2014 9:38 AM  
**To:** 'Lana Esplin'  
**Subject:** RE: IDFG transfer questions

Ms. Esplin;

I have reviewed the water right files and can provide the following responses to the questions you put forth in your February 11, 2014, email.

Q.) Does the IDFG have to follow the rules other water users follow?

A.) Yes, IDFG must comply with the laws and rules of the State of Idaho. IDWR is still waiting to hear from the Idaho Department of Fish and Game (IDFG) concerning the completion of its transfer. We will let you know when we have received that confirmation. While Idaho Code § 42-222 provides for forfeiture of a water right after five years of non-use, there are several defenses against forfeiture. One of these defenses is to place the water right into the Water Supply Bank, as you know. Forfeiture also is not typically found when a water user wants to exercise its water right, but there isn't adequate water at the water source to supply the water right.

Q.) How can the IDFG use the water if the measurements for two years show the water isn't there?

A.) According to the conditions of Water Right 21-2100, IDFG can't divert more water from Henrys Lake than is provided by Pittsburg Creek. However, the natural unavailability of water does not result in forfeiture, as discussed above. If Pittsburg Creek were to flow 6.00 cfs or more at IDFG's old point of diversion on Pittsburg Creek and deliver that amount into Henry's Lake, IDFG would have the right to divert up to 6.00 cfs from the lake.

Q.) Since Henry's Lake Station has been an egg taking station for several years, shouldn't the IDFG application for a water right transfer have listed a "change of use" from "Fish Propagation" to "Egg Gathering?"

A.) IDWR doesn't usually distinguish among the various stages of rearing fish stock. Water rights for all or any part of the process of rearing fish are usually termed Fish Propagation.

I would also like to touch on your statement that "our water can not be used by the IDFG when it is in the water bank." When a water right is placed in the Water Supply Bank, someone must rent that water right from the Water Supply Bank in order to exercise it. If no one rents the water right, then the water in the stream is available to junior appropriators for use in accordance with their water rights. There are only two water rights authorizing diversion from Pittsburg Creek. North Henrys Lake HOA holds the senior right (21-10015 with a 1904 priority date). IDFG has the junior water right (21-2100 with a 1948 priority date). If the HOA is not using its right and it is not rented by someone else, then IDFG is entitled to use the water pursuant to its right. The Pittsburg Creek situation is different than most because IDFG is not actually diverting directly from the creek. Its transfer allows it to divert from Henrys Lake. Therefore, if the HOA is not diverting water and its right is not rented from the Water Supply Bank by someone else, all the Pittsburg Creek water will flow downstream and into the lake, where it can be diverted pursuant to IDFG's water right.

Based on these circumstances, it seems to me that the HOA is in a nearly ideal situation. It has the most senior water right. Consequently, when it needs to divert water, it cannot be deprived of water by another water user. When it does not need or want to divert water, all the water in Pittsburg Creek will flow

downstream and into Henrys Lake. Only then may it be diverted by the junior water right holder, IDFG. Thus, enjoyment of the natural amenity of water flowing in the creek is possible.

I hope I answered all of your questions. Please don't hesitate to contact me if you have any future concerns.

Sincerely,

Shelley Keen  
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