



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

August 16, 2010

T. J. Budge
Racine Olson Nye Budge & Bailey
P O Box 1391
Pocatello, ID 83204

Re: Applications for Transfer 74658 and 74659 (Smith/Barlow)

Dear Mr. Budge,

In February 2008, you filed two complementary applications for transfer, Nos. 74658 and 74659, seeking to switch the location of two water rights. According to the letter accompanying the applications, Mr. Brad Smith recently sold a piece of property to Mr. Charles Barlow. As part of the sale, Mr. Smith agreed to transfer a decreed water right (13-679) from Cold Spring Creek to the property purchased by Mr. Barlow. In exchange, Mr. Barlow would transfer a statutory claim (13-7710) associated with the purchased property to a piece of property owned by Mr. Smith. There are a couple of items that need to be addressed before the transfer review can be completed.

First, Mr. Smith needs to provide documentation tracing ownership of the place of use for water right 13-679 from himself back to the owner of record, John Harrington. This can be accomplished by simply assembling a chain of deeds from Mr. Harrington to Mr. Smith. Some documents were provided with the applications, showing the conveyance of property from Alice Cynthia Leavitt Smith to Mr. Brad Smith.

Second, we need additional evidence supporting the statutory claim 13-7710. As you are aware, the department can only approve transfers of valid water rights. This requirement is especially important for statutory claims because they have never been verified by the department or a court. Before a statutory claim can be transferred, the department must conduct a detailed review to verify the priority date and the extent of beneficial use under the claim. The first component we would like to verify in this case is the claimed priority date. The affidavit from Mr. Smith, located in the statutory claim back file, is likely sufficient to establish a priority date of April 20, 1960. If the applicant would like a more senior priority date, additional evidence of priority must be submitted. He may, however, decide that a priority date of April 20, 1960 is sufficient for purposes of this transfer, and choose to proceed without submitting additional evidence. The statutory claim will be changed to coincide with whatever priority date is proven. Once the priority date for the statutory claim is established, a water rights agent from our office will need to conduct a field exam to verify the capacity of the system, the location of the ditches, the location of the point of diversion, and the number of acres irrigated.

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Finally, the department needs to verify some of the elements of water right 13-679. Exceptions filed against statutory claim 13-7710 state a concern that the decreed right (13-679) from Cold Spring Creek has actually been historically delivered to the place of use associated with the statutory claim. If this allegation is correct, it would mean that the statutory claim is actually based on delivery of decreed water and that no statutory claim is warranted. Aerial photography also suggests that it is possible that the place of use described in water right 13-679 may actually be irrigated using another source and another water right (Bobs Creek, 13-619). A field exam is needed to confirm that the decreed place of use for 13-679 is actually being irrigated with water from Cold Spring Creek. We will conduct the field exam for 13-679 and statutory claim 13-7710 at the same time.

The transfers will likely be advertised at some point in the coming months. If protests are filed against the transfers, they may identify additional items that need to be addressed by the applicants. However, it makes sense to get started now on the additional documentation identified above. I am establishing a 60-day time frame for you to assemble and submit a chain of deeds supporting the ownership of the place of use associated with water right 13-679 and, if the applicants prefer, additional evidence supporting the priority date of statutory claim 13-7710. If I have not received any response from you on or before October 15, 2010, the applications for transfer may be voided.

Please feel free to contact me or Dave Carlson if you have any questions.

Sincerely,



James Cefalo
Water Resources Program Manager
IDWR – Eastern Region

Cc: Brad Smith
Charles Barlow