



State of Idaho

DEPARTMENT OF WATER RESOURCES

Eastern Region, 900 North Skyline Drive, Suite A • Idaho Falls, Idaho 83402-1718
Phone: (208) 525-7161 • Fax: (208) 525-7177 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

October 21, 2010

Fred Hunzeker & Sons Partnership
1041 Bench Road
Montpelier, ID 83254

Re: Applications for Transfer 74806, 74807, and 74808

Dear Mr. Hunzeker,

On August 12, 2010, I sent a letter discussing the status of three transfer applications before the department (74806, 74807 and 74808). I explained that the three beneficial use claims listed in the transfers would need to be verified by the department before the transfers could be processed or approved. The first step in validating the three statutory claims is to establish the priority dates associated with the claims. The August 2010 letter asked you to provide specific evidence of priority date for each of the claims.

On October 18, 2010, Keith Wilson from Rocky Mountain Environmental dropped off a stack of papers at our office. There was no cover letter from Mr. Wilson nor any explanation of the documents or how they relate to the statutory claims. I have spent some time reviewing the documents submitted. Unfortunately, the documents do not provide any additional support for the three statutory claims in question (11-4095, 11-7585, and 11-7586). It is important for you to understand why the documents submitted do not support the claims filed.

The first two pages of the packet (Teuscher Fax 2-3) describe notices posted by Ovid Agricultural and Irrigating Company for diversions from North Creek. Although the place of use described in the notices overlaps the place of use described in claim 11-4095 by 80 acres, the source listed is entirely different. The posted notices describe a point of diversion that is miles away from the point of diversion described in claim 11-4095. North Creek underwent a local adjudication in 1902. It is unlikely that you would be able to obtain a water right from North Creek with a priority date earlier than 1902.

The next part of the packet (Teuscher Fax 4-5) describes a notice posted by Nielsen, Peterson, and Quarrell? for two ditches out of Ovid Creek. The notice specifically identifies the acres to be irrigated. There is no overlap between the place of use described in the notice and the place of use claimed in 11-4095 and 11-7585. Therefore, the posted notice does not provide any support for the irrigation of the lands described in your claims. Please note that the water described in this posted notice has been claimed by other individuals who own property located within the place of use described in the notice.

The next part of the packet (Teuscher Fax 6-12) includes agreements relating to the Bear Lake Outlet Canal and the sloughs and dikes in that area. A number of the agreements are simply rights-of-way granted to Utah Power and Light Company by various land owners. These easements for the Bear Lake Outlet Canal and its associated dikes do not constitute evidence of diversion. Two of the agreements, No. 13696 (Teuscher Fax page 8) and No. 12078 (Teuscher Fax page 10), are of particular interest. The agreements gave Christian Sorensen the authorization to construct a dam to collect and divert overland flows away from the Bear Lake Outlet Canal. This structure is visible from aerial photography and is identified in the margin of Teuscher Fax page 11 as the "Thronock Dam." The agreements indicate that the dam was constructed to protect the dikes of the outlet canal from being eroded by waters in the surrounding sloughs. These documents provide evidence of the diversion of the slough water at the Thronock Dam. The point of diversion would be the Thronock Dam. These agreements refer to channels carrying water from Ovid Creek, but do not identify the channels specifically. The agreements do not authorize any diversion of water from Ovid Creek and do not describe the acres to be irrigated with the water diverted from the Slough. Therefore, these agreements do not provide support for your statutory claims out of Ovid Creek. You may want to consider amending your claims to list the Thronock Dam as the point of diversion and unnamed sloughs as the water source. Of course, this change would not give you any right to divert water from Ovid Creek.

The homestead patent to Anders Nielsen does not provide any evidence in support of your claims. The General Land Office record refers generally to any water rights, ditches, or canals that may be recognized under local laws. It is standard language included in most homestead patents and does not constitute evidence of a specific diversion or water right.

Finally, the Warranty Deed from Cook to Hunzeker & Sons Partnership refers back to the dikes and embankments constructed under the authority of the Utah Power and Light agreements. This is further evidence that the dikes and embankments, including the Thronock Dam, were constructed to collect and divert slough waters around the Bear Lake Outlet. This warranty deed does not refer to Ovid Creek or to any diversion structures on Ovid Creek.

To summarize, before your transfers can be processed, the statutory claims listed in the transfers must be validated by the department, including the priority dates claimed. Mr. Wilson from Rocky Mountain Environmental collected a number of documents. However, none of the documents provided support the claims in question. The documents provided are related to activity on upper North Creek and sloughs near the Bear Lake Outlet, not the middle section of Ovid Creek. As it stands, we have no evidence of priority associated with statutory claim 11-4095. The only evidence of priority associated with statutory claims 11-7585 and 11-7586 are the affidavits from Mr. Wayne Johnson, that state that he had personal knowledge of the irrigation practices in the area since 1942. These affidavits may support a priority date of 1942 for claims 11-7585 and 11-7586.

Your options remain similar to those outlined in the August, 2010 letter. You can continue to search for specific evidence supporting the priority dates listed in your statutory claims. You can move forward with the evidence available at this time (Statutory claims 11-7585 and 11-7586 would receive a 1942 priority date and a field exam will confirm the extent of current beneficial use. Statutory claim 11-4095

would be dropped from the transfers.). Or, you can withdraw the transfers and wait to make the changes contemplated by the transfers until your water rights are adjudicated by a court. You can also amend claims 11-7585 and 11-7586 to list the source as "unnamed sloughs" and the point of diversion as the Thornock Dam. If you choose this option, the claims may receive a priority date of 1915, but the claims and any transfers of the claims would be limited to the amount of water available in the sloughs, not in Ovid Creek.

I originally set a 60-day time period to collect evidence. I will extend this collection period by another 30 days. Please provide additional evidence of priority, or withdraw the transfers, or notify our office that you wish to proceed with the existing evidence on or before November 20, 2010. If we do not receive a response by November 20, 2010, we will take that to mean that you are no longer interested in pursuing the transfers and will likely take steps to void the transfer applications.

Thank you for your continued cooperation in this matter. Feel free to contact me with any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read 'J Cefalo', written in a cursive style.

James Cefalo
Water Resources Program Manager
IDWR – Eastern Region

Cc: Keith Wilson
Rocky Mountain Environmental