



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

October 27, 2011

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

TJ Budge
Racine Olson Nye Budge & Bailey
201 East Center Street
PO Box 1391
Pocatello, ID 83204-1391

Paul Arrington
Barker Rosholt & Simpson LLP
113 Main Avenue West, Suite 303
PO Box 485
Twin Falls, ID 83303-0485

RE: Notice of Change in Water Right Ownership for Merrill Ranch and Miller Family

Dear Mr. Budge and Mr. Arrington:

In December 2010, you submitted ownership changes for certain water rights from Cottonwood Creek on behalf of your respective clients. Miller Family Real Estate ("Miller Family") is seeking to update the ownership record for rights 13-885A, 13-886A, 13-887A, and 13-889C. Merrill Ranch Partnership LLC ("Merrill Ranch") is seeking to update the ownership record for rights 13-885B, 13-886B, 13-887B, and 13-889D. I recently worked with Merrill Ranch on a water right matter on Stockton Creek. I recall coming across some issue relating to previous transfers on these particular rights, and I chose not to include the rights in a proposed transfer because of the issue.

As I sat down to complete these ownership changes and began reviewing the file, it quickly became apparent what had caused my previous anxiety about working with these rights. This letter is meant to describe the history of these rights and how the pending ownership changes could affect your clients.

The 1920 Decree listed the following rights for Edwin Bennion on Cottonwood Creek:

458. Edwin Bennion

(a) June 1, 1870	1.5 cfs	Springs	(old 11-824, new 13-884)
(b) June 1, 1879	2.0 cfs	Cottonwood Cr.	(old 11-825, new 13-885)
(c) June 1, 1887	1.5 cfs	Cottonwood Cr.	(old 11-826, new 13-886)
(d) June 1, 1895	1.4 cfs	Cottonwood Cr.	(old 11-827, new 13-887)
(e) June 1, 1870	5.0 cfs	Cottonwood Cr.	(old 11-828, new 13-888)
(f) January 1, 1904	14.0 cfs	Cottonwood Cr.	(old 11-829, new 13-889)

The 1920 Decree is somewhat vague regarding the number of acres irrigated under these water rights. The irrigated acres are described as follows: **“ . . . for the irrigation of 624 acres in Section 36, Township 12 South, Range 41 East, and Lots 3 and 4 and the East half of the Southwest quarter of Section 31, Township 12 South, Range 41 East.”**

Most of the other entries in the 1920 Decree, which are split into subparts ((a), (b), (c), etc.), identify the specific irrigated acres associated with each individual subpart. The Edwin Bennion entry (#458) only described irrigated acres in the subparagraph associated with (e) and (f). It is unclear whether the (e)/(f) subparagraph acres applies to all of the Bennion rights. It is also unclear from the decree language whether the 624 acre total includes the acres in Section 31 or is in addition to the acres in Section 31.

Evidence strongly suggests that all of the Bennion rights, in combination, are limited to the irrigation of 624 acres. It is highly unlikely that there were 624 irrigable acres within Section 36 in 1920. A very steep grade (hillside) exists in the S1/2S1/2 of Section 36. The hill covers approximately 150 acres and could not have been flood irrigated out of Cottonwood Creek. Further, the Bear River runs through the middle of the property described in Section 31 (SW1/4). Only 76 acres sit on the west side of the Bear River. It is unlikely that water from Cottonwood Creek was being flumed across the Bear River in 1920. The irrigable acres in Section 36 (no more than 490 acres) and the irrigable acres in Section 31 (76 acres) only add up to 566 acres.

As stated, there is also a question as to whether the (e)/(f) place of use description applies to all of the rights. According to Transfer 475 (1929), the ditches described in decree entries (b) and (c) (King Ditch and Caldwell Ditch) were located in the SW1/4 of Section 36. Based on the topography of the area, these ditches could have only provided water to acres within Section 36.

For these reasons, I believe all of the Bennion water rights, in combination, are limited to the irrigation of 624 acres. The water rights themselves confirm this result. The 1904 water right is really a high-water or flood right. It is not in priority on the Bear River beyond the early summer. The other water rights (a)-(e) would be the base or primary water rights. In combination, these base rights are good for 11.4 cfs. Assuming 624 irrigated acres, this equates to 0.018 cfs / acre (just under 1 inch / acre). When the high-water right is added to the mix, the total water available is 25.4 cfs and the ratio becomes 0.04 cfs / acre (exactly 2 inches / acre). As you are familiar, many of the water rights in the Bear River follow this same pattern, allowing 2 inches / acre in the early season and dropping to 1 inch / acre by the mid-summer. Therefore, the ownership changes will be completed assuming the Bennion rights listed under Decree entry 458, in combination, are limited to the irrigation of 624 acres.

In 1929, the Commissioner of Reclamation approved Transfer 475, moving two water rights (11-825, 2.0 cfs, 6/1/1879 and 11-828, 5.0 cfs, 6/1/1870) from lower Cottonwood Creek to

the Stockton Creek drainage. The rights were to be delivered to Stockton Creek through the Treasureton Canal. The new place of use for the water rights was described as 35 quarter-quarters (1400 acres). There was no discussion of how many acres could be irrigated at the new place of use or how many acres would be dried up at the original place of use.

On November 21, 1955, the State Reclamation Engineer approved Transfer 863, which reversed the effects of Transfer 475. Water rights 11-825 and 11-828 were moved from the Stockton Creek drainage back to the original place of use at the lower end of Cottonwood Creek. The transfer described the new place of use using the language of the 1920 decree.

Also on November 21, 1955, the State Reclamation Engineer approved Transfer 864, which moved water rights 11-825 (2.0 cfs, 6/1/1879), 11-826 (1.5 cfs, 6/1/1887), 11-827 (1.4 cfs, 6/1/1895), and 10.0 cfs of 11-829 (1/1/1904) to the Stockton Creek drainage. The portion of water right 11-829 moving to Stockton Creek was assigned water right number 11-829B. The rights were to be delivered to Stockton Creek through the Treasureton Canal. The new place of use for these water right was described as 38 quarter-quarters (1520 acres). There was no discussion of how many acres could be irrigated at the new place of use or how many acres would be dried up at the original place of use.

At some point prior to September 1989, rights 11-825, 11-826, and 11-827 were split into an A and B portion. Right 11-829B was split into ad C and D portion. The rights were split 50/50 between Bosen (Miller Family's predecessor in interest) (A and C portions) and Merrill Ranch (B and D portions). Transfer 3578 was approved in September 1989, moving the Merrill Ranch portion of the water rights to different acres located in the Stockton Creek drainage. Transfer approval 3578 did not define the number of irrigated acres associated with the Merrill Ranch portion of the water rights.

It appears that Transfer 3578 and the ownership split caused a slight stir. The Department issued two letters in 1990, seeking to confirm the status of the water rights in question. On May 15, 1990, the Department issued a letter confirming that rights 11-825A&B, 11-826A&B, 11-827A&B, and 11-829C&D could be delivered to Stockton Creek. On June 18, 1990, the Department provided a brief analysis of the ownership record available at that time. The Department concluded that Merrill Ranch actually owned 70% of the Cottonwood Creek rights used in the Stockton Creek drainage. Bosen owned the other 30% of the rights.

The ownership changes filed by Merrill Ranch and Miller Family in December 2010 assert the same ratio of ownership. The ownership changes included cover letters from the attorneys representing Miller Family and Merrill Ranch confirming the 30/70 split. Therefore, the pending ownership changes will be completed using this ratio. It should be noted that the water rights in question were renumbered as shown in the table above to reflect their location within administrative basin 13.

The only question remaining is how the 624 irrigated acres should be split between the various water rights. Water rights 13-885A&B, 13-886A&B, 13-887A&B, and 13-889C&D ("Stockton Rights") represent 43.0% of the original base rights decreed to Edwin Bennion (4.9 cfs / 11.4 cfs). The Stockton Rights represent 71.4 % of the high water right decreed to Mr. Bennion (10.0 cfs / 14.0 cfs). The Stockton Rights represent 58.7% of the total rights decreed to Mr. Bennion (14.9 cfs / 25.4 cfs).

Before completing the ownership changes, I would like your input as to how the acres should be divided. Any acreage split must be based on the underlying deeds and transfers. For example, the acres could be split in proportion to share of the total water rights owned. The acres could also be split in proportion to the share of the total base/primary rights owned. Another option would be to defer splitting the acres at this time. As part of the ownership change, a condition would be added to all of the split portions of the Bennion rights, noting that, in combination, the rights are limited to the irrigation of 624 acres.

Aerial photography suggests more than 500 acres are currently being irrigated with the Stockton Rights. Your clients may have beneficial use (statutory) claims representing the additional acres developed under the Stockton Rights. Of course, my analysis is based on the documents available for review. If you happen to have additional information that would lead to a different outcome, I would be happy to consider it in completing the ownership changes. Feel free to call me with any questions or comments.

Sincerely,

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

James Cefalo
Water Resources Program Manager
(208) 525-7161