

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 4002 OF WATER RIGHT NO.)
47-2137 IN THE NAME KEN MULBERRY)
ENTERPRISES)

**ORDER TO
SHOW CAUSE**

The Director of the Department of Water Resources (Department), being charged with the duties of protecting vested water rights, enforcing specific statutes of the State of Idaho and the rules promulgated by the Department makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On October 17th, 1919, the State of Idaho licensed a water right to Alice A. Pope for 0.60 cfs from an unnamed stream tributary to Rock Creek for irrigation and domestic purposes with a priority of April 29th, 1918. The purpose of use is for irrigation of 30 acres described within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of S22, T11S, R18E. The water is diverted from the stream within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of S23, T11S, R18E. The water right is now numbered 47-2137.

2. On December 13th, 1988, Ronald Yanke filed a claim in the Snake River Basin Adjudication (SRBA) for water right 47-2137 claiming the use as licensed.

3. On June 28th, 1990, Ken Mulberry Enterprises (applicant) filed a change of ownership notice for claim 47-2137.

4. On May 8th 1991, the Department received a memorandum from the state attorney general's office indicating two claimants had filed to change ownership of the same water right. The applicant's proof of ownership included a warranty deed dated December 11, 1989, by which the original claimant, Ronald Yanke, had conveyed to the applicant "part of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and part of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ " of S22, T11S, R18E, along with water right License No. 42-2137. The other claimant, Lex R. Christiansen, provided a warranty deed dated January 22, 1991, where Mr. Yanke had conveyed to Mr. Christiansen lands that included the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of S22, T11S, R18E, which is the property that License No. 42-2137 was and remains appurtenant. As Idaho law allows water rights to be sold separately from the land, the water right was changed into the applicant's name. Memo advised the Department to contact applicant to inform him he was required to file a transfer prior to utilizing the water right.

5. On April 9th, 1992, Ken Mulberry Enterprises filed an application for transfer numbered 4002 (now numbered 67718 in transfer database) (application). The application involves moving water right 47-2137 from licensed lands within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of S22, T11S, R18E (30 acres) to lands within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of S22, T11S, R18E (30 acres). The application proposes to convey the water from the existing

diversion from the Unnamed Stream (locally known as the West Fork of Rock Creek) located within SW¼ SW¼SW¼ of S23, T11S, R18E and inject it into Rock Creek and then re-divert the water from Rock Creek within the NW¼ SE¼ NW¼ of S22, T11S, R18E for irrigation of the lands described above.

6. On April 24th, 1992, Ken Mulberry Enterprises amended claim 47-2137 changing the location of the lands irrigated and the means of diversion to match the way the transfer proposes the water to be used.

7. On October 15th, 1992 the Department advertised the transfer application. On October 21st, 1992, a formal protest was received from William J. Williams (protestant). Protestant objected on the basis that he felt more water was being diverted from Rock Creek than actually was necessary for irrigation. Protestant stated he would agree to this and other transfers on Rock Creek provided the volume of water was "checked" and that "there is in fact that much water available."

8. On November 17th, 1992, the Department mailed letters to protestant and applicant acknowledging receipt of the protest, describing Department actions concerning protests and applications, and suggesting they contact one another to determine the exact nature of the protest and to possibly resolve the matter.

9. On February 25th, 2002, the department contacted the applicant requesting information regarding their intent to proceed with this application. On March 18th, 2002, the Department received a letter from applicant stating they were still interested in pursuing the application. They asked the Department to hold the application until they had time to meet with the protestant concerning his protest.

10. On November 9th, 2005, the Department forwarded a letter to the applicant stating the Department would make a recommendation to the Snake River Basin Adjudication (SRBA) Court to license water right 47-2137 on the licensed place of use due to the fact that a transfer for this right had never been completed. Accordingly the Department has recommend right 47-2137 for 0.58 cfs for irrigation of 28 acres within the SW¼NW¼ of S22, T11S, R18E similar to the original license. (Acres were reduced from 30 to 28 based on GIS analysis of field boundary.)

11. The Department has also recommended right 47-15262 in the SRBA to Lex Christiansen for irrigation of the same 28 acres within the SW¼NW¼ of S22, T11S, R18E from wastewater. This right overlaps with right 47-2137 as recommended.

12. The Department has also recommended rights to the Twin Falls Canal Company for irrigation of the lands within their service area including the NW¼NW¼ of S22, T11S, R18E. The Twin Falls Canal Company records indicate there are currently canal shares associated with these lands. (Land which are proposed to be irrigated if transfer is approved.)

13. In 2007 the SRBA recommendation for right 47-02137 was objected to by the Twin Falls Canal Company and by Ken Mulberry Enterprises. These objections are not yet resolved.

14. On March 25th, 2010 the property which the applicant is seeking to transfer water right 27-2137 to (NW¼NW¼ of S22, T11S, R18E) was sold to Robert J. Meyers.

15. On June 29TH, 2010, an unopposed motion for realignment of parties was filed on behalf of the applicant in the SRBA. Motion indicates that Robert Meyers has assigned and transferred interest to the following claims: 47-02137; 47-17301; and 47-17302. The motion states the Mulberry's are owners of record of the properties the above claims are appurtenant. Contrary to the motion, current records indicate the applicant owns the properties 47-17301 and 47-17302 are appurtenant, but only owns water right 47-2137, and not the property it is currently appurtenant nor the property it is proposed to be moved to pursuant to the transfer.

CONCLUSIONS

For applications that propose changing the place of use of a water right, the applicant not only needs to show that they own the right involved with the transfer &/or the land to which it is appurtenant, but they must also show that they own the land where they are proposing to move the water right to. If the land is owned by a party other than the applicant, then the applicant must have some sort of documentation from the current owner of the land allowing the applicant to move the water right(s) to their land. In addition, documentation must be included that addresses the ownership of the right(s) on the land. The documentation must clearly address the issue of whether the applicant will retain ownership of the right(s) on someone else's land, or whether the land owner will own the right(s) once the transfer is approved.

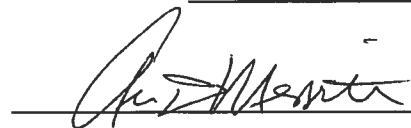
IT IS HEREBY ORDERED as follows:

1. Within 30 days of the date of this order Kenneth Mulberry Enterprises shall demonstrate to the satisfaction of the Director their continued interest in pursuing the application for transfer.

2. Within 30 days Kenneth Mulberry Enterprises shall also provide evidence to show that Kenneth Mulberry Enterprises has legal access to the property described in the application and clearly demonstrate the ownership of the right if it becomes appurtenant to the lands within the NW¼NW¼ of S22, T11S, R18E.

3. Failure to respond will provide cause for the application to be voided or rejected.

DATED this 8th day of November, 2010.



Allen Merritt
Southern Region Manager

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of November, 2010 a true and correct copy of the above and foregoing Order to Show Cause was forwarded with all required charges prepared, by the methods indicated below, to the parties listed:

KEN MULBERRY ENTERPRISES
PO BOX H
KIMBERLY ID 83341

Hand delivered _____
U.S. Mail-Regular _____
U.S. Mail-Certified X _____
Fax _____

WILLIAM L MAUK
MAUK & BURGOYNE
PO BOX 1743
BOISE ID 83701-1743

Hand delivered _____
U.S. Mail-Regular X _____
U.S. Mail-Certified _____
Fax _____

WILLIAM J WILLIAMS
WT WILLIAMS I NC
3094 N 3200 E
TWIN FALLS ID 83301

Hand delivered _____
U.S. Mail-Regular X _____
U.S. Mail-Certified _____
Fax _____

ROBERT MEYERS
3921 N 3300 E
TWIN FALLS ID 83301

Hand delivered _____
U.S. Mail-Regular X _____
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MICHAEL C CREAMER
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Mary A. Baldwin
Administrative Assistant I