



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

September 30, 2010

Lance Anderson
Cache Landmark
1011 West 400 North, Suite 130
Logan, UT 84321

Re: Ownership Change and Split of Water Right 11-924

Dear Mr. Anderson,

On September 16, 2010 the department held a pre-hearing conference to discuss issues of protest related to Transfers 74914 and 74916, filed in the name of The Retreat at Bear Lake ("Black Bear"). As a result of the conference and your efforts, the protests filed against those two transfers have been withdrawn. The department can now move forward with final review and approval of the transfers. Transfer 74914 involved re-arranging the place of use for a single water right in the Sorenson Ditch. This transfer is relatively straight-forward and will be approved by the end of this week. The other transfer, 74916, presents a more difficult challenge. Transfer 74916 seeks to correct an apparent error in the split of water right 11-924 and to combine certain water rights in the Nuffer Ditch into a permissible place of use.

At the pre-hearing conference, I said that it seemed that the water right split of 11-924 had been done incorrectly. Closer review of the ownership change and the underlying documents, however, reveals that the split was done correctly and in accordance with department standards. Therefore, that portion of the transfer cannot be approved. We are still able to combine water rights 11-7597 and 11-7601 into a permissible place of use. Water right 11-7597 would simply be limited to 154.3 irrigated acres. You may decide to ask the department to hold-off on approving the transfer until the question of water right ownership is resolved. This letter is meant to provide a brief explanation of the department's role in ownership changes and a description of how water right 11-924 was split.

The department actually has a very limited role in ownership changes. Although the department can determine the validity or existence of a water right, the department does not have the legal authority to create or eliminate an ownership interest in a water right. A perfected water right is real property, just like a parcel of land. A water right can only be conveyed from one person to another through a valid legal transaction or agreement (warranty deeds, contracts, quiet title actions, probate actions, court judgments). The department's role in an ownership change is to merely update the water right database record to reflect the ownership as it is described in the supporting legal documents. In fact, the department's application form is titled "Notice of Change in Water Right Ownership." The actual change in ownership occurs as a result of the property conveyance or court judgment, not as a result of the department processing an ownership change application.

Given these limitations, the department seeks to make the water right record accurately reflect the specific terms of the documents that are submitted with an ownership change. In the case of water right 11-924, Black Bear provided a number of deeds tracing ownership of the Four Pines Ranch property back to the owner listed on the old decreed water right, Ola Transtrum. One deed in particular was critical in the analysis of water right ownership. It is the 1952 deed that split the Transtrum Ranch and sent a portion of the ranch and the decreed water rights to Earl and Florence Sorenson. After describing the land conveyed, the 1952 deed states, "Together with the following described water rights: 11.5 c.f.s., 1877, in Neuffer Ditch . . . All of said water rights being on Bear River and decreed to the said land."

Water right 11-924, which carried an 1877 priority date, authorized the diversion of 15.0 cfs and the irrigation of 500 acres. The 1924 Terrell Decree described the place of use for 11-924 by quarter-quarter. It identified a permissible place of use of 15 quarter-quarters or roughly 600 acres. Only 6 of the 15 quarter-quarters described in the decree were located on the Sorenson Ranch.

When Cherie Padilla in the Boise office processed the ownership change, she allocated 11.5 cfs of the water right to Black Bear. The 1952 warranty deed clearly states that 11.5 cfs of the water right was conveyed to the Sorenson Ranch. However, the deed was silent as to how many of the authorized irrigated acres were transferred to the Sorenson Ranch. The language quoted above actually refers back to the lands described in the original decree. Further there was never a transfer filed with the department or any evidence provided of a transfer agreement that the irrigated acres were intended to be moved to the Sorenson Ranch. Because the 1952 deed and all of the other deeds provided were silent as to irrigated acres, Ms. Padilla split the irrigated acres based on the proportional ownership of the decreed place of use.

As a slight interjection, it would seem that water rights should always be split proportionately or, in other words, that a proportionate number of acres should go with a proportionate share of the conveyed diversion rate. This is not always the case. Often deeds retain to the selling property a disproportionate share of the diversion rate or irrigated acres. Individuals are free to divide water rights in any way they wish. For this reason, the department can never assume that the diversion rate and irrigated acres were intended to be split proportionately if the conveyance document is silent on that matter.

Ms. Padilla analyzed the roughly 600 acres that were described in the original decree. She determined that only 538 acres of the 600 acres described were actually irrigable. The remaining acres were located on steep hillsides or in the within the Bear River channel. Of the 538 irrigable acres, only 166 acres (or 30.8%) fell within the property described in the 1952 deed or the 2007 warranty deed from Four Pines Ranch to Black Bear. The authorized acres were split to reflect the same percentage as the irrigable acres. Therefore, Black Bear's portion of water right 11-924 was for 154.3 irrigated acres within a 166 acre permissible place of use. This split of the irrigated acres is consistent with department standards.

As we discussed at the pre-hearing conference, this result seems strange. However, it is the only result supported by the legal documents available at this time. I do not dispute that Black Bear may actually own the right to irrigate more acres under its portion of 11-924. In fact, the affidavit of Mr. Black states that a large number of acres were irrigated on the Sorenson Ranch. However, Mr. Black's affidavit does

not constitute a legal conveyance of water rights. Before we can revise the ownership record, we need better evidence of conveyance. You may want to search for documents verifying that Black Bear is in fact the legal owner of the additional authorized acres. I would guess that such documents do not exist or they would have already been found and submitted. Black Bear may ultimately need to pursue a quiet title action to more clearly define what was conveyed to the Sorenson Ranch in 1952. Another alternative would be to have the other property owners within the original decreed place of use sign an agreement recognizing the division of water right 11-924 proposed by Black Bear.

You should be aware that the other portion of the split water right 11-7596 has been split again three times. Portions of old water right 11-924 are now held by William Robinson, Demar Romrell, and Lanette Kimball. This may simplify matters to some extent. These three individuals provided sufficient proof of ownership to the department to have the water right records changed into their names. Black Bear may want to approach these individuals to see if they would be willing to officially convey a portion of their authorized acres to Black Bear.

I hope this helps you understand the constraints we are dealing with in this matter. I apologize if any of my previous statements may have been incorrect. Please let me know how you would like to move forward with Transfer 74916. As stated, we can hold-off on approving the transfer to allow you some time to resolve the question of authorized acres.

Sincerely,



James Cefalo
Water Resources Program Manager
IDWR – Eastern Region

Cc: Bruce Barrett