

August 12, 2010

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

Re: Applications for Transfer 74806, 74807, and 74808

Dear Mr. Hunzeker,

In May 2008, you filed three transfer applications with the department, seeking to change some of the elements of three separate statutory claims (11-4095, 11-7585, and 11-7586). Transfers involving statutory or beneficial use claims require a considerable amount of review and can include significant procedural hurdles. In the past, the department has often "held" such transfers rather than invest the large amount of staff time needed to conduct the detailed review. Because your transfers involve disputed statutory claims, they have not been processed. This letter is meant to notify you that our office has recently begun an effort to address some of these "held" transfers involving statutory claims, including your three transfers.

Over the years, the department has developed a set of guidelines to assist its staff in processing transfer applications. These guidelines were created to provide a uniform system for reviewing transfers and ensure that the legal requirements governing transfers are being met. The current set of guidelines ("Transfer Processing Memo No. 24") states the following:

Applications for transfer proposing to change a water right based on a statutory or beneficial use claim must be reviewed to determine the validity, priority date, and extent of beneficial use established under the claimed right. Review must include field verification or other means to verify the right. . . . In addition, the applicant must be asked to provide information confirming the priority date of the claim.

The basis for this language is that the department, by statute, must verify that a water right is valid before approving a transfer of that water right. Statutory claims are generally created by the claimant and have not been validated by the department or a court. Therefore, before a statutory claim can be transferred, the department must verify that the claim constitutes a valid water right. All of the elements of the statutory claim must be verified (priority date, diversion rate, period of use, place of use).

In accordance with the transfer guidelines, before processing your transfers, the department must conduct a detailed review to determine the validity of your statutory claims. The first elements to be analyzed are the priority dates claimed. **Therefore, the department is requesting specific evidence of the priority dates listed on statutory claims 11-4095 (12/10/1864), 11-7585 (6/15/1892), and 11-7586 (6/9/1915).** I have enclosed a pamphlet titled "Evidence of Priority" that was distributed to claimants in the Snake

River Basin Adjudication. This pamphlet was meant to assist applicants in collecting and identifying documents that sufficiently establish a priority date.

I recognize that there was some evidence of priority submitted with two of the statutory claims (11-7585 and 11-7586) when they were filed. Evidence submitted with 11-7585 included a notarized statement from Wayne D. Johnson. The written statement was notarized in December 2007. Mr. Johnson states that the "Thornock Dam" has been in existence since 1864 and was included in a decree in 1889. He admits, however, that he has only owned and operated the land since 1942. Affidavits are sufficient evidence of priority only to the extent that they are based on personal knowledge (actual observations of the affiant). Mr. Johnson's statement is only sufficient to establish a priority date of 1942 because that is the beginning of his personal knowledge. A similar affidavit was submitted with claim 11-7586. Mr. Johnson states that the Thornock Dam was built in 1915 (which is a direct contradiction of his other affidavit). He also states that he has "seen this land irrigated personally since 1942." This affidavit would also support a 1942 priority date, but nothing earlier.

Please review the pamphlet and try to find physical or documentary evidence establishing a priority date for the water use described in the statutory claims. If the Thornock Dam has been an important irrigation feature in the community, there may be reference to its existence in old journals or town archives. The claimant ultimately bears the burden of proving the elements of his claim, including priority date. You may have difficulty finding evidence to support the priority dates listed in your statutory claims. Given this distinct possibility, it appears that you have three options with regard to your transfer applications:

Option 1: Locate and provide specific evidence supporting the priority dates listed in your statutory claims. Once sufficient evidence of priority is received, the department will finish the review of the statutory claims. This will likely include a field exam to verify the location of the existing points of diversion (listed in the claims), the number of acres irrigated, and the capacity of the delivery system. After the statutory claims have been validated, the transfer applications will be advertised to the public. If a transfer application is protested, the department will begin an administrative hearing process. If the transfer applications are not protested, they will be approved with conditions or will be denied.

Option 2: Locate and provide evidence of a later priority date. As stated above, the evidence already in the file would likely support a priority date of 1942. You may not be able to find reliable evidence tracing back to the early priority dates claimed. However, you may find evidence supporting a priority date earlier than 1942. Once sufficient evidence of any priority is received, the department will complete the field examination of the statutory claims and will finalize the transfer process as described above. This alternative may be less preferable, however, because the priority date of your statutory claim must be changed to agree with the evidence provided before the transfers can be considered. Any changes to the priority dates made by the department constitute a final administrative determination of the priority date.

Option 3: If you are unable to find any proof of priority dates or do not want to invest the time to track down evidence or do not want to have a late priority date affixed to your statutory claim, you can always withdraw the transfers. This can be done by sending the department a letter officially withdrawing the transfers. Although you will not be able to adjust your water delivery systems as contemplated in the transfers, you will at least preserve the priority date associated with your statutory claims for the time

being. You should be aware, however, that if an adjudication is ever held in the Bear River drainage, claimants will be expected to provide proof of priority date. Because you will likely have to validate the priority dates associated with your claims at some point in the future, it may be worthwhile to locate whatever evidence may exist today and add it to your statutory claim files.

To summarize, your transfer applications have been held by the department because they involve statutory claims and will require a detailed review before they can be approved. The department is beginning the process of reviewing some of these held transfers. The first part of the review of your transfers is establishing the validity of the priority dates listed in your statutory claims. You are officially being asked to provide sufficient evidence supporting your claimed priority dates. If you are unable to establish valid priority dates, the department is ultimately unable to approve the transfers and they will be voided. I am establishing a 60-day time period to collect and submit evidence supporting the claimed priority dates. If you are unable to provide evidence of priority on or before October 15, 2010, your applications for transfer (No. 74806, 74807, and 74808) will be voided due to a lack of evidence supporting the underlying statutory claims.

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

Sincerely,

James Cefalo
Water Resources Program Manager
IDWR – Eastern Region

Cc: Rocky Mountain Environmental

Encl: Evidence of Priority pamphlet (April 1991)