

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)	
TRANSFER NO. 75916 IN THE NAME OF)	PRELIMINARY ORDER VOIDING
WESTERN HERITAGE HOMES, INC.)	APPLICATION FOR TRANSFER
_____)	

This matter having come before the Idaho Department of Water Resources ("Department") as a result of an application to transfer water rights, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On September 4, 2009, Western Heritage Homes, Inc. ("Western Heritage") filed an Application for Transfer, No. 75916, with the Department seeking to change the point of diversion and place of use for all of water right 17-7165 and a portion of water right 17-7063. The application also proposed to split water right 17-7063 and change the ownership of one of the split portions of the water right into the name of Western Heritage. Protests were filed by Blue Hills Land and Livestock LLC ("Blue Hills"), Eliason Livestock LLC, RL Farms LLC, and Dennis Nalder. Blue Hills and RL Farms LLC are represented by an attorney, Brandon Baxter.

2. At the time of the application, Western Heritage was the listed owner of water right 17-7165. Water right 17-7165 was formed as a result of a water right split and ownership change occurring in July 2009. The parent water right, 17-2052, was split between Blue Hills (17-7164) and Western Heritage (17-7165). As evidence of ownership, Western Heritage provided a warranty deed showing that a portion of the property associated with the place of use for water right 17-2052 was conveyed to Western Heritage by Blue Hills on October 7, 2008. The warranty deed did not refer to any water rights. It was therefore presumed that the water rights were conveyed with the property.

3. At the time of the transfer application, Blue Hills was the listed owner of water right 17-7063. Western Heritage was seeking to change the ownership of a portion of water right 17-7063 as part of the water right transfer process. As evidence of ownership, Western Heritage provided a warranty deed showing that a portion of the property associated with the place of use for water right 17-7063 was conveyed to Western Heritage by Blue Hills on November 17, 2008.

4. On September 11, 2009, Blue Hills filed a lawsuit against Western Heritage, Curtis Baum, and Burtine Baum in the Idaho Sixth Judicial District Court in Oneida County ("District Court"). The case was numbered by the District Court as CV-2009-100. Among other things, the Complaint filed by Blue Hills alleged that Blue Hills did not transfer any water rights to Western Heritage as part of the October 2008 or November 2008 warranty deeds and that the November 2008 warranty deed incorrectly described the property conveyed.

5. On March 18, 2010, a pre-hearing conference was held to discuss the elements of

protest related to the transfer application. At that meeting, Mr. Baxter notified the Department that Western Heritage and the other named defendants had failed to respond in the lawsuit and that the District Court had entered a default judgment against Western Heritage and the other named defendants. Mr. Baxter indicated that the District Court was in the process of drafting a final judgment order in the matter. Lynn Baum, representative for Western Heritage at the pre-hearing conference, did not deny any of the assertions made by Mr. Baxter.

6. On August 5, 2010, the Department received a copy of a Partial Default Judgment, issued by the District Court on July 30, 2010. The Partial Default Judgment contains the following rulings pertaining to water rights:

“Plaintiff [Blue Hills] did not transfer any water rights to any of the Defendants.”

“This Court affirms and declares Plaintiff [Blue Hills] as the sole owner of water rights 17-2052 and 17-7063.”

“[T]he Idaho State Department of Water Resources . . . [is] hereby ordered to rescind and reverse any actions taken on behalf of any of or at the request of the Defendants to divide water rights 17-2052 and/or 17-7063 in order to create water rights 17-7164 and 17-7165 titled in the name of the Defendants.”

“The Idaho State Department of Water Resources . . . [is] also ordered to rescind, reverse, and/or deny any actions taken on behalf of or at the request of any of the Defendants to assign ownership interest in water rights 17-2052, 17-7063, and/or divided water right 17-7164 and 17-7165 to any party.”

“The Idaho State Department of Water Resources . . . [is] further ordered to rescind, reverse, and/or deny any actions or requests to transfer ownership or otherwise alter the point of diversion, point of application of water rights 17-2052, 17-7063, and/or divided water rights 17-7164 and 17-7165 taken on behalf of or at the request of any of the Defendants.”

7. In accordance with the Partial Default Judgment issued by the District Court, the Department has rescinded the split of water right 17-2052. Blue Hills is now listed as the current owner of the entirety of water right 17-2052. Further, Blue Hills remains the owner of record of water right 17-7063.

CONCLUSIONS OF LAW

1. Application for Transfer No. 75916 proposes to change certain elements of water rights 17-7165 and 17-7063. Water right 17-7165 was created as a result of splitting water right 17-2052 into 17-7164 and 17-7165. Ownership of water right 17-7165 was changed into the name of Western Heritage in July 2009. This ownership change and the split of water right 17-2052 have been rescinded by the Department pursuant to court order, meaning 17-7165 is no longer a valid, recognized right. Ownership of water right 17-2052 is now in the name of Blue Hills, the owner of

record prior to the split. Blue Hills is also listed as the current owner of water right 17-7063. The District Court confirmed that Blue Hills is the current owner of water rights 17-2052 and 17-7063 in its Partial Default Judgment. Therefore, Western Heritage does not have the authority to transfer or alter any of the elements of those water rights.

2. The Department should void Transfer Application No. 75916.

ORDER

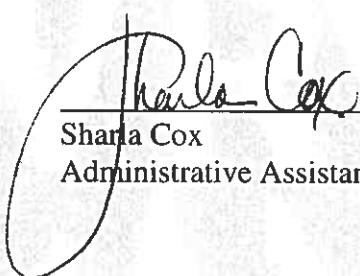
IT IS HEREBY ORDERED that Transfer Application No. 75916 in the name of Western Heritage Homes, Inc. is VOIDED.

Dated this 9th day of August, 2010.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of August 2010, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER VOIDING APPLICATION FOR TRANSFER to the person(s) listed below:


Shana Cox
Administrative Assistant

US MAIL

RE: TRANSFER NO. 75916

Dennis Nalder
1250 S 21000 W
Holbrook ID 83243

Eliason Livestock LLC
23370 W Old Hwy 37
Holbrook ID 83243

RL Farms and Blue Hills Land
C/O Bearnson & Peck LC
PO Box 675
Logan UT 84321

Western Heritage Homes Inc
21316 W Old Hwy 37
Holbrook ID 83243

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.