

**Lester, Steve**

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**From:** Baxter, Garrick  
**Sent:** Monday, October 19, 2009 8:13 AM  
**To:** Skaggs, Pam; Lester, Steve  
**Subject:** RE: Transfer 75115 Questions for SO

Hi Pam and Steve,

I have had a chance to research the issues raised by Steve. Here are my thoughts. I'd be happy to meet with you to discuss further if you would like. Just let me know.

**The Decree:** The SRBA decree is not all that unusual. Even when the water is diverted in a neighboring state, we decree the elements that occur inside Idaho so that we have a record of the water use in Idaho. This aids in administration. This way, Tim Luke and his group have a record of the water use and don't end up sending the folks an NOV for irrigating without a water right.

**Injury:** Steve is correct. Moving the POD from Oregon to Idaho would result in legal injury to junior water right holders. They would be inserting themselves into our administration and would jump in front of other Idaho water users. I located one federal court case that suggested that this type of change should be allowed, but the case is distinguishable from these facts and the case has been severely criticized and discounted by water law experts. Thus, I think the correct legal analysis is that this change would cause injury to other Idaho water users in violation of Idaho's transfer statutes absent some redress of the injury.

I have seen transfers where IDWR has advanced the priority date to address injury issues. Addressing the potential for injury is a bit weird here because of the jurisdictional issues. One possible solution is for IDWR to advance the priority date and include a condition requiring that the water user abandon the POD in Oregon. While Idaho would have no way of going into Oregon to enforce or check the abandonment of the POD, I don't know if it will become a practical issue for IDWR. If IDWR thinks the Oregon POD is still being used, IDWR can monitor the place of use and ensure that water from Oregon isn't coming across and being used on the place of use. So in effect, IDWR can effectively ensure that the Oregon POD is not being used without going into Oregon.

Could IDWR simply reject the application b/c of the interstate enforcement issues? IDWR could take this position, but because of the broad transfer authorizations under 42-108 and 42-222 and because this right is documented by an SRBA decree, I think that a court could reasonably find that Idaho Code provides for a transfer like this and that IDWR should process the transfer so long as all requirements of the statute are met and injury can reasonably be addressed. Thus, I think it best if IDWR reasonably try to work within its existing system to find a solution that addresses the injury issue (assuming the water user is able to satisfy all the other transfer criteria, of course.)

**Validity of the Oregon POD:** IDWR apparently found enough proof of use in Idaho to recommend 57-4006 in the SRBA. Because of the decree, IDWR is required to recognize that some water is coming to Idaho from Oregon. Thus, I don't believe there needs to be a separate investigation into the Oregon POD because the water use was affirmed in the SRBA and a requirement to prove up on the POD (and the other elements) would essentially be a collateral attack on the decree. There is a presumption that some water was coming over from Oregon...I don't think the exact location of the POD makes a difference.

Hope this helps.

-Garrick

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**From:** Skaggs, Pam  
**Sent:** Wed 9/30/2009 4:02 PM  
**To:** Baxter, Garrick  
**Cc:** Lester, Steve  
**Subject:** FW: Transfer 75115 Questions for SO

10/27/2009

Hi Garrick,

Steve has presented some questions regarding SRBA Decreed Right 57-4006 and proposed transfer issues. I haven't researched this very far & won't for a couple of weeks at least due to other matters. Steve wanted me to forward his queries to you in the meantime, so that you would have that time to consider the issues. The questions are on page 3 of attached review memo for rejected transfer 75115. They propose to pursue the change in the future & we would like to be better prepared. Can you shed some light on this unusual decree? We would appreciate your comments & would be happy to discuss with you at your convenience.

Pam

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**From:** Lester, Steve

**Sent:** Thursday, September 24, 2009 2:40 PM

**To:** Skaggs, Pam

**Subject:** Transfer 75115 Questions for SO \*Responded 09-30/Won't be able to work on immediately\*

Hi Pam:

I chatted with Shelley briefly today about this one so he might enjoy discussing it with you - it's a weird one.

This is the rejected xfer where SO & Western had almost simultaneous phone calls from NRCS person the other day in a big panic about "what's up." I followed up by returning a call to the applicants. Transfer remains rejected but applicants might resurrect it somehow if can find good enough information to support their proposal. While they are working on that, I told them I'd consult with SO about the central problem with this one: move Oregon diversion to Idaho.

We got everything scanned except review memo & its attachments. I completed those after the phone calls so we could all look at the info & determine if the idea is even approvable.

All docs except memo/attachment are scanned under 57-4006, Transfer 75115. Memo/attachments available on backfile under Winchester 75115. Copy of memo & attachment included here for your convenience.

Last page of memo poses questions for SO Allocation plus Legal - Shelley suggested Garrick would be good person to ask in Legal.

I have never seen a decree such as this one - pretty odd! Thanks for your help.

Steve

<<Review memo.doc>> <<Review memo attachment.pdf>>

10/27/2009