

MEMORANDUM

TO: Transfer No. 70097 and 70098 Files

FROM: Steve Lester 

DATE: June 14, 2004

RE: Evaluation of Sufficiency of Information Submitted

The transfers propose to “swap priorities for 340 acres of irrigation” between two owners with separate permissible places of use (PPU) in the Cinder Cone Butte CGWA. Each transfer will relocate water from 170 acres in one PPU and transfer it to 170 acres in the other PPU. The applications originated in early 1999 and were amended prior to advertising in August 2002. Protests were not filed. No comments were received from the Mtn. Home GWMA Advisory Committee. The remaining tasks are to retrofit the transfers into parallel processing and issue approvals.

John Marshall of Givens Pursley law office represents both applicants in this package as noted in the applicant data entry tab. Marshall replaced his colleague, Mike Creamer, in this regard.

The reader is encouraged to **review the common legal notice** used for both applications for an overview of the situation. The notice is mostly narrative. The reader should also **review the diagram attached to this memo.**

Several non-standard and/or unusual aspects of processing are found in completing this review as follows:

- signatures on amended applications
- ownership changes to associated rights
- reduced use of a right while part of the right remains in the water bank
- changing one right per PPU instead of all rights in each PPU.

Details of each item are discussed throughout the memo.

Summary of Information Submitted

Authority to File: LDS Church (LDS) filed Transfer 70097 to split 61-7195A, one of two rights in an 1168 acre “South PPU” (South PPU and North PPU labels serve the convenience of the reviewer but are not names used by the applicants). Attachment D of that application confirms LDS ownership of the entire PPU. Proposed right 61-12010 will remain in the South PPU for LDS. Proposed right 61-12011 will move to a nearby PPU, the “North PPU”, owned by the applicant in Transfer 70098. Attachment D in that filing confirms ownership of the North PPU for Cinder Cone Butte Farm LLC (Cinder Farm aka Reynolds & Son).

Cinder Farm filed Transfer 70098 to split 61-7424, one of three rights in the 925 acre North PPU. Proposed right 61-12012 will remain in the North PPU for Cinder Farm. Proposed right 61-12013 will move to the South PPU for LDS.

Both applicants own the rights in their respective PPUs. Both applications include adequate ownership documentation. Both applicants maintain valid business entity registrations with the IDSOS. The applicants have authority to file the transfers. Also see the summary at the end of this memo about mailing transfer approvals.

Water Right Validity: Right 61-7195A is presumed to be valid based on its full recommendation in the SRBA. Court action on the recommendation awaits completion of the transfer process.

Right 61-7424 was developed after 1987 (SRBA n/a) and licensed in 1995. The transfer application was filed in January 1999. The right is presumed to be valid because a five year period between licensing and filing of the application did not exist.

Injury to Other Water Rights: In each case, proposed irrigation will replace irrigation retired under the other application. Injury is not found.

Enlargement of Use: T.70097 proposes to split 61-7195A and move 3.40 cfs/680 af to 170 acres within the North PPU for the other owner. The remaining portion of 61-7195A will continue to be used in the South PPU. Neither portion of the split is enlarged.

T.70098 proposes to split 61-7424 and move 2.48 cfs/680 af to 170 acres within the South PPU for the other owner. The original idea was for each owner to swap priorities for 3.40 cfs. Due to different duties of water, this led to an imbalance in the number of acres to be retired from each place. Additionally, the South PPU could not accommodate any increase in the number of irrigated acres (1168 acres irrigated per year in 1168 acre boundary). The revised plan focused on “swapping 170 acres” to avoid that problem. Under the revised approach, Transfer 70098 reduced irrigation by 2.48 cfs associated

with 170 acres. This allowed each applicant to transfer 170 acres worth of irrigation to the other party. But Cinder Farm had to do something else to reach the 3.40 cfs reduction proposed by the other applicant.

To resolve this problem, Cinder Farm elected to place the differential part of 61-7424 in the water bank. A part of 61-7424 was accepted into the water bank in August 2002. That portion included 0.92 cfs/252 af for 63 acres. Cinder Farm cannot use that portion in the North PPU while it remains in the water bank. This balanced the scales and allowed both transfers to proceed. The water bank solution might help other water users in the CGWA.

Expansions will not occur in the resulting PPUs proposed by the transfers. The only change to combined uses in the South PPU is a slight reduction in overall rate from 18.65 to 17.73 cfs (same reduction as $3.40 - 2.48 \text{ cfs} = 0.92 \text{ cfs}$ to the water bank). Total acres and volume remain the same.

The North PPU is currently not rate-limited by a system capacity. The total rate for the PPU is the sum of the rates in the rights. The North PPU will realize a corresponding increase in its combined rate from 16.39 to 17.31 cfs (0.92 cfs increase). Total acres and volume remain the same. The increased rate still remains within the 0.02 cfs/acre limit. Additionally, the rate is not increased as long as the water bank deal remains in place. With or without the water bank limitation imposed in the North PPU, an expansion does not occur by slightly increasing the overall rate for the same land covered by combined rights. The combined use is limited by acres and volume – a slightly increased rate under these circumstances is not a real expansion. Additionally, no single right is expanded by this activity.

When considered together, uses before and after the transfers are not considered expansions in rate, volume or acres. See the “Discussion” section of this memo for more details of “before and after” comparisons for the transfer applications. Also see the hand-written worksheets attached to this memo.

Local Public Interest: No conflict with the local public interest can be found.

Beneficial Use/Conservation of Water Resources: The transfers propose beneficial uses consistent with conservation of water resources in Idaho.

Review of the applications finds there is no clear inconsistency with criteria of I. C. § 42-222 preventing continued processing of the applications.

Discussion

The applicants do not need to provide additional information. Additional IDWR analysis is not needed.

Data entry affected the correct records for both transfers: SRBA recommendation for Transfer 70097 and water right record for Transfer 70098.

Overlap conditions in each PPU currently reference 61-7204. That is outdated information since that right does not share any P/D or P/U with either PPU. Reference to 61-7204 has been omitted in the draft transfer approvals.

An explanation of several unusual aspects of these applications is useful.

Signatures on amended applications – Original applications included notarized signatures. The amended versions state “see original application” instead of another notarized signature. The attorney of record for both applicants included a cover letter discussing the amended applications. Both applications include a water agreement between the parties or successors in interest to the original parties to complete the proposed swaps (Application Attachment E in both cases). Neither applicant is blindsided by the lack of notarized signatures on the amended applications. The amended applications are complete and acceptable as filed.

Changing one right in a PPU – Both cases propose to change a single right in each PPU instead of all the rights in each PPU. This is acceptable because the rights originally used to create each PPU did not overlap but served separate acres. Therefore the rights in each PPU are not “stacked” and can be changed on an individual basis as proposed.

Ownership changes to associated rights – Transfer approvals routinely include ownership changes for rights or portions of rights proposed for change. Transfer approvals can also cover ownership changes for associated rights such as the other rights in each PPU that are not proposed to be changed. Both applicants provided thorough ownership information of the rights within their respective PPU’s. Ownership changes for the other rights in each PPU can be completed within this transfer process.

Attachment D in T70098 documents ownership of the North PPU water rights. Note the deed does not include the Section 17 portion of the PPU. This was puzzling to the applicants’ attorney and the reviewer until additional research clarified this item. The original action establishing the current North PPU included Section 17 even though that land was not owned by the water right owner at that time. The right holder had a lease with the Section 17 owner, Elizabeth Bonar. This allowed the rights to be described on land owned or leased by the right holder. This arrangement was further documented in T5065. In that file, see attorney Madigan’s 7-18-97 letter and owner Bonar’s 7-15-97

letter for confirmation. The same thinking can be applied to T70098 without additional documentation from the Section 17 owner. In this way the rights can be used in Section 17 if the right holder has legal access to that property. The Section 17 owner does not have ownership of any portion of the water rights in the North PPU. Neither transfer proposing use in the North PPU should authorize trespass to Section 17. Appropriate conditions have been added to both transfers in that regard.

Portion of water right in the water bank – A portion of 61-7424 currently enrolled in the water bank will be included in the proposed split under 61-12012 in the North PPU. The water bank portion cannot be used on the North PPU. Approval of 61-12012 in Transfer 70098 suggests more use can occur in the North PPU than can actually occur under an approval. The cover letter for approval of Transfer 70098 should notify the owner of this limitation.

Additionally, associated rights in both transfers have been updated to show common rate, volume and acre limits shared by all rights within each PPU. This updates various versions of combined use limits previously identified in the rights. The “right-of-way” condition has been used for all rights in the North PPU regarding Section 17 as previously discussed. This is an appropriate revision and/or addition of conditions to associated rights.

These two transfer applications can easily confuse the reader – “which right goes where and does what?” The following tables might help.

Table 1 – Proposed Splits in Transfers 70097 and 70098

TRANSFER/WR #	NEW # / OWNER	CFS	AFA	ACRES
70097 / 61-7195A	61-12010 LDS	13.38	2680	670
	61-12011 Cinder Farm	3.40	680	170
70098 / 61-7424	61-12012 Cinder Farm	4.52	1240	310
	61-12013 LDS	2.48	680	170

The transfers split the rights and move a portion to the other owner’s PPU. Each owner gets 680 af for 170 acres. The rates for the respective 170 acres vary with the respective duties of water.

Table 2 – South PPU

ACTION	CFS	AFA	ACRES
PPU before transfer: 61-7195A / 7210	18.65	4672	1168
Transfer 70097: subtract 61-12011	- 3.40	- 680	- 170
Transfer 70098: add 61-12013	+2.48	+ 680	+ 170
Result after transfers	17.73	4672	1168

The only change to the South PPU after the transfers is to slightly reduce the combined rate of flow. The resulting rate, volume and acre limits apply to 61-7210, 61-12010 and 61-12013 for the South PPU.

Table 3 – North PPU

ACTION	CFS	AFA	ACRES
PPU before transfer: 61-7306C / 7390 / 7424	16.39	3500	875
Transfer 70097: add 61-12011	+ 3.40	+ 680	+ 170
Transfer 70098: subtract 61-12013	- 2.48	- 680	- 170
Result after transfers	17.31	3500	875

The North PPU before the transfers was limited by volume and acres. The combined rate was not identified in prior conditions of approval. The sum of the rates is somewhat increased after the transfers. This is acceptable as previously explained – not a rate-limited scenario and not an actual expansion. Use per acre remains within the 0.02 cfs / 4 afa standard. Recall that the 63 acre portion currently leased to the water bank reduces actual use under combined rights in this PPU. An expansion will not occur even with the water bank portion conceivably restored for use someday in the North PPU.

Prior Transfer 5065 split 61-7306A into C and D portions. After that transfer, rights 61-7306C, 61-7390 and 61-7424 were limited to a combined PPU of 875 acres/year within a 925 acre boundary.¹ The 875 acres were allotted a combined 16.39 cfs (sum of individual rates) and 3500 af (volume condition of approval). Some confusion was encountered in processing the two current transfer applications due to some lagging database changes (61-7306A still referenced in conditions under 61-7195A and 61-7424, for example). But a careful review reveals the limits of the North PPU prior to Transfers 70097 and 70098. Those limits are the first row in Table 3. Approval of the two new transfers as discussed will correct any lagging database oversights.

¹ Prior to Transfer 5065, 925 acres could be irrigated in the North PPU. That transfer removed 50 acres of irrigation but retained the same PPU boundary, reducing total use to 875 acres within 925 acres. Incomplete database updates resulted in some records not properly noting the limits that followed approval of Transfer 5065. Also see the handwritten worksheet included with this memo.

The resulting rate, volume and acre limits apply to 61-7306C, 61-7390, 61-12011 and 61-12012 for the North PPU.

Summary

Transfers 70097 and 70098 should be approved as shown in the draft approvals. All the associated rights in each case are involved, including ownership changes for those rights. Lingering database inaccuracies (61-7306A etc.) can be cleared up with transfer approvals. The two transfers also resolve the acre and volume limits for the North PPU as detailed in the attached worksheets.

LDS and Cinder Farm will own all the rights in their respective PPUs. LDS and Cinder Farm can use all their respective rights except for a portion of one right that will remain in the water bank until further action is approved, precluding its use in the North PPU. Shape files have been updated.

A proposed contact table change for LDS is pending per the reviewer's 4-22-04 memo to Jeff Peppersack et al. Use the LDS name and address in T70097 to mail approvals of both transfers to that applicant. Also send a copy of both approvals to the central contact being proposed for LDS (see attached 4-14-04 letter from LDS) as reflected in transfer data entry.

Send both approvals to Cinder Farms. Send both approvals to attorney John Marshall.