

BEFORE THE DIVISION OF WATER RIGHTS

<p>In The Matter Of:</p> <p align="center">Gino Foianini</p> <p align="center">RESPONDENT</p>	<p align="center">CONTROL STRUCTURE SECOND NOTICE</p> <p align="center">SEAA No. 1330 DISTRIBUTION ACCOUNT: 102864 WATER RIGHTS: 41-3481 et al.</p>
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I. AUTHORITY

The Division of Water Rights ("Division") issues this Notice under UTAH CODE ANN. § 73-5-4 (2008), and in accordance with UTAH ADMIN. CODE R. 655-15 (2008).

U.C.A. § 73-5-4 states in part :

- (1) To assist the state engineer or water commissioner in the regulation, distribution, and measurement of water, a person using water in this state, ... shall construct or install and maintain controlling works and a measuring device at:
 - (a) each location where water is diverted from a source; and*
 - (b) any other location required by the state engineer.**
- (2) A person using water in this state shall make the controlling works and measuring device accessible to the state engineer or water commissioner.*
- (3) The state engineer shall approve the design of:
 - (a) the measuring device; and*
 - (b) controlling works so that the state engineer or a water commissioner may regulate and lock the works. ...**
- (6) If a water user refuses or neglects to construct or install the controlling works or measuring device after 30 days' notice to do so by the state engineer, the state engineer may:
 - (a) forbid the use of water until the user complies with the state engineer's requirement; and*
 - (b) commence enforcement proceedings authorized by Section 73-2-25.**

II. STATEMENT OF FACTS

1. The Respondent diverts water from the Middle and East Forks of Beaver Creek under Utah Water Right No. 41-3481.
2. The Respondent jointly shares the use of the ditch (Gregory Basin Canal) leading from the Thompson Creek drainage over to the Burnt Fork drainage that is also used to deliver some Hoop Lake storage water to downstream users below the Respondent's diversions.
3. The Commissioner continues to have difficulties bypassing storage water past the Respondent's diversion structures along this canal.
4. There are critical times when it is important that the Commissioner be able to bypass storage water past Respondent's diversions on this canal to the downstream water users receiving their storage water allocations.

SCANNED

5. The Respondent has installed lockable control structures; however, the control structures are not to the approval of the River Commissioner and the Utah State Engineer. The control structures allow for water to leak through or bypass their openings when they are in a closed position allowing for water to leave the canal.
6. The Memorandum Decision that approved the Respondent's Utah Water Right Fixed-Time Application to Appropriate Water No. 41-3481 (F69530) stated under the fifth condition of approval:

"The applicant shall ensure that adequate headgates and measuring devices are in place to regulate the use of water under this right. Headgates and measuring devices shall be to the approval of the Water Commissioner and the State Engineer."

7. Recently, the control structures have not been left in a closed or locked state to enable the Commissioner to bypass deliveries to downstream water users when the Commissioner was delivering water to other users in the Burnt Fork drainage.
8. The diversion of water from the ditch by the Respondent, without the approval of the River Commissioner, often results in the impairment of the water rights of other water users in the system. These water rights have senior priority dates to the Fixed-Time Water Right (W.R. No. 41-3481) of the Respondent.
9. The Commissioner measures and reports water deliveries to the downstream water users.

III. ACTIONS REQUIRED

1. The Respondent must not divert water from the ditch without the verbal or written approval of the River Commissioner.
2. Headgates along this canal must be of sturdy construction that will not leak when shut off. (e.g. Waterman or similar quality commercial grade gate)
3. The Headgates must be equipped with control gate handle wheel that can easily be locked (a chain and padlock are typical) so the gate position will not move after the gate handle wheel is locked by the water commissioner.
4. The gates must enable the commissioner to bypass the correct amount of water past these diversion gates to downstream water users whenever these new headgates are locked into position by the commissioner.
5. The Respondent must receive prior approval of his selected headgate and locking mechanism designs from both the water commissioner and the Utah State Engineer's Office (Division of Water Rights) prior to installing them as required.
6. **The work must be completed before July 1, 2010.**

IV. ADDITIONAL AGENCY ACTION

1. The Respondent is encouraged to diligently attend to the work required by this Notice. If the work is satisfactorily completed in a timely manner, the Division will conclude this agency action.
2. If the work is not satisfactorily completed in a timely manner, the Division may issue an Order forbidding the use of water until the Respondent has complied, or may commence an enforcement action as allowed under Utah Code Ann. § 73-5-4 (5).

3. If an Order forbidding the use of water is issued and is violated by the Respondent, the Division may commence an enforcement action in accordance with Utah Code Ann. § 73-2-25 (2008).
4. If determined to be in violation an Order, the Respondent may be subject to administrative penalties in accordance with Utah Code Ann. § 73-2-26 (2005), including fines not to exceed \$5,000 per day for knowing violations or \$1,000 per day for unknowing violations and replacement of up to 200% of water diverted without right. In addition, the Respondent may be liable for expenses incurred by the Division in investigating and stopping the violation.”

V. FURTHER INFORMATION

If the Respondent has any questions concerning this Notice, state laws and rules, or the required and recommended action, please discuss them with:

Robert W. Leake, P.E.
Regional Engineer
Vernal Office/Eastern Region
Utah Division of Water Rights
(435) 781-5327

Ben Anderson, P.E.
Water Rights Distribution Engineer
Utah Division of Water Rights
(801) 538-7469

1594 W North Temple Ste 220
P.O. Box 166300
Salt Lake City, UT 84104-6300

Dated this 14th day of June, 2010

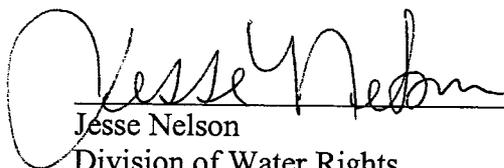


Ben Anderson, P.E.
Water Rights Distribution Engineer
Utah Division of Water Rights

CERTIFICATE OF MAILING

I, the undersigned, certify that on this 14th day of June 2010, I mailed a copy of the foregoing Notice by regular U.S. Mail, delivery confirmation receipt requested, to the following:

Gino Foianini
1248 CO RD 238
Lyman, WY 82937

A handwritten signature in cursive script, reading "Jesse Nelson", written over a horizontal line.

Jesse Nelson
Division of Water Rights
Field Services Secretary

cc: Robert Leake, Regional Engineer
Todd Covolo, Water Commissioner

U.S. Postal Service™ Delivery Confirmation™ Receipt

Postage and Delivery Confirmation fees must be paid before mailing.

Article Sent To: (to be completed by mailer)

(Please Print Clearly)
Gino Foianini
1248 CO RD 238
LYMAN, WY 82937

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