

Cefalo, James

From: Cefalo, James
Sent: Wednesday, May 4, 2022 10:47 AM
To: 'billy.m.porter@gmail.com'
Subject: RE: water right 15-7009

Billy,

The license for water right 15-7009 cannot be amended or corrected to add beneficial uses to the water right. A similar question was raised in a recent contested case before the Department of Water Resources. One party to the case argued that a license issued in 1966 did not accurately reflect the full extent of beneficial use developed under the water right. The final order for the contested case included the following paragraph:

Idaho Code § 42-220 states that water right licenses "shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein." The Department, therefore, is bound by previously-issued licenses. Except for clerical errors, or licenses that include a term limit or a condition authorizing subsequent review, the Department does not have the authority to reconsider the elements of a license after the appeal period has passed. The Idaho Supreme Court has declared that "finality in water rights is essential." *State v. Nelson*, 131 Idaho 12, 16,951 P.2d 943,947 (1998). To allow a water right license to be challenged years after the license is issued creates significant uncertainty for the owner of the water right.

(Amended Preliminary Order Approving Transfer 82640 (October 29, 2019) at 14).

The same reasoning would be applied to your water right. The exclusion of irrigation and domestic from the license for water right 15-7009 was not a clerical error. The field exam report specifically stated that stockwater was the only beneficial use developed under the right. The license for water right 15-7009 was issued in 1989 as an order of the Department and any appeals or challenges to the license should have been filed immediately after the license was issued.

I've tried to provide a summary of the legal framework governing licensed water rights. If you feel that my summary is incorrect, please feel free to contact a water rights attorney or water rights consultant to review your rights.

James

 IDAHO DEPARTMENT OF
WATER RESOURCES
James Cefalo | Regional Manager
900 N Skyline Drive, Idaho Falls, ID 83402
(208) 525-7161 | www.idwr.idaho.gov

From: billy.m.porter@gmail.com <billy.m.porter@gmail.com>
Sent: Tuesday, May 3, 2022 5:09 PM
To: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Subject: RE: water right 15-7009

James,

I just found a few of the documents, including the examiner's report.

The examiner specifically doesn't include the irrigation piping in his report. Nor includes it in the hand drawing.

The narrative states the spring water is used for irrigation and stock water, but the conclusion is that it is not for irrigation....only stockwater.

So clearly it is being used for irrigation...but the notice and correspondence says it's for stock water.

You can see why I am confused right?

So...its been used for irrigation and stock water the entire time but the state re-classifies it as stock water only the owner agrees?

Help.

From: billy.m.porter@gmail.com <billy.m.porter@gmail.com>
Sent: Tuesday, May 3, 2022 4:47 PM
To: 'Cefalo, James' <James.Cefalo@idwr.idaho.gov>
Subject: RE: water right 15-7009

From page 28 in the narrative:

"To be used for irrigation if the water supply is there"

System Description (continued)

3. **Narrative:** Description (As operating at time of measurement. Indicate pressure, number of s

Spring to Storage pond then to a 4" mainline
be used for irrigation if water supply is there.
Stock drink from spring pond (in stream)

NOTE: The spring appeared to set idle at the point
originated, and from that point I saw no evidence
water was flowing through its stream channel. However
discover that the spring resurfaced approximately 20
down stream and flowing at a rate of 0.09 cfs.

See Remarks on p

From: billy.m.porter@gmail.com <billy.m.porter@gmail.com>
Sent: Tuesday, May 3, 2022 4:37 PM

To: 'Cefalo, James' <James.Cefalo@idwr.idaho.gov>

Subject: RE: water right 15-7009

James,

You can see the pictures of the Irrigation piping ...in your documents. This has been in continual use since before 1976 to irrigate this property. These are and never were illegal diversions.

The examiner made a mistake, that is easily resolved.



Please provide me any documentation of the change in the water right ...to Eunice Tovey...from your department stating the use of this water right for domestic and irrigation use is prohibited....or changed from the previous 1979 documented re-instating domestic and irrigation use. The copy to Eunice Tovey...from the Dept. I really doubt that anyone, especially a historical farming family, would knowingly give up their right to drink water and use it to irrigate their field after so much hard work was put into placing the piping to do just that.

A copy of the examiners report would be helpful also.

James, I am asking you to make some logical deductions here. This water right has been being used to irrigate this property...and water cows since it's development. You are really going to tell me there is no legal way to make corrections or changes to a water right that was wrongly re-classified? Of course there is.

I would like you to help me with this process instead of being a roadblock. You have the power to make these sort of judgement calls or at least help me gather the documents you need to make the corrections to an obvious mistake by your department long ago.

Please help me.

THX

BP

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>

Sent: Tuesday, May 3, 2022 3:25 PM

To: billy.m.porter@gmail.com

Subject: RE: water right 15-7009

William,

You have access to the backfile for water right 15-7009, so I will refer to the pages in the full backfile pdf. On August 19, 1979, Eunice Tovey filed a statement that she had completed development under water right 15-7009. (Page 46 of 79) Filing proof of beneficial use is an important step in the water rights process. See Section 42-217, Idaho Code. Filing proof of beneficial use signifies that the permit holder has completed all development that will occur under the permit and notifies the Department that it can complete a field exam to confirm and quantify the amount of water developed. On August 13, 1987, an examiner for the Department conducted a field exam for Permit 15-7009. (Pages 27-30) The examiner found that the permit holder had only diverted water from the spring for stockwater use. (Page 30) "Water is being used for stockwater only, no irrigation or home." (Page 30) Consistent with the observations of the field examiner, the Department issued a final water right license for water right 15-7009 on August 8, 1989. (Page 8) The license authorizes a diversion of 0.06 cfs (27 gpm) from a spring for stockwater use. It appears that the right holder, Eunice Tovey was provided a copy of the draft license and did not have any objections to the licensed amounts. (Page 22) The appeal period to object to License 15-7009 would have passed in the months following the issuance of the license. There is no mechanism under Idaho law to challenge a water right license thirty years after the license was issued.

Water right 15-7009 is limited to a diversion rate of 0.06 cfs for stockwater use. It cannot be expanded to include domestic or irrigation use without filing a transfer application to change the nature of use from stockwater to domestic/irrigation. As noted in my previous email, a change in nature of use will be limited to the historic consumptive use for stockwater.

Any diversion from the spring for domestic or irrigation use without (1) changing the nature of use for water right 15-7009 or (2) obtaining a new water right for the proposed use would be an illegal diversion of water under Section 42-351, Idaho Code.

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From: billy.m.porter@gmail.com <billy.m.porter@gmail.com>
Sent: Tuesday, May 3, 2022 2:36 PM
To: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Subject: RE: water right 15-7009

James,

The development period ended in 1979? The order of Reinstatement was in 1979 (see attached) for **irrigation, stockwater and domestic** use. That means somewhere there should be a water right changed to show that in 1979...so...it was ordered but never issued?

We are not going to stop using water from our Spring. It flows from the ground. We are going to keep using it from "spring to sink" ...for "domestic, irrigation and stockwater" use. Just like we always have. How would we stop it? Of course we wouldn't we would put it to use.

A field exam conducted in 1981, or at any time, would be incorrect in their assessment of stock water use only. As the examiner would obvious see spring water being used for Irrigation. Documentation exhibits a continued irrigation use (1989 microfilmed – see attached) using the existing infrastructure (collection, pond & piping). The same infrastructure being used today.

Since its development, 100% of this water right from the spring has been used for beneficial purposes and is clearly documented for **Irrigation** and Stockwater use.

I want you to help us fix the incorrect assessments of the past...clerical errors. Can you do that? Now that you see this clearly presented evidence?

What else do you need?

Help.

BP

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Tuesday, May 3, 2022 12:07 PM
To: billy.m.porter@gmail.com
Subject: RE: water right 15-7009

The development period for water right 15-7009 ended in 1979. The department conducted a field exam to quantify what was developed under the right and issued a license for the beneficial use developed. There is no opportunity under state law to re-open the development period for the right. The current water right elements represent the full extent of the right. The only way to add beneficial uses to the water right, is to change the nature of use for the existing beneficial use (stockwater). The new uses would be limited to the historic consumptive use occurring under the existing right (stockwater). For stockwater, the historic consumptive use would be the water consumed by the cows each day. For 103 cows, that would be approximately 1,200 gallons per day. If the cows are only on the property for part of the year, that would further limit the annual volume of water available for new uses. For example, if the cows are only on the property for 3 months (90 days), then the total water available for a different/new beneficial use would be 108,000 gallons per year (90 days x 1,200 gallons/day).

The other water right on the property, 15-64, seems poorly suited to change to domestic (residential) use. The source of water described in the water right is Cherry Creek, which may have water quality issues for drinking water. Further, by decree, the right is only available for 27 hours out of 192 hours on rotation with other water users on Cherry Creek. It would be difficult to manage a residential system that only gets water for one day per week.

From: billy.m.porter@gmail.com <billy.m.porter@gmail.com>
Sent: Tuesday, May 3, 2022 10:37 AM
To: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Cc: billy.m.porter@gmail.com
Subject: RE: water right 15-7009

Thank you for this info James.

There are cows on it every spring, just like last year and the years before. The amount of cows and duration are in direct relation to how much spring rain we get and how long the grass remains through the summer.

100% of this water has had historical beneficial use, so no water right enlargement is needed. I simply need you to add back the irrigation description to the right (that was there originally) + add domestic use.

27 GPM is 38,000+ gallons a day ...year round. This water collects in a detention pond and outflows through irrigation piping in our fields. It has always been used almost entirely for irrigation from May to October.

Assuming I am within my rights to use the authorized diversion of 27 GPM (and after you add domestic use to the right) this would be enough water for 38 homes @ 1000 Gallons per day.

I'll start the applications.

Again, thank you for your time.

BP

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Tuesday, May 3, 2022 9:43 AM
To: billy.m.porter@gmail.com
Subject: RE: water right 15-7009
William,

To change the nature of use of a water right from stockwater to irrigation and/or domestic use, you would need to file an Application for Transfer. The application form can be found on our website: idwr.idaho.gov.

To prevent enlargement of a water right, whenever a water user proposes to change the nature of use for a water right, the new use is limited to the consumptive portion of the existing use. The amount of historical consumptive use occurring under a right is case specific. A water user would have to provide evidence of historical consumptive use as part of a transfer application.

Water right 15-7009 currently authorizes the diversion of 0.06 cfs (27 gpm) from a spring for stockwater use. According to a beneficial use field exam conducted in 1981, the water right was used to provide stockwater to 103 cattle. Range cattle drink approximately 12 gallons per day. Very little of this water returns to the creek or ground water aquifer. Assuming 103 cattle and 12 gallons per day per cow, there might be 1,236 gallons per day available for the new uses. That amount of water would be sufficient to provide in-house culinary water to two or three homes. That amount of water would be sufficient to irrigate approximately 0.10 acres. Again, this is assuming you can demonstrate that the right was used to provide stockwater to 103 cattle in the recent past.

If you want to develop a spring for stockwater use, you need to file an application for permit. The Application for Permit form can also be found on our website.

James

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From: billy.m.porter@gmail.com <billy.m.porter@gmail.com>
Sent: Monday, May 2, 2022 1:39 PM
To: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Cc: billy.m.porter@gmail.com
Subject: water right 15-7009

James,

Can you tell me the process of adding Drinking water and Irrigation to this water right? Right now it is listed only as Stock Water use.

water right 15-7009

I have another small spring on my property used for Stock Water. Can you send me any information I need to establish it as a new water right?

Thank you.

William Porter
Cherry Creek Land
801-231-7031