

MEMORANDUM

Date: August 16, 2021
To: Water rights 2-2172, 63-3142, and 63-7083
From: Dave Betts
Re: Review of applications for Extension of Time to Avoid Forfeiture

Background:

On December 31, 2019, Dry Lake Dairy, LLC, ("applicants") filed an application for Extension of Time to Avoid Forfeiture for each of the following water rights: 2-2172, 63-3142, and 63-7083. The applications were signed by Ryan Vander Stelt. On February 27, 2020, I sent a letter to Dry Lake Dairy, LLC, requesting additional information that would confirm authorization of the signee, Ryan Vander Stelt, to sign on behalf of the water right owners, and to request a notification of change in ownership to put water right no. 2-2172 in the name of Dry Lake Dairy, LLC.

On March 27, 2020, the Department received a Notification of Change in Ownership to put water right no. 2-2172 in the name of Dry Lake Dairy, LLC, and a copy of the applicants' 2019 annual report to the Secretary of State of Idaho. The annual report and an accompanying cover letter from Charlie S. Baser (Attorney – Givens Pursley LLP) confirm that Ryan Vander Stelt is a member of the LLC, and has authority to sign on behalf of the applicants.

The applications for extensions of time to avoid forfeiture were advertised for public comment beginning in September of 2020. No protests were filed with the department. I have found no reason to deny the requests for extensions of time to avoid forfeiture, but it appears that the protection from forfeiture should only apply to a portion of the places of use (POUs).

Concerns regarding validity of water rights

The argument for limiting the protection from forfeiture to a portion of the places of use is based in part on the review of an application for transfer. On Nov. 1, 2016 the Department received Application for Transfer no. 81290 requesting changes to the points of diversion (PODs) for water right nos. 63-3142 and 63-7083. These two rights divert from ground water, and are supplemental to right no. 2-2172 which is the third water right included in the request for extensions of time. Water right no. 2-2172 was not included in the application for transfer (no. 81290) because right no. 2-2172 diverts from surface water, and does not share the PODs that were changed by the transfer.

Department staff addressed the validity of water rights 63-3142 and 63-7083 in their review of the application for transfer (Evaluation of Application - September 25, 2017). The reviewer found that there had been less irrigation than the full 183.2 acres authorized by the two water rights. A large fraction of the permissible place of use (PPU) had not been irrigated in more than 5 years, including portions of the POUs that have been converted to a diary. The reviewer provided opportunities to the water right owners to submit evidence of defense from forfeiture for the non-irrigated acres. The water right owners did not provide a defense from forfeiture

and the application for transfer was processed with the available information.

When Application for Transfer no. 81290 was approved, the Department determined to exclude the portions of the places of use that had not been irrigated in more than 5 years. Pursuant to Idaho Code §42-222(2), the 262 acre PPU was reduced to 150 acres, and the combined acre limit of the two rights was reduced from 183.2 acres to 150 acres.

The reviewer of Transfer 81290 noted that portions of the POU of 2-2172 were likely forfeit for the same reasons that the POUs of 63-3142 and 63-7083 were reduced. Because water right no. 2-2172 did not pertain to Transfer 81290, the POU for 2-2172 was not reduced at that time.

My review of the validity of the water rights included in the applications for extensions of time agrees with the review for Transfer no. 81290. There is evidence that portions of the authorized POU for 2-2172 may be forfeit due to non-use. The non-use includes the same portions of the original combined PPU that were identified in the review of Transfer no. 81290 which have been converted to a commercial dairy. Some of the non-use appears to go back as far as 2004, exceeding the five year limit of protection from forfeiture due to non-use (I.C. §42-222(2)).

This analysis has not concluded how much of water right no. 2-2172 remains valid. Rather this memo is commenting on what portions of the places of use for the three water rights will be protected from forfeiture with extensions of time. The intent of limiting the protection from forfeiture is to clarify that an approval of the applications for extensions of time should not be used to assert that the entirety of water right is valid. Approval of an extension of time does not grant de facto validity to portions of the POU for right no. 2-2172 that appear to not have been used.

Portions of water rights to receive protection from forfeiture

Because the general method for approving extensions of time may not adequately provide opportunity to clarify the extent of the protection, the proposed method of approval of the extensions of time will be a preliminary order. The preliminary order will limit the defense from forfeiture to the valid portions of the POUs as identified by the applicants.

In their applications for extensions of time, Dry Lake Dairy, LLC, identified the portion of the POUs that they desired to protect. In item 6 of the applications, the applicants request extensions of time for the irrigation places of use "in the SWSE of Section 13, T1N, R3W". Review of satellite imagery of this area shows evidence of a reduction of irrigation within this quarter-quarter beginning in 2016. The applications for extensions of time were filed before the end of the fifth year of non-use. The portions of the POUs described by the applicants are presumed to be valid.

My recommendation is that the applications for extensions of time be approved for the portion of the POUs in the SWSE quarter-quarter of Section 13, Township 1 North, Range 3 West, B.M. I recommend a resumption of use date by July 1, 2026, which would be prior to the end of the sixth year of non-use after granting the proposed extensions of time.