

Cefalo, James

From: Cefalo, James
Sent: Friday, September 04, 2020 12:39 PM
To: 'Kristin Moore'
Subject: Application for Transfer 84145 (RMWE)

Kristin,

The protest filed against Application 84145 has been withdrawn. There are no more protests against the application, so the Department can proceed with its review. I have concerns about the viability of this application and planned to raise those concerns during the pre-hearing conference for the contested case. Now that the pre-hearing conference has been cancelled, I will raise my concerns through this email.

If the application were approved as proposed, the change would result in an enlargement of the transferred water right. When a transfer application proposes to change the nature of use of a water right, the water user must reduce the beneficial use under one of the existing elements of the right to create the water supply for the new beneficial use. Application 84145 proposes to simply add Fish Habitat as an authorized beneficial use without making any reduction to the existing beneficial use (Irrigation). The Department asserts that this type of change constitutes an enlargement of the right. See Transfer Memo page 28 ("For example, hydropower use cannot be added to a right use for irrigation, even though no additional water would be diverted for hydropower use.").

The enlargement concerns with Application 84145 go beyond the simple example from the Transfer Memo. When an application proposes to change the nature of use for a water right, the Department evaluates the historic consumptive use for the right. You provided information showing that the transferred portion of irrigation water right 22-7681 historically consumed 20.2 acre-feet. Once the nature of use is changed, the reduced volume becomes the full extent of the water right. In Application 84145, once the nature of use is changed to Fish Habitat (Aquatic Habitat), the total annual diversion volume for the right would be 20.2 acre-feet. Application 84145, however, proposes to continue to use the transferred portion for irrigation, in some years, and divert up to 35 acre-feet. Diversion of more than 20.2 acre-feet in future years would constitute an enlargement. The conversion from Fish Habitat back to Irrigation, however, presents even more concerns. Assume that the water right has been used for Fish Habitat for a number of years. In the year that the water user decides to use the water for irrigation (changing the nature of use from Fish Habitat back to Irrigation), to prevent enlargement, the water user should be limited to the historic consumptive use under the previous beneficial use. One could argue that Fish Habitat use is essentially non-consumptive. Therefore, there would be no volume of water available for irrigation use. The conversion from Fish Habitat to Irrigation, in whatever year it occurs, would constitute an enlargement.

I recognize that RMWE or its attorney may have a different understanding of the prohibition against enlargement. You are entitled to pursue your understanding of enlargement in a formal process. If you would like, I can issue a preliminary order denying transfer, thereby creating a forum where you can raise your enlargement arguments to the Director or to the District Court. Otherwise, the application needs to be withdrawn or amended. An amended application should clearly identify what portion of the water right is being changed to Fish Habitat and what portion will continued to be used for Irrigation. Please let me know how you would like to proceed once you have been able to consult with the end water user.

James Cefalo
Regional Manager
IDWR Eastern Region
(208) 525-7161

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