

Cefalo, James

From: Cefalo, James
Sent: Thursday, September 12, 2019 10:56 AM
To: 'Jerry Rigby'
Cc: Holliday, Michael; 'John Marshall'; 'Kristin Moore'
Subject: Bunts & Singles Applications

Jerry,

Thank you for providing a copy of the settlement agreement. I've spent some time reviewing the transfer application and permit application and have some suggestions. I don't have any concerns with the overarching goals of the settlement agreement, but the agreement may need to be amended slightly to make the water rights work.

1. I noticed a couple of typographical errors in the documents (agreement and lease). Water right 21-4071A was occasionally listed as 21-4107A. The agreement also states that right 21-4071A will be limited to 6,5000 gpd, rather than 6,500 gpd. These errors could be corrected in an amended agreement.
2. We have still not addressed the question of overlapping water rights. It appears that water rights 21-4071, 21-4071A and 21-11478 represent the same beneficial use. All of these rights describe a domestic use occurring in the SW1/4 of Section 6. I am not aware of any domestic use occurring in the SW1/4 of Section 6 besides the domestic use associated with the original Peterson cabin. At one point we discussed the possibility of the Forest Service abandoning water rights 21-4071 and 21-11478. Liz Davy explained that getting the Forest Service to abandon property is very difficult. We will likely pull water rights 21-4071 and 21-11478 into the transfer approval as associated rights and limit them to 6,500 gpd, representing the remaining portion of the 13,000 gpd volume limit for all three rights. In other words, 21-4071A would get half of the 13,000 gpd limit, 21-4071 and 21-11478 would get the other half. Is the Forest Service okay with having water rights 21-4071 and 21-11478 limited to a combined volume of 6,500 gpd?
3. The settlement agreement states that Hagenbarth will file a transfer application to "add" a new, non-consumptive recreation use to water right 21-13226. This proposed transfer may not be the best option. Currently, water right 21-13226 describes the diversion of 3.58 cfs for the irrigation of 178.9 acres and 0.24 cfs for stockwater (3.58 cfs total). Idaho Code Section 42-222 allows a water user to "change" the nature of use of a water right, not add beneficial uses to a water right. Which of the current beneficial uses under water right 21-13226 will be changed? I don't think that Hagenbarth will be willing to give up (change) any portion of the irrigation right, and the stockwater portion may not be large enough to satisfy the proposed recreational use.
4. Application 21-13254 should include "Diversion to Storage" as a proposed beneficial use. The proposed pond is off-stream; it is located on a ditch. Therefore, there needs to be rate identified for filling the pond.

I think the application for permit should be structured as follows:

Application for Permit 21-13254

Diversion to Storage	11/1 – 5/1	4.00 cfs
Recreation Storage	1/1 – 12/1	8 acre-feet
Recreation	11/1 – 5/1	4.00 cfs
Totals:		4.00 cfs, 8 acre-feet

During the non-irrigation season (11/1 – 5/1), the pond could be filled (if needed) and 4.00 cfs can flow through the pond continuously. Filling the pond would be subject to prior existing rights in the Upper Snake River system. This permit would be junior to Sheridan Reservoir, Island Park Reservoir, American Falls Reservoir and Lake Walcott rights. If the pond is filled during a good water year and remains full, then there are no injury issues. Water district 1 can regulate this right in priority.

During the irrigation season (5/1 – 10/31), the water flowing through the pond will primarily be the irrigation/stockwater rights held by Hagenbarth and the State of Idaho. Water right 21-4071A will also be flowing through the pond and will be used to offset any evaporation from the pond. Water right 21-4071A is junior to water rights 21-2054B, 21-12854, 21-13226 and 21-13233 owned by Hagenbarth and water right 21-2054C owned by the State of Idaho. However, because Hagenbarth will own water right 21-4071A, he can choose to subordinate his senior irrigation rights to his junior domestic right. This subordination does not need to be reflected on the water rights, because they are all held by Hagenbarth, but you may want to describe the subordination in the private agreement. If 21-4071A remains deliverable all year, then the evaporation from the pond will be covered all year. I don't see any value in changing any of Hagenbarth's rights.

I spoke with Tony Olenichak about water right administration. He said that Hagenbarth's ditch from the spring has not been actively regulated by Water District 1. Outside of water rights 21-12854 and 21-13233 (which bear an 1894 priority date and are limited to 0.40 cfs), the rights in the Hagenbarth ditch are junior (1912/1939 priority dates). There is always a chance that these rights will be administered by WD1 in the future. There may come a day when the Hagenbarth ditch is cut back to 0.40 cfs or shut off entirely during the summer months. In this scenario, water would not flow through the pond, so evaporation would not be an issue. Because the proposed pond is off-stream, the evaporation from the pond only has the potential of affecting the rights delivered through the ditch. As long as Hagenbarth is willing to subordinate his senior rights (and the State of Idaho right is delivered in full), then the evaporation will be of no effect.

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