

MEMORANDUM

TO: Transfer No. 81190 File
FROM: Cody Parker
DATE: November 20, 2017
RE: Evaluation of Sufficiency of Information Submitted

The purpose of this transfer is to define a permissible place of use for 10 water rights allowing the owner to use the limited water supply more efficiently. The applicant is installing pivots and other sprinkler irrigation methods to better utilize the available water supply for the ranch. Water will be used at the current place of use, generally located directly south of Holbrook Lane, approximately 1.5 miles southeast of Ola, Idaho.

Summary of Information Submitted

Authority to File:

The owner of record for all 10 rights is M & T Ranches, LLC, which is also the applicant listed on the application. The application is signed by Mark F Andelin, listed as the manager, which matches the information from the Idaho Secretary of State website. The proposed place of use lies within the property bounds for M & T Ranches. 3 acres that were originally included within the proposed PPU are owned by the State of Idaho. The applicant has clarified they do not have an agreement with the State to irrigate that land. The 3 acres were removed from the PPU, reducing the overall PPU acres to 217 from 220. All points of diversion for natural flow rights, and points of re-diversion for storage rights are on the Ranch land. 2 PODs listed are for on stream storage of water several miles upstream. The applicant states on page 5 of their application that these PODs are operated under existing right-of-way agreements.

Water Right Validity:

All 10 rights were decreed in 2004. The rights total 729 acres irrigation. There are 225 unique acres of irrigation according to overlap analysis. The applicant proposes to establish a 217-acre permissible place of use.

I was able to identify 146 acres of irrigated land from imagery captured during the forfeiture review period, which indicates that 71 acres are at risk of forfeiture. I sent a letter to the applicant requesting they submit any exceptions or defenses to forfeiture. They replied stating that the Ranch has used the full supply of available water every year. According to their letter, annual precipitation has been below average for the area in 6 of the previous 10 years. They also note that storage water must be conveyed over 10 miles for use at the POU. Without adequate precipitation to support baseflow for Little Squaw Creek, they experience significant conveyance losses.

According to Admin TP Memo No. 24, lack of available water is an acceptable defense to forfeiture as determined by case law. Furthermore, the defense provided seems to qualify as "nonuse [resulting] from circumstances over which the water right owner has no control..." as

outlined in 42-223(6) *Idaho Code*. Therefore, no part of the rights are being considered at risk of forfeiture. However, the applicant is creating a 217 acre PPU for rights total 225 unique acres of irrigation by creating additional overlap between rights. The representative for the applicant acknowledges that this is purposefully done.

Injury to Other Water Rights:

None anticipated. The applicant will continue to irrigate 211 acres from natural-flow rights as previously authorized, though now within a 217-acre PPU. They will use storage water to irrigate 6 additional acres, 5 of which have been historically irrigate and 1 which has not, bringing the total irrigated acreage to the full 217. Expanded use of storage water is permissible according to 42-222 *Idaho Code* as long as no other water rights are injured. All diversion rate and volume limitations are retained through the transfer, and the applicant does not propose to increase the acreage irrigated from natural flow.

Users downstream protested this application at advertising, citing concerns regarding the availability of water to satisfy other water rights. There is some chance that the expanded irrigation from storage water could injure downstream users by increasing consumptive use and reducing return flows. However, the private agreement reached, which led to withdrawal of all protests, seems to address this issue. Furthermore, the new irrigation system the applicant proposes to use will likely improve irrigation efficiency, reducing the diversion requirement, leaving more water in the channel for downstream users.

Enlargement of Use:

None anticipated. I discuss the method I used to determine acreages in the overlap section below. There are 225 unique acres of irrigation authorized by the 10 rights. Of these, 7 natural flow rights authorize irrigation of 211 acres. The other 3 rights are storage rights which authorize 216 unique acres of irrigation.

To create a 217-acre PPU for these rights totaling 225 unique acres of irrigation, the applicant proposes to create additional overlap between the natural flow and storage systems. When sufficient natural flow is available in the early season, the applicant irrigates 211 acres from natural flow and releases water from storage to irrigate an additional 6 acres. As natural flow becomes scarce toward the end of the season, the applicant increases the number of acres irrigated from storage water up to 217 acres. However, as I discuss above, they are not limited to 217 acres of irrigation from storage as they are allowed to expand their irrigation use of storage water. Condition X27 is added to natural flow rights upon approval of the transfer to limit each right to their specific number of acres within the 217 acre PPU. X35 is added to all natural flow rights to make sure it is clear that there is no overlap between natural flow rights. The POU for all three storage rights will be listed as the full 217 acres. Another X35 condition is added to all rights, limiting the total irrigated acreage to 217. This second X35 **does not prevent the future expansion of irrigation using storage water** and is thus not a limit to irrigation from storage. It is used to show that it is the same 217 acres listed on all rights.

On paper, there is no increase in the total annual volume or rate diverted from the source. The expansion of from-storage irrigation by 1 acre is a permissible enlargement for reasons discussed above. The actual effect of the transfer will be to allow for more efficient use of available water.

Condition R63 is added to all rights to replace the existing unit combined use limits, and restricts the total combined irrigation to 0.02 cfs/acre and 3.5 afa/acre. R70 is added to storage rights to state the statutory duty of water for irrigation storage and irrigation from storage uses.

The applicant does not indicate that there are any changes to the PODs intended in the "Purpose of Transfer" (A.1) section of the application. However, the applicant does not check the box indicating that there are no proposed changes to the POD, and they list all PODs in the table for item B.3. Then, in item B.5 they write "Existing diversions...no changes proposed but all natural flow rights can divert from any point of diversion in Gem County and all storage can be rediverted from any point of diversion in Gem County." The application seems to be inconsistent in its treatment of the points of diversion. I called the representative, Dave Shaw of ERO Resources, on April 25, 2017 to settle this matter. He confirmed over the phone that there are no changes proposed to the points of diversion, i.e. the rights will list the same PODs upon approval of the transfer. So, conditions limiting total diversion for combined irrigation and stockwater use at each POD are maintained through the transfer.

Local Public Interest:

The changes proposed will not impact use of the source by other users or the local ecosystem. The application was advertised to confirm the public interest in the project. All protests were withdrawn following approval of a private agreement that has been included in the file. Condition 020 is added to all rights through the transfer to show that the agreement exists between those parties. The watermaster did not oppose the approval of this application at advertising.

Beneficial Use/Conservation of Water Resources:

The applicant propose to continue an established beneficial use. They plan to implement more efficient irrigation methods to conserve available water.

The application is consistent with the criteria of I.C. § 42-222 and should be processed.

Discussion

Dave Shaw, representative for the applicant, submitted a 2-page response to the Department request for information sent January 31, 2017. The following briefly summarizes the content of his reply:

- In my request letter, I explained that there are 225 unique acres of irrigation authorized by the rights. Mr. Shaw confirmed that the reduction in acreage proposed was purposefully done. He states that the reduction is the result of water shortages in recent years, and explains that the applicant has reduced the acreage to focus on using the available water supply more efficiently over a slightly smaller area

- I requested information regarding the inclusion of State land in the PPU. Mr. Shaw confirmed that inclusion of these acres was an error. They ask to exclude the acres moving forward.
- I requested any exceptions or defenses to forfeiture for non-irrigated area. Mr. Shaw cited water shortages as a defense to forfeiture. The defense is confirmed as legitimate by Admin TP Memo No. 24, and the pertinent case law cited in that memo.

Overlap

I estimate unique irrigated acres for both the storage and natural flow systems based on the following assumptions:

1. The max number of irrigated acres per QQ is 40.
2. The number of irrigated acres in a QQ is the highest acreage listed in that QQ for all the rights.

I found 225 unique acres between both systems. There are 216 unique acres between the 3 storage rights and 211 between the 7 natural flow rights. There is 202 acres of overlap between the two systems prior to approval of the transfer. 14 acres are unique to the storage water irrigation and 9 are unique to the natural flow system. Through the transfer, natural flow stays at 211 acres, storage right are increased by 1 acre to 217, and the overlap between these 2 system is increased to 211 acres.

There is POD overlap for all of the PODs included. Several natural flow and storage stockwater rights use the same PODs at the Ranch. The overlap is cited in existing conditions on the rights. The PODs at the reservoir are used by other rights, which just points towards other uses of the reservoir for uses other than irrigation.

Conditions:

STORAGE RIGHTS

X61- Extended irr season
 R63- 0.02 cfs/acre, 3.5 afa/acre
 R70- 5.0 afa/acre for irr storage
 R05- Watermaster 65A
 R02- lockable device
 18C- reservoir measuring device
 020- private agreement from protests
 T07
 T08
 T19- replaces C18

NATURAL FLOW RIGHTS

X61
 R63
 R05
 R43- MD and lock (rights >0.20 cfs)
 020
 T07
 T08
 T19