

Keen, Shelley

To File 63-10560

From: Keen, Shelley
Sent: Tuesday, September 13, 2016 5:01 PM
To: 'Randy and Becky Fowers'
Cc: Newbry, Ashley
Subject: RE: License 63-10560

Randy,

Ashley and I very much appreciated the opportunity to join you, Ray, and Harold to discuss PHOA's water use and water rights. Before I answer the question you posed, I should say that I am going to be out of the office for a few days, so I am writing quickly to be as responsive as possible. I would characterize this email as my initial thoughts based on my recollection of the water right file and our discussion. If necessary, I'd be glad to consider this question more fully next week.

As for transferring part of the heating water use authorized under Right 63-10560, the answer may not be straightforward. The license itself does not specifically identify which 11 cabins can be supplied with heating water in addition to the 43 homes specifically identified in condition no. 7 on the license. I think it might be possible to take the view that any 11 cabins (homes) could be served heating water, as long as they fall within the authorized place of use, which lots 47-53 of Willis Carrie's Paradise Subdivision do. That being said, I am convinced by our review of the record that the current license was intended for seven Grouse Creek cabins and four cabins on Lot 38, for a total of eleven. Therefore, one could also interpret the license such that a 7-cabin portion of the heating use is appurtenant to the Grouse Creek cabins.

If you were to take the view that a cabin is a home and, therefore, any 11 homes within the place of use could be supplied water for heating, the assertion could be questioned by someone whose lot is not among the 11 chosen. When there is a dispute or ambiguity about appurtenance (attachment to the land) and ownership of a water right, it is not IDWR's role to decide between the contending parties. That role is for the courts. Determining with certainty where the 11-cabin portion of the water right belongs would likely take a quiet title action in court.

If you concur that Right 63-10560 is partly appurtenant to the Grouse Creek cabins, then a water right transfer application would be the appropriate mechanism to propose moving some of the authorized use to lots 47-53 of Willis Carrie's Paradise Subdivision. However, when processing a transfer, IDWR must ensure it will not cause injury to existing water right holders. Consequently, when processing such a transfer, IDWR would want written acknowledgment that the Grouse Creek cabin owners concur with the proposal. If Grouse Creek's consent were obtained, IDWR would also have to evaluate for forfeiture. IDWR is required to make sure the water right (or portion) being changed has not been forfeited by five consecutive years of non-use. IDWR will, therefore, want to know that there is a recent history of heating use in the Grouse Creek cabins. If the history of use could not be confirmed, IDWR would not be able to approve the transfer. In that case, the transfer application could be withdrawn before there is any official decision, thus preserving the right to heat the Grouse Creek cabins. If the transfer application were not withdrawn, IDWR would likely issue an order denying the transfer.

Regards,

Shelley

Shelley Keen
Water Rights Section Manager
Idaho Department of Water Resources
Shelley.Keen@idwr.idaho.gov

From: Randy and Becky Fowers [<mailto:RBFOWERS@msn.com>]

Sent: Tuesday, September 13, 2016 9:27 AM

To: Keen, Shelley

Subject: License 63-10560

Shelley,

Thanks again for meeting with the Phoa water committee. As we digested what we learned, or perhaps gained some understanding of what we don't know, I have a question for your consideration and comment.

The PHOA board is interested in correcting what they feel was an unfortunate error in the last version of the 63-10560 license. We understand the limitations that IDWR has in assisting with that goal. We see two paths available to us and perhaps you might be able to point out more.

First, we understand the the Idaho statute 42, defines in its section 222, an ability to remove a use for five continuous years of no use, and certainly the 7 Grouse Creek cabins fall into that description. However, since the history of this license includes a failed attempt by the PHOA board to add the last 7 lots (lot 47- 53) as places of beneficial use, the question raised is, if we could request a transfer of the 7 GCC lots to the 7 PHOA lots to make the license more in line with our intent? I understand the volume on the license would probable not change under either action since they were based on the ability of the PHOA delivery system at the time of the license.

The board recognizes that some of the PPI lots may not be covered by any license or permit and the 7 Grouse Creek Cabin lots may end up in that situation. We will be addressing those issues later on.

I would very much appreciate your comments and opinion on these items.

Thanks,
Randy