

Keen, Shelley

From: Keen, Shelley
Sent: Tuesday, February 18, 2014 9:22 AM
To: 'Lana Esplin'
Subject: RE: IDFG transfer questions

Ms. Esplin,

The NHLHA **cannot** use any portion of its Pittsburg Creek water right while it is leased to the Water Supply Bank. I have reread my email to you, and I cannot see how I may have left you with the impression that it is okay to divert if the right is not rented. It definitely is not, pursuant to the rule you quoted below. Nevertheless, let me provide some additional explanation.

Usually there are multiple water rights from a stream. The water is allocated to the water right holders based on the priority dates of the water rights. In a time of shortage, the senior water users get to divert all their water before the junior water users get any water. When a senior water right is leased to the Water Supply Bank and is not used, it temporarily makes more water available to junior water right holders. I say "temporarily" because the junior water right holders will have to curtail their use to satisfy the senior water right if it is rented from the Water Supply Bank or if the right holder formally withdraws the right from the Water Supply Bank and resumes using it for its authorized purpose. Another way of saying all this is that leasing a water right into the Water Supply Bank often makes more water available to the other water right holders on a stream system, it does not guarantee the water will stay within the stream.

As for the IDFG water right, I do not see that it is limited to a certain amount from either source. It appears to allow 6.0 cfs from either source or from a combination of the two. I do not know if IDFG plans to use water diverted from Henrys Lake only in March and April. The water right allows the diversion all year.

I recommend asking IDFG about the settlement agreement and any outstanding obligations.

Sincerely,

Shelley Keen
Idaho Department of Water Resources
Shelley.Keen@idwr.idaho.gov
208-287-4947

From: Lana Esplin [mailto:lgesplin@sunrivertoday.com]
Sent: Tuesday, February 18, 2014 8:47 AM
To: Keen, Shelley
Cc: Weigand
Subject: Re: IDFG transfer questions

Mr. Keen

Thanks for the excellent answers to my questions.

That's good news that the NHLHA can use their Pittsburg Creek portion of our water right when it's in the Water Bank if it's not rented. That makes a lot of sense. Now we can make all our members aware that they can use this water again if it's not rented.

The NHLHA water right is already used indirectly by the hundreds of aspens along the creek. As you know, aspens are groups of continuous plants. There were over 150 aspen trees on my 2 lots, which border Pittsburg Creek, the last time I counted. In the past, many of our home owners with lots bordering the creek, were using water from the creek to irrigate their lots. This has helped on our pumping costs from our municipal water system at Howe Springs which comes up on NHLHA property.

I understood the NHLHA was subject to the Water Bank Rule below, but I didn't see anything showing the junior water right holder was treated any differently::

Section 000 Page 2

IDAPA 37

TITLE 02

CHAPTER 03

37.02.03 - WATER SUPPLY BANK RULES

. 025. ACQUISITION OF WATER RIGHTS FOR THE BOARD'S WATER SUPPLY BANK (RULE 25).

08. Placement of Water Right.

b Upon acceptance of a water right into the Board's water supply bank, the owner of the water right is not authorized to continue the diversion and use of the right while it is in the Board's water supply bank, unless the water right is for hydropower and is placed in the Board's water supply bank to be released for salmon migration and power production purposes.

There are a few discrepancies in some of your explanations. To clarify:

Both the NHLHA and the IDFG have combined water rights. The NHLHA combines 1 cfs from Pittsburg Creek and .5 cfs from Howe Springs into one right: 21-10015. The IDFG combines 2 cfs from Hatchery Creek (Sherwood) and 4 cfs from Pittsburg Creek into one right: .

The reason the required measurements must be taken at Highway 87 is because our Howe Springs portion flows into Pittsburg Creek just below Highway 87. It is also part of our Court settlement Agreement.

You mentioned the special situation of the IDFG and their new plan to use water out of the lake. It's my understanding they plan to pump water from the lake up into the spawning trough and egg gathering building? which will mix with the 2 cfs water from Hatchery Creek and run back into the lake. The only time they would need the water would be March and April.

Question: Is this their plan?

Question: If NHLHA is using it's water in the Water Bank while it's not rented and the IDFG has a beneficial use, couldn't they still use their Hatchery Creek portion to pump back up from the lake if needed? If it is rented, what are their options?

Question: Can you find out when the IDFG will give the NHLHA the "Quit Claim Deed" that was part of our agreement to settle the court case?

Thanks so much for your help!

Lana Esplin

On 2/14/2014 9:38 AM, Keen, Shelley wrote:

Ms. Esplin;

I have reviewed the water right files and can provide the following responses to the questions you put forth in your February 11, 2014, email.

Q.) Does the IDFG have to follow the rules other water users follow?

A.) Yes, IDFG must comply with the laws and rules of the State of Idaho. IDWR is still waiting to hear from the Idaho Department of Fish and Game (IDFG) concerning the completion of its transfer. We will let you know when we have received that confirmation. While Idaho Code § 42-222 provides for forfeiture of a water right after five years of non-use, there are several defenses against forfeiture. One of these defenses is to place the water right into the Water Supply Bank, as you know. Forfeiture also is not typically found when a water user wants to exercise its water right, but there isn't adequate water at the water source to supply the water right.

Q.) How can the IDFG use the water if the measurements for two years show the water isn't there?

A.) According to the conditions of Water Right 21-2100, IDFG can't divert more water from Henrys Lake than is provided by Pittsburg Creek. However, the natural unavailability of water does not result in forfeiture, as discussed above. If Pittsburg Creek were to flow 6.00 cfs or

more at IDFG's old point of diversion on Pittsburg Creek and deliver that amount into Henry's Lake, IDFG would have the right to divert up to 6.00 cfs from the lake.

Q.) Since Henry's Lake Station has been an egg taking station for several years, shouldn't the IDFG application for a water right transfer have listed a "change of use" from "Fish Propagation" to "Egg Gathering?"

A.) IDWR doesn't usually distinguish among the various stages of rearing fish stock. Water rights for all or any part of the process of rearing fish are usually termed Fish Propagation.

I would also like to touch on your statement that "our water can not be used by the IDFG when it is in the water bank." When a water right is placed in the Water Supply Bank, someone must rent that water right from the Water Supply Bank in order to exercise it. If no one rents the water right, then the water in the stream is available to junior appropriators for use in accordance with their water rights. There are only two water rights authorizing diversion from Pittsburg Creek. North Henrys Lake HOA holds the senior right (21-10015 with a 1904 priority date). IDFG has the junior water right (21-2100 with a 1948 priority date). If the HOA is not using its right and it is not rented by someone else, then IDFG is entitled to use the water pursuant to its right. The Pittsburg Creek situation is different than most because IDFG is not actually diverting directly from the creek. Its transfer allows it to divert from Henrys Lake. Therefore, if the HOA is not diverting water and its right is not rented from the Water Supply Bank by someone else, all the Pittsburg Creek water will flow downstream and into the lake, where it can be diverted pursuant to IDFG's water right.

Based on these circumstances, it seems to me that the HOA is in a nearly ideal situation. It has the most senior water right. Consequently, when it needs to divert water, it cannot be deprived of water by another water user. When it does not need or want to divert water, all the water in Pittsburg Creek will flow downstream and into Henrys Lake. Only then may it be diverted by the junior water right holder, IDFG. Thus, enjoyment of the natural amenity of water flowing in the creek is possible.

I hope I answered all of your questions. Please don't hesitate to contact me if you have any future concerns.

Sincerely,

Shelley Keen
Idaho Department of Water Resources
Shelley.Keen@idwr.idaho.gov
208-287-4947