

MEMORANDUM

DATE: March 22, 2013

TO: Gary Spackman

FROM: Shelley W. Keen *SWK*

RE: Ownership Change Notice Submitted by Gertrude Day for Water Right 98-7193

Issue

Senator Keough asked the Department to review its decision not to process an ownership change notice submitted by Gertrude Day for Water Right 98-7193. Gertrude Day's parcel description does not match the place of use listed on the water right license. However, the license may have been issued with an incorrect place of use description.

Background

On April 11, 1977, Richard and/or Sharlene Grantham ("Granthams") applied to the Department to appropriate 0.20 cubic feet per second ("cfs") from an unnamed spring in Government Lot 2, Section 3, Township 64 North, Range 2 East, for domestic, irrigation, and stockwater purposes. The proposed place of use was in Government Lot 2 (SW $\frac{1}{4}$ NE $\frac{1}{4}$), Section 3, Township 64 North, Range 2 East. Government Lot 2 actually corresponds to what would be the NW $\frac{1}{4}$ NE $\frac{1}{4}$ in a regular section. The map submitted with the application shows the proposed point of diversion and place of use clearly within Government Lot 2, but the square symbol which seems to depict the domestic use is close to the line between Government Lot 2 and the SW $\frac{1}{4}$ NE $\frac{1}{4}$. The Department assigned number 98-7193 to the application ("application").

On June 23, 1977, the Department issued permit 98-7193 ("permit") as proposed in the application. Richard Grantham submitted a proof of beneficial use statement for the permit on April 14, 1982.

In 1988 a Department field examiner conducted an examination to verify the beneficial use of water established in connection with the permit. The field examiner was accompanied by John Heller, whom he identified as a renter. The field examiner found an unnamed spring in Government Lot 2, Section 3, Township 64 North, Range 2 East. The spring provided a supply of domestic water to a house. The examiner's system diagram shows the house to be located almost due east from the spring. The examiner's map depicts the domestic use southeast of the spring, just south of the line dividing Government Lot 2 from the SW $\frac{1}{4}$ NE $\frac{1}{4}$. The water right file contains two photographs, both apparently taken by the field examiner. One photograph shows a home with a green metal roof and is labeled "Place of use". The other photograph, labeled "Point of Diversion", shows a small pool of water with one inch PVC pipe leading away.

On September 19, 1989, the Department issued Water Right License 98-7193 ("water right" or "right") to the Granthams for the diversion of water from an unnamed spring for domestic use. The licensed point of

Memo to Gary Spackman about Right 98-7193
March 22, 2013
Page 2

diversion is Government Lot 2, Section 3, Township 64 North, Range 2 East. The licensed place of use is the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East.

On July 30, 2003, the Department received a *Notice of Change in Water Right Ownership* from John T. Day and Sharon L. Day (“Days”) for the water right. To support their ownership change notice, the Days submitted a warranty deed conveying two tracts of land from the Granthams to them. Both tracts are in Government Lot 2, Section 3, Township 64 North, Range 2 East, which does not match the licensed place of use. Nevertheless, on August 1, 2003, the Department acknowledged receipt of the Days’ ownership change notice.

On July 2, 2012, the Department received a *Notice of Change in Water Right Ownership* (“notice”) from Getrude Day for Water Right License 98-7193. To support her notice, Gertrude Day submitted three quitclaim deeds, each describing the same parcel of land, which is further described as a portion of the two tracts conveyed in the warranty deed from Granthams to Days. The first quitclaim deed -- dated June 30, 2004 -- conveys the interests of John T. Day and Sharon L. Day in the parcel to Andy L. Armes and Trudy Day-Armes. The second quitclaim deed -- dated August 18, 2004 -- appears to accomplish the same objective as the first quitclaim deed, although the property legal description might be slightly altered. The third quitclaim deed released Andy Armes’s interest in the same parcel to Gertrude Day (aka Trudy Day-Armes). On July 12, 2012, the Department returned the notice to Gertrude Day because the parcel described in the quitclaim deeds is in Government Lot 2, Section 3, Township 64 North, Range 2 East, whereas the licensed place of use is in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East.

On August 2, 2012, Eric Davis (“Davis”) of the Department met with Gertrude Day at her home to investigate the water use under the right. The photograph Davis took of Getrude Day’s home that day shows the same home photographed by the field examiner in 1988. The home now has a roof extension, perhaps a carport, which was not in place in 1988, and the green metal roof has been replaced by a gray metal roof. In the Davis photograph, a large lawn lies to the right of the driveway leading to the house. Recent aerial photography available to the Department shows a house fitting this description -- gray roof, lawn, roof extension -- in Government Lot 2, Section 3, Township 64 North, Range 2 East, just north of the line separating it from the SW $\frac{1}{4}$ NE $\frac{1}{4}$. A Global Positioning System point collected by Davis during his visit corresponds to the location of Gertrude Day’s home. Tax parcel ownership information available to the Department indicates the house is on a lot owned by Gertrude Day. Davis found that Gertrude Day’s house receives its domestic water supply from a spring located northwest of the house.

The recent aerial photography also shows a house approximately 200 feet southwest of Gertrude Day’s home. This house is located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East (the licensed place of use) on a parcel owned by Williams Trust. This house does not appear on 1992 aerial imagery available to the Department. Another house lies a little further to the southwest, approximately 770 feet from Gertrude Day’s house, on a parcel owned by Richard Villelli (“Villelli”). The Villelli home may have existed in 1992.

Conclusion

The field examiner’s photograph and Eric Davis’s photograph depict the same house -- Gertrude Day’s house -- as the one receiving water pursuant to Right 98-7198. However, Gertrude Day’s house is in Government Lot 2, Section 3, Township 64 North, Range 2 East, whereas the field examiner said the

home to be licensed is in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East. The field examiner worked with a 1:24,000 scale topographic map. His ability to draw the quarter-quarter lines on the map was limited. Consequently, his location for the home receiving water under Right 98-7198 was imprecise. Since the house on the Williams Trust parcel did not exist when the field examiner confirmed the water use under Right 98-7198, it could not have been the domestic use confirmed by the examiner. The Villelli home is in the licensed place of use and, theoretically, could have been the licensed domestic use. However, its distance from the line separating Government Lot 2, Section 3, Township 64 North, Range 2 East, from the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East, makes it unlikely. In all likelihood, the only house in the area that could have been the established place of use was the house now owned by Gertrude Day.

Recommended Course of Action

At first impression, the correct course of action would appear to be to issue an order correcting the place of use on the license and acknowledging Gertrude Day's ownership of the water right. However, correcting a license can be problematic for a couple of reasons. First, it is possible that the property owners in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East, particularly Williams Trust and Richard Villelli, have researched the water right records and come to believe that Right 98-7193 is appurtenant to their land. Second, the Department has a longstanding policy of limiting license corrections to clerical errors and avoiding license corrections based on "improved methodology for referencing and displaying the location, which results in a more accurate description of the same physical location." (Transfer Memo 24, p. 5) The Department's concern has been that it could be overwhelmed by requests to correct longstanding licenses that were based on the best methods at the time they were issued. As a consequence of these two concerns, the Department's stated policy for correcting places of use is:

see "Refined Descriptions"

The department will not initiate an enforcement action against the water right owner due to the discrepancy between the water right record and the referenced location if the discrepancy is created by better methodology and is not due to a change in physical location. However, if the water right owner wishes to correct the water right record, an application for transfer or an appropriate amendment will be required, as previously described for correction of errors. (Transfer Memo 24, pages 5-6)

The stated policy provides an administrative avenue for the right owner to pursue a correction and for others who may be affected by the change to become involved in the process.

The dilemma, in this case, is that Gertrude Day cannot pursue a change to the right because the Department will not recognize her ownership of it. There are at least three possible ways out of the dilemma:

1. First would be to acknowledge Gertrude Day's interest in the water right and allow her to file an application for transfer if she wants to change the place of use in the water right record. Requiring a transfer application to change the record would be in accordance with the stated policy. Also consistent with the policy, if Gertrude Day chose not to file a transfer application, IDWR would not pursue an enforcement action against her for using water at the "wrong" location. If a transfer were to be filed, anyone believing they have an interest in the right, including Williams Trust or Villelli, could protest the transfer.

Memo to Gary Spackman about Right 98-7193
March 22, 2013
Page 4

2. The second way out of the dilemma would be to diverge from the stated policy by issuing an order to correct the place of use on the license. Since Gertrude Day's ownership change notice matches the correction proposed for the license, her ownership of the right could be recognized in the corrected license. If this option is pursued, Williams Trust and Villelli should be notified of the order changing the license so they can request a hearing if they believe the water right is theirs.
3. The third way out of the dilemma would be for Gertrude Day to file an application for permit to establish a new water right with the place of use in Government Lot 2, Section 3, Township 64 North, Range 2 East. Since there is very little competition for water in Basin 98, the difference in priority date between Right 98-7193 and a new right would be inconsequential.

My recommendation would be option 1 because it acknowledges Gertrude Day's ownership of the right, which is what she set out to accomplish, while remaining consistent with the Department's stated policy for changing legal descriptions on water right licenses.

Vicinity of Water Right 98-7193

