

Keen, Shelley

From: Keen, Shelley
Sent: Tuesday, October 09, 2012 4:34 PM
To: 'Vonde, Ann'
Cc: Peppersack, Jeff
Subject: RE: Water Supply Bank Application Question

Ann,

I finally got a chance to review the IDOC water right files to try to answer your questions. Sorry it took so long.

After reviewing the files, it seems like non-use of the irrigation portions of the IDOC rights could subject those portions of the rights to partial forfeiture. I could probably use some help with case law here, but it seems like continued use of the municipal components of the rights would not necessarily prevent partial forfeiture of the irrigation components. IDWR is not seeking to find forfeiture of water rights, but the agency would have to respond if it received some kind of pleading or motion alleging forfeiture.

The Water Supply Bank may or may not be an appropriate choice for protecting the irrigation components of these rights from forfeiture. It depends on how the municipal components of the rights are being exercised. Before providing an explanation, however, it's probably a good idea to clarify how the rights can be used. Contrary to what I first thought, it's clear that that irrigation can occur independent of the municipal use. IDWR believes the definition of municipal use in Idaho Code § 42-202B(6) does not include agricultural irrigation. Therefore, the limitations on the use of municipal water for irrigation are intended to prevent the direct application of water diverted under the municipal components of the rights to agricultural land. In other words, IDOC can't enlarge the stated irrigation use and assert that the municipal components of the rights allow irrigation of agricultural land directly. However, if water is diverted for municipal purposes, it can be applied to agricultural land after its use in the prison facilities. If the prison facilities (and the municipal use) were to disappear, the rights could still be used for irrigation, up to the irrigation limits described on the controlling documents. It is this independence of the two authorized uses that leads me to believe the irrigation components could be subject to partial forfeiture while the municipal components are still in use and protected.

With that understanding in mind, I think I can answer your question about putting the irrigation components of the rights into the Water Supply Bank. Let's use Right 63-3487 as an example. The total diversion rate is 5.4 cfs, and the authorized diversion rate for the municipal use is also 5.4 cfs. The authorized irrigation rate is 2.8 cfs. However, while the irrigation use can occur independently from the municipal use, the irrigation diversion rate of 2.8 cfs is an alternative use of part of the 5.4 cfs; it is not additive. Therefore, any irrigation diversion rate leased into the Water Supply Bank would have to be subtracted from the 5.4 cfs available for municipal use. IDWR would be reluctant to accept irrigation acres into the Water Supply Bank without the corresponding diversion rate because any renter would have to divert the water at some rate, which would result in enlargement of the decreed water right. The bottom line is that IDOC could only lease the irrigation component of Right 63-3487 into the Water Supply Bank if it is willing to forego the corresponding amount of municipal diversion rate. If IDOC isn't using the municipal component of its water right to its full authorization, then leasing the irrigation component of the right to the Water Supply Bank may be an option. The same holds true for Right 63-7025.

The analysis for Right 63-12296 is slightly different because most of the irrigation rate is additive. The irrigation component of Right 63-12296 could be leased to the Water Supply Bank by giving up only a small part of the municipal diversion rate. Similarly, most of the irrigation component could be leased to the Water Supply Bank without giving up any of the municipal water use.

If the Water Supply Bank isn't a viable option to prevent forfeiture, then what options are there? One option would be to file a Request for Extension of Time to Avoid Forfeiture pursuant to Idaho Code § 42-222(3). The limitation of this

approach is that IDOC would be required to resume the irrigation use within five years. (Other defenses to forfeiture, such as enrollment in the Water Supply Bank, may trump the resumption requirement. We are not sure.) Another option is to look at whether the forfeiture protection afforded by Idaho Code § 42-223(3) applies. If IDOC is not irrigating to the full extent of the rights because the land application of municipal wastewater is sufficient to cover some of the beneficial use, then Idaho Code § 42-223(3) may apply. Idaho Code § 42-223 may describe other applicable defenses to forfeiture, depending on IDOC's particular circumstances. If you haven't yet, it may be useful to take a look.

Call or email if you have other ideas or would like to talk it over some more. It seems like a pretty complex scenario. Additional facts could make a difference.

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From: Vonde, Ann [mailto:ann.vonde@ag.idaho.gov]
Sent: Wednesday, October 03, 2012 1:44 PM
To: Peppersack, Jeff; Keen, Shelley
Subject: Water Supply Bank Application Question

Hello,

I am working on some water supply bank applications for the Idaho Department of Correction. They have several water rights that they would like to place in the water bank to preserve them from forfeiture. IDOC has three water rights that have both Irrigation and Municipal listed as the purpose of use:

- (1) 63-3487: Irrigation (2.8 cfs), Municipal (5.4 cfs), Total Diversion 5.4 cfs.
- (2) 63-7025: Irrigation (3.38 cfs), Municipal (.5 cfs), Total Diversion 3.38 cfs.
- (3) 63-12296: Irrigation (0.9 cfs), Municipal (4.23 cfs), Total Diversion 5.0 cfs

Each of the rights contains a remark stating the water may be used for irrigation on the prison grounds and may only be used for irrigation on agricultural lands if it is first used in the prison facility.

I am wondering whether these rights need to be placed into the water supply bank to keep them from forfeiture. Is the municipal portion of these rights sufficient to keep them secure? Or do I need to put the irrigation portion of the rights into the bank? I'd appreciate any insights you have. Please let me know if you have any questions or need additional information

Thanks,

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