

Merritt, Allen

From: Jones, Doug
Sent: Friday, October 07, 2011 11:33 AM
To: Spencer, Nick
Cc: Merritt, Allen
Subject: RE: 47-2137 (Meyers) and 47-15262 (Christiansen)

Thanks for your deep thoughts on the matter. It is a paradoxical conundrum.

Not to sound defensive, but.... As I think I've said earlier I did not look at the history of everything when I made the ADR on the amended claim. It never dawned on me that there was a stacking issue. The original recommendation was not objected to and was actually decreed when it was pulled back and amended to correct the claimed QQs to describe the 2 QQs west of the offending POU.

I just wish the Christiansens would have hired an excellent attorney to combat the convoluted process that Creamer has woven. There isn't even an objection filed. I would wish that Mike had the responsibility to forward settlement alternatives well before the sit-down so that no one is on the spot or blindsided. After all, they are the "late comer" to the table.

Since the license isn't regulated by a water master yet there has never been curtailment and so no quantification of the supplement is possible. If it is indeed true that the 15262 right was never used on the hill (2137 ditch delivers to the top of it) until Christiansen installed a pump in the stream at the foot of the hill, then there is no stacking anyway.

Oh well. Thanks again Nick.

Doug

From: Spencer, Nick
Sent: Thursday, October 06, 2011 4:17 PM
To: Jones, Doug
Subject: FW: 47-2137 (Meyers) and 47-15262 (Christiansen)

Hi Doug.

Based on the comments you made below I am re-thinking the proposal I made for how to unstack the rights. It looks to me like what was done in the Basin 32 situation would no longer be allowed under Transfer Memo No. 24. Assuming, without benefit of clarification, that what you are saying in your response to my proposal is that you do not believe the unstacking can be done without benefit of a transfer—either per 42-222 or per the accomplished transfer statute—you raise a very interesting point: does IDWR have any broader a scope of authority in the SRBA to remediate problems such as stacking that were created at least in part by IDWR's SRBA recommendations than it has to remediate problems such as stacking through its administrative transfer process? Personally I think such an argument can be made, but I know it is a murky area. (Jo Beeman's being an advocate of that position doesn't help to clarify it any.) Since you and Allen are uncomfortable with the proposal I made I am fine with instead proffering the idea of resolving the stacking problem through splitting the POU between the two rights.

I don't suppose either side will be enthused with the proposal, but it may be the better choice for the Christiansen side since the alternative they face is Mike Creamer prosecuting his motion to alter and amend and overturning IDWR's recommendation of 15262 by proving that Christiansen never used the 15262 water on the south parcel until after Mulberry had purchased 2137 (something which Mike says he can prove). Keeping part of the 15262 water on the south

parcel is better for them than losing all of the right on that parcel. I wonder if Meyers also will be satisfied with half a loaf, or if he will instead decide to take it to trial to see if he can get the entire loaf.

In addition I suspect that at the settlement meeting next month Mike will want to talk about other possible ways to unstack the rights. In the past I know Jeff has talked about allowing unstacking by quantifying the annual use attributable to the supplemental right. That seems to me to be a hard thing to figure out, but I know that Jeff has talked about it. Have Allen and you had any experience in applying that method of unstacking? Jeff also has talked about limiting diversion under the supplemental right to only when the primary right has been cut per a priority call. Do you think that approach has any merit here?

Please let me know your thoughts. Thanks. NBS

From: Spencer, Nick
Sent: Tuesday, October 04, 2011 10:53 AM
To: Jones, Doug
Subject: RE: 47-2137 (Meyers) and 47-15262 (Christiansen)

Doug, I fail to understand the distinction you point to between this situation and the Basin 32 situation. There is no accomplished transfer here. In the beginning there was the license. Then, per your recommendation, the BU right was developed in 1947. That right was developed in part on top of the licensed right, which means that when it was developed it became the supplemental right on the parcel with the license. Then the license was severed, and is in the process of being moved. Whether it has been legally moved or not yet, it has been severed from the underlying acres so Christiansen can't use it. The BU right therefore becomes the only remaining, i.e. the primary, right but to prevent injury from the unstacking the priority date for it must be advanced. Are you saying that this unstacking can only occur as part of the transfer proceeding involving the licensed right, and that—while a similar unstacking was allowed in the Basin 32 subcase—present transfer guidelines would now prohibit it? NBS

From: Jones, Doug
Sent: Tuesday, October 04, 2011 10:26 AM
To: Spencer, Nick
Cc: Merritt, Allen
Subject: RE: 47-2137 (Meyers) and 47-15262 (Christiansen)

Nick,

The example right you pointed to, 32-2135, was a stacked GW right with a senior SW. It was then unstacked and used as a primary right in 1975 and the priority was advanced in the transfer to that date by Order.

This circumstance is different in that an accomplished transfer can't be asserted. An unstacking would have to be authorized by transfer. Allen's feeling is that this would be favored under the present Transfer Processing Guidelines. The senior right holder's predecessor is not without fault in not pursuing the transfer, not pursuing objection to Christiansen's original recommendation, and the current owner in not filing an objection.

Allen's and my conclusion is that both rights be reduced (split the baby). I don't know if new water right apps could be processed due to moratorium or not.

The source of the water in the channel that they both appropriate is seep, drain and waste water. It is drier, but not dry, early in the year and it is water logged by late season. The protestant in the transfer that is held up may not agree to let them have "New Water" rights, anyway.

Thanks,

Doug

From: Spencer, Nick
Sent: Monday, September 26, 2011 5:53 PM
To: Jones, Doug
Cc: Merritt, Allen
Subject: 47-2137 (Meyers) and 47-15262 (Christiansen)

Hi Doug.

I have been spending some time looking into how to resolve the unstacking problem that we are confronted with regarding these rights. It seems to me that it's a real shame that Meyers, who holds the senior, licensed, right, should be the one to be penalized because there is a junior, beneficial use, right stacked on top of the license. Therefore I have been looking at what might be done to the junior right to allow the senior right to be transferred off the south parcel and moved to the north parcel.

Carter believes that the rights could be unstacked if the priority date on the beneficial use right were advanced to prevent injury. He thinks 47-15262 could be split between the Section 21 acres (35 acres) which would keep the 1947 priority date, and the Section 22 acres (29 acres) which would have the priority date advanced to prevent injury. He thinks the earlier priority date that could be assigned to the Section 22 parcel would be 12-12-1989, the day after the date of the deed from Yanke severing license 47-2137 from the Section 22 acres and conveying it to Mulberry. The theory here is that 12-12-1989 is the earliest date that the beneficial use right could have become the primary right on the parcel. An alternative date that could be considered would be 1-22-1991, the date that Yanke conveyed the Section 22 acres to Christiansen. The theory here is that Christiansen could not have begun using 47-15262 as the primary right on the Section 22 acres until he obtained legal title to the parcel. To me it doesn't matter that much which priority date is chosen because—since 47-15262 morphing from the supplemental right to the primary right on Section 22 constitutes an enlargement—it would have to have the standard enlargement subordination remark giving it in effect a 1994 priority date anyway.

Carter has pointed me to precedent for this approach. In the order approving Transfer 5113, of licensed right 32-02135, dated 2-27-1998, Karl Dreher adopted just this approach.

I see several things in this proposal that I like. First, it allows the transfer of the senior right to be completed. Second, it keeps more than half of 47-15262 (the 35 acres in Section 21) as it was recommended in the SRBA. And third, by treating the portion of 47-15262 as having become the primary right on the Section 22 acres after the senior licensed right was severed from them, it recognizes the reality of what likely happened.

Of course the proposal also raises the basic question of what will the Christiansen camp, especially Verla Kinsey, think of the idea? I suppose if they didn't agree to it, we could file ADRs in the SRBA Court splitting 47-15262 as proposed above. Christiansen could then object. And since we couldn't move forward on the Meyers transfer until the matter was sorted out in the SRBA, that would be a real incentive for Mike Creamer to file a response and come into the SRBA proceeding to defend IDWR's virtue, which I suspect he would be willing to do because I am sure Meyers would like this proposal, and he would want the court to adopt it so that he could complete the transfer.

The question of what the Christiansen camp would think of this proposal raises in my mind a question I have for you: in the grand scheme of things on Rock Creek, I am presuming the 1947 priority date presently recommended for 47-15262 makes it a pretty junior right. Is 1947 such a junior priority date, that for practical purposes it doesn't matter if the

priority date is advanced to 1994: the right won't get filled either way? Or, if as Verla Kinsey says, there is plenty of water, does the difference between 1947 and 1994 even matter? Will the right get filled anyway?

I'd very much appreciate your thoughts on this.

Thanks,
NBS