

Robertson, Jean

From: Keen, Shelley
Sent: Wednesday, June 20, 2012 1:09 PM
To: Merritt, Allen; Robertson, Jean
Subject: RE: O'Gara Transfer #76658
Attachments: DOC.pdf

Jeanie and Allen,

I've scanned and attached some history on the supplemental use conditions, including the 1999 letter from Norm Young to John Rosholt. I haven't looked at the O'Gara transfer, but I think we could probably craft conditions that identify which rights are supplemental and which are not.

Shelley

From: Merritt, Allen
Sent: Wednesday, June 20, 2012 11:36 AM
To: Keen, Shelley
Subject: FW: O'Gara Transfer #76658

FYI

From: Paul Arrington [<mailto:pla@idahowaters.com>]
Sent: Wednesday, June 20, 2012 11:17 AM
To: Robertson, Jean
Cc: Merritt, Allen
Subject: RE: O'Gara Transfer #76658

We will be filling a petition for reconsideration today.

Though, Shelley's observation is wrong. For example, the conditions state that the ground water rights cannot be diverted if the SW is moved from the property. They are supplemental in every sense of the word.

Paul L. Arrington
Barker Rosholt & Simpson LLP
(208) 733-0700 - telephone
(208) 404-9436 - mobile

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From: Robertson, Jean [<mailto:Jean.Robertson@idwr.idaho.gov>]
Sent: Wednesday, June 20, 2012 11:14 AM
To: Paul Arrington
Cc: Merritt, Allen
Subject: RE: O'Gara Transfer #76658

We talked about it at this morning's meeting and he thought he could find a copy of that letter if you want but didn't think it would address your specific question. He basically reiterated the points that Pam made and noted that most SW rights have acre limits within anyway so that GW rights can often still be regarded as primary even with these conditions. Jeanie

From: Paul Arrington [mailto:pla@idahowaters.com]
Sent: Wednesday, June 20, 2012 9:00 AM
To: Robertson, Jean
Subject: RE: O'Gara Transfer #76658

Did you get anything from Shelley?

Paul L. Arrington
Barker Rosholt & Simpson LLP
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From: Robertson, Jean [mailto:Jean.Robertson@idwr.idaho.gov]
Sent: Friday, June 15, 2012 4:00 PM
To: Paul Arrington
Subject: FW: O'Gara Transfer #76658

Paul,
This is an initial response from Pam but we will likely get additional information from Shelley next week...Jeanie

From: Skaggs, Pam
Sent: Friday, June 15, 2012 3:01 PM
To: Robertson, Jean
Cc: Merritt, Allen
Subject: RE: O'Gara Transfer #76658

Jeanie,

Yes, that letter was the basis of these conditions. I can't put my hands on a copy, but I know that the general idea is to preserve ground water for domestic, municipal or other uses that require higher quality of water. In general, the Department of Water Resources believes it is good policy to require continued use of the surface water because:

- It conserves the ground water for other uses that require clean water.
- It minimizes the number of wells, which are potential conduits for ground water contaminants.
- It maintains the long-term economic viability of the surface water providers.
- Because the canals leak, it provides a continued supply of water to recharge our aquifers.

The conditions are applied in transfers where ground water & surface water rights are combined in a common system creating overlapping rights and sources. If the goal is to preserve a separate groundwater use, the rights should be maintained on separate or specific acres without surface water rights.

Pam

From: Robertson, Jean
Sent: Friday, June 15, 2012 11:17 AM
To: Skaggs, Pam
Cc: Merritt, Allen
Subject: O'Gara Transfer #76658

Hi Pam,
We just approved this transfer and had a call from the consultant, Paul Arrington. He wants to know why we put conditions 104 and 065 (must use SW first) on the GW rights? They combined 2 previous PPU's into one super PPU and the GW rights didn't have those conditions on before this transfer. We had them submit a system diagram showing how

everything was co-mingled so I told him that those are the conditions we use in cases like that. He wants to know where it says that? In the transfer memo or what? I looked in the condition code explanations and see that 104 says that it is based on a letter from Norm Young to John Rosholt dated 11/1/1999. Is that what I should tell him our guidance is based on? Jeanie

MEMORANDUM

DATE: November 3, 1999

TO: Norm Young

FROM: Shelley W. Keen *SWK*

RE: Supplemental groundwater conditions

The attached table shows the changes to water right conditions suggested in your 11/1/99 letter to John Rosholt. Before I invest the time to implement the changes for use on future approvals, I want to be sure these changes are exactly what you expect. I think your letter clearly spells out the changes to conditions 079 and 101. After studying your letter, I believe you also addressed conditions 065 and 100, albeit less directly.

In your letter, you tell Mr. Rosholt, "IDWR has not intended to force the right holder to fully exhaust all appurtenant surface water supplies before using groundwater." I believe conditions 065 and 100, which have been placed on many dozens of rights since 1996, leave the impression that IDWR does want the right holder to exhaust surface water supplies before turning to groundwater. Both 065 and 100 say, "... and shall only divert groundwater under this right for irrigation purposes when water from the appurtenant surface water rights cannot be delivered to the right holder." Based on your statement to John Rosholt, I am recommending eliminating that phrase on future approvals. I would, however, like to pose a question about this change.

What criteria are we to use to determine when the owner of a supplemental groundwater right can pump groundwater? Before today, I thought the criteria were pretty clear.

- If the right holder has an adequate supply of surface water available from any source, he or she should not be using groundwater.
- If the right holder has historically needed both surface water and groundwater for a full supply, then both can be used simultaneously.
- Groundwater should not be used exclusively unless there is no surface water available.

These criteria seemed to support a policy of conserving Idaho's groundwater resources by minimizing groundwater pumping and maximizing groundwater recharge through leaky canals. Now I am not sure I could adequately interpret the condition if asked by a right holder.

For your review, I have also attached copies of three memos detailing the history of condition 065. Condition 100 is simply a practical modification of 065 for multiple use rights.

Old Number	Old Text	Old Usage Description	New Number	New Text	New Usage Description
065	The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted under this right and shall only divert groundwater under this right for irrigation purposes when water from the appurtenant surface water rights cannot be delivered to the right holder.	Used statewide on groundwater irrigation uses where overlapping surface water is appurtenant to the place of use. For multiple use rights, use condition 100.	<i>WWW</i> WWW	The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted under this right.	Added 11/3/1999 for use on rights where the irrigation use is to be supplemental to existing surface water irrigation rights. Replaces condition 065. Usually used in conjunction with condition XXX. Use condition YYY on multiple use rights.
079	This right shall not be used if the surface water right(s) appurtenant to the place of use is sold, transferred, leased or used on any other place of use.	Used statewide on groundwater irrigation rights supplementing surface water use. Moratorium remark effective 5/92 and modified 11/30/94. Use condition 101 on multiple use rights.	<i>XXX</i> 101	If the surface water right(s) appurtenant to the place of use is sold, transferred, leased or used on any other place of use, this right to divert groundwater shall not be used without an approved transfer pursuant to Section 42-222, Idaho Code, or approval of the Department, if a transfer is not required.	Used statewide on groundwater irrigation rights supplementing surface water use. Replaces approval condition 079 effective 11/3/1999. Usually used in conjunction with condition WWW. Use condition ZZZ on multiple use rights.
100	The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted for irrigation purposes under this right and shall only divert groundwater under this right for irrigation purposes when water from the appurtenant surface water rights cannot be delivered to the right holder.	Added 1/21/1999 for use on multiple use rights where the irrigation use is to be supplemental to existing surface water irrigation rights.	<i>YYY</i> 20 YYY	The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted for irrigation purposes under this right.	Added 11/3/1999 for use on multiple use rights where the irrigation use is to be supplemental to existing surface water irrigation rights. Replaces condition 100. Usually used in conjunction with condition ZZZ.
101	This right shall not be used for irrigation purposes if the surface water right(s) appurtenant to the place of use is sold, transferred, leased or used on any other place of use.	Added 1/21/1999 for use on multiple use rights where the irrigation use is to be supplemental to existing surface water irrigation rights. Usually used in conjunction with condition 100.	<i>ZZZ</i> 105 ZZZ	If the surface water right(s) appurtenant to the place of use is sold, transferred, leased or used on any other place of use, this right to divert groundwater shall not be used for irrigation purposes without an approved transfer pursuant to Section 42-222, Idaho Code, or approval of the Department, if a transfer is not required.	Added 11/3/1999 for use on multiple use rights where the irrigation use is to be supplemental to existing surface water irrigation rights. Replaces condition 101. Usually used in conjunction with condition YYY.

MEMORANDUM

To: Jim Johnson
From: L. Glen Saxton 
RE: REVISED CONDITION OF APPROVAL
Date: February 13, 1996

The director recently reviewed a couple of Recommended Orders that I prepared and asked that we change one of the conditions of approval which we use.

More specifically, we often use the following condition:

The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted under this right.

We need to add language to the condition so it will read as follows:

The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted under this right and shall only divert groundwater under this right when water from the appurtenant surface water rights can not be delivered to the right holder.

Please make appropriate changes in our computer based conditions.

c: Norm Young

MEMORANDUM

Date: July 5, 1995
From: Jim Johnson
To: Shelley Keen
Subject: Modified Condition

=====

I have added to the conditions table the following condition per the attached memorandum dated June 23, 1995. Please note the number and advise your people.

Condition 65

The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted under this right.

Shelley -

M E M O R A N D U M

DATE: June 23, 1995

TO: Norm Young

FROM: Shelley W. Keen

RE: Condition on Supplemental Groundwater Rights

=====

As you directed, we are using the following condition on licenses for supplemental groundwater rights.

The right holder shall use the full allotment of appurtenant surface water rights, to the extent they are available, in conjunction with groundwater diverted pursuant to this right.

We are also using this condition on new permits in open basins, such as the Boise River and Payette River basins. Glen has expressed some concern, however, about the clause "to the extent they are available" in the condition. While we interpret the statement to mean that the surface water must be used until it is not available due to a priority cut, it may be possible for a user to interpret the clause differently.

I would prefer not to use two versions of the condition. Therefore, I propose that we simply drop the clause from the condition.



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

November 1, 1999

John A. Rosholt
Rosholt, Robertson & Tucker, Chartered
P.O. Box 1906
Twin Falls, Idaho 83303-1906

Re : Permit Condition #4 - 36-08220H

Dear John:

Thank you for your letter of October 19, 1999, providing additional thoughts on the effect of Condition #4. I had to read the condition several times with your concerns in mind to appreciate what you are saying. This is probably because IDWR takes it as axiomatic that canal companies and irrigation districts have exclusive control over the movement of water within their authorized places of use. I have always read the phrase "without the approval of the Department" in Condition #4 as referring to the ground water right being permitted or licensed. When read to refer to the underlying surface water right, I can understand your concern. IDWR will revise the wording of the condition to address your concern.

The wording you suggest for Condition #3 and #4 raises some questions. IDWR has not intended to force the right holder to fully exhaust all appurtenant surface water supplies before using ground water. A user may have stored water or other surface supplies that he can make better use of later in the season. Condition #3 as used by IDWR simply requires the full use of the surface water to the extent it is available in conjunction with the use of ground water. For this reason, I do not propose to change the wording of Condition #3 from that we have been using.

Condition #4 will be revised as follows:

"If the surface water right(s) appurtenant to the place of use is sold, transferred, leased or used on any other place of use, this right to divert ground water shall not be used without an approved transfer pursuant to Section 42-222, Idaho Code or approval of the Department, if a transfer is not required."

John A. Rosholt
November 1, 1999
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With respect to Condition #4, it is not IDWR's intention to put a canal company or irrigation district in the role of monitoring the cessation of use of a ground water right when the surface water right is moved. However, because IDWR does not usually know when canal company or irrigation district water is moved within the authorized place of use, the department's usual methods of enforcement may not be effective. If a canal company or irrigation district is willing to include in their internal procedures a requirement, such as you suggest, to consider whether a ground water right is appurtenant to the land from which surface water is being moved, IDWR can, upon being notified, do a records check and follow up to see that the ground water is not used unless a transfer is approved.

Sincerely,

A handwritten signature in cursive script, appearing to read "Norman C. Young".

Norman C. Young
Administrator
Water Management Division

bcc: Josephine Beeman