

MEMORANDUM

DATE: May 14, 2012

TO: Water Right File 95-467

FROM: Shelley W. Keen *SWK*

RE: Water Supply Bank Lease Application

On February 7, 2008, Dalton Gardens Irrigation District filed an application to lease Water Rights 95-467 and 95-467A to the Water Supply Bank. On February 15, 2011, IDWR returned the application for corrections, and Dalton Gardens Irrigation District resubmitted the application on March 10, 2011. IDWR has not approved the application because of concerns about forfeiture and enlargement of the water rights. In short, IDWR was concerned because Dalton Gardens Irrigation District had not been using the rights to their full extent, and it could not show which acres it would stop irrigating when putting the rights into the Water Supply Bank. While IDWR staff members were correct to be concerned about forfeiture and enlargement, I believe Water Rights 95-467 and 95-467A have a unique history that qualifies them to be leased to the Water Supply Bank anyway.

Water Rights 95-467 and 95-467A were decreed to Hayden Lake Irrigation District for irrigation and domestic purposes. On February 21, 2003, IDWR approved a transfer application acknowledging a change in ownership of the rights to Dalton Gardens Irrigation District, authorizing the new owner to change the points of diversion for the rights, and allowing the new owner to begin using the rights within the Dalton Gardens Irrigation District service area instead of the Hayden Lake Irrigation District service area.

One key question for evaluating whether Rights 95-467 and 95-467A can be leased into the Water Supply Bank is whether they may have been forfeited prior to submitting the lease application. Although Hayden Lake Irrigation District had not been using the rights since 1990 or so, they were not forfeited by Hayden Lake Irrigation District. In its transfer approval order, IDWR stated that Water Rights 95-467 and 95-467A were not forfeited as long as they were "held by" Hayden Lake Irrigation District. Whether Dalton Gardens may have forfeited the rights after it acquired them depends on how the term "held by" is interpreted. On one hand, it could mean that the forfeiture protection was valid only until Dalton Gardens Irrigation District acquired the rights, which apparently happened around October of 2001. (See the 1/14/2002 letter to Allen Beardslee from Robert Wright.) On the other hand, "held by" Hayden Lake Irrigation District could be interpreted to mean appurtenant to the service area of the Hayden Lake Irrigation District. The water rights were appurtenant to the Hayden Lake Irrigation District service area until the transfer in 2003. Since a water right can be used on the lands to which it is appurtenant, even if the water right owner is not the landowner, I think a plain interpretation is that Water Rights 95-467 and 95-467A were not subject to forfeiture as long as they remained

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appurtenant to the Hayden Lake Irrigation District service area. Thus, the period of non-use without protection against forfeiture began when the transfer was approved on February 21, 2003.

As for the duration on the non-use without forfeiture protection, Dalton Gardens Irrigation District submitted its lease application on March 10, 2003, less than five years after the transfer was approved. The timing was crucial for Dalton Gardens Irrigation District because it intended the lease to protect Water Rights 95-467 and 95-467A from forfeiture due to five years of non-use. IDWR typically approves a Water Supply Bank lease retroactive to the date the application was submitted. It could be argued that IDWR did not receive a complete application until March 10, 2011. However, over three years passed before IDWR pointed out the application's deficiencies. When notified, Dalton Gardens Irrigation District acted quickly to correct the deficiencies. Dalton Gardens Irrigation District should not be penalized for the three-year delay caused by IDWR.

With the forfeiture question resolved, the enlargement concern can be addressed as follows. At the time Dalton Gardens Irrigation District filed the lease application, the rights had not been forfeited by Hayden Lake Irrigation District, less than five years had passed since the transfer approval, and the transfer approval contained no deadline for completing the authorized changes. Therefore, Dalton Gardens Irrigation District had valid water rights when the lease application was filed. Dalton Gardens Irrigation District does not have to show the irrigation that will be discontinued to put the rights in the Water Supply Bank because it was not required to have used the rights by the date the lease applications was filed. In fact, it could be argued that the required non-use commenced within the Hayden Lake Irrigation Service Area many years ago

Since the unique history of Rights 95-467 and 95-467A explains why they have not been forfeited and why their lease to the Water Supply Bank will not result in enlargement, these items should not be impediments to processing the lease application and approving it retroactively to the February 7, 2008. The diversion rate issue described in the April 25, 2012, letter from Monica Van Bussum to Dalton Gardens Irrigation District must still be addressed. Assuming Dalton Gardens Irrigation District acts promptly to adjust the proposed diversion rate downward, this item should also not prevent approval of the lease retroactive to February 7, 2008.