

Lester, Steve

From: Lester, Steve
Sent: Tuesday, June 05, 2012 3:50 PM
To: Dana@IdahoWaterLaw.com; Price, Fredric W
Subject: Basin & Range, amended Transfer 77052

Dana & Fred:

Dana called earlier today to discuss procedural matters in this application. One idea was for both of you to send a proposed condition of approval that you agreed on and to ask for IDWR comments to see if the condition could be used to settle the protest.

Subsequently, Fred sent an email to me with option 1 and option 2 proposed conditions. His email also referenced similar examples from several SRBA files. Later, Dana sent an email to me asking if option 1 in Fred's email is an acceptable condition for this transfer.

Copy of option 1 follows.

1.

"The place of use within the SESW and SWSE of S23, T06N, R05W is limited to the north half of those quarter-quarters."
"The place of use within the NWSW of S24, T06N, R05W is limited to the west half of that quarter-quarter."

Although this is a very informal way to conduct protested matters, it appears the applicant and protestant can agree on option 1 wording. A protest withdrawal contingent upon inclusion of such a condition could be used by IDWR to issue a transfer approval. I suggest this process:

A settlement agreement with the exact wording of a condition(s) both parties agree on.
Settlement agreement signed by both parties.
Original settlement agreement – not email – provided to this office.

This would allow IDWR to issue a transfer decision shortly thereafter. Today's email exchange is an exception to my prior request to avoid continued emails copied to, or directly addressed to, IDWR as part of the protest process. Please confine your emails to IDWR in this matter to just those already sent today. I would be glad to discuss procedural matters in individual &/or conference phone calls as an alternative to more emails. Thank you for your understanding in this regard.

Steve Lester
Water Rights Supervisor
IDWR Western Region
208-334-2190

*Possible protest settlement
in progress*

Lester, Steve

From: Hofstetter Law Office [Dana@IdahoWaterLaw.com]
Sent: Tuesday, June 05, 2012 3:09 PM
To: Lester, Steve
Subject: Fwd: RE: Basin and Range - Amended Transfer 77052 - 4072.1
Attachments: Where-can-it-be-used-remarks.pdf

Steve:

Would IDWR accept the language in the proposed conditions listed in Option 1 below?

Thank you,
Dana

----- Original Message -----

Subject: RE: Basin and Range - Amended Transfer 77052 - 4072.1
Date: Tue, 5 Jun 2012 13:12:41 -0600
From: Price, Fredric W <fwprice@blm.gov>
To: Lester, Steve <steve.lester@idwr.idaho.gov>
CC: dana@idahowaterlaw.com <dana@idahowaterlaw.com>, Negri, David (ENRD) <david.negri@usdoj.gov>, Briggs, Anne L <anne.briggs@sol.doi.gov>

Steve,

RE: Transfer 77052, Basin and Range Resource Company, LLC

The parties are to the point where we need to know what language IDWR would except in a clarifying condition which further limits the use of water within individual legal land descriptions listed under the place of use element. I have endeavored to find examples of remarks employed in the SRBA for further describing legal land descriptions (See below). Hofstetter prefers #1 below. Is there something else that IDWR will accept if these examples are unacceptable?

1.

"The place of use within the SESW and SWSE of S23, T06N, R05W is limited to the north half of those quarter-quarters."
"The place of use within the NWSW of S24, T06N, R05W is limited to the west half of that quarter-quarter."

2.

"The use of water within SESW and SWSE, S23, T06N, R05W is limited to the north half of those quarter-quarters."
"The use of water within NWSW, S24, T06N, R05W is limited to the west half of that quarter-quarter."

Fred

FURTHER SUBDIVISIONS:

02-10200, Ace Black Ranch:

"The use of water within NWNE, S28, T05S, R05E is limited to the west half of that place of use."

"The use of water within Lot 2, Lot 3, and SENE, S01, T06S, R04E; and Lot 6 and SESW, S06, T06S, R05E is limited to the Northern Bank."

75-10592, Park:

“The use of water is limited to the SE1/4 of the described place of use.” There was only one POU.

33-00101A, Pancheri:

“The use of water within T07N, R29E, S30, NESW does not include federal land.”

74-14980, Whittaker:

“The use of water within SWNW, S27, T15N, R26E is limited to the E1/2 of the NE1/4 of that place of use and does not include federal public land.”

HOMESTEAD ENTRY SURVEYS:

43-00228, 43-00229, Ottley:

“The use of water under this right is limited to Homestead Entry Survey 206”

65-22486, 65-22487, Goetsch:

“The place of use lies within HES 404.” There is only one POU.

74-00252, Bean:

“Place of use is within HES 151.” There are 6 POUs.

“Place of use does not include federal public lands.”

74-00258, Bean:

“Place of use is within HES 231.” There are 5 POUs.

“Place of use does not include federal public lands.”

74-00263, 74-00822, Bean:

“Place of use is within HES 232.” There are 6 POUs.

“Place of use does not include federal public lands.”

74-00268, Bean:

“Place of use is further described as HES, 151, HES 230 and HES 231.”

“Place of use does not include federal public lands.”

MINERAL SURVEYS:

79-13605, Haskin:

“The place of use is within Mineral Survey 2427.”

TRACTS:

43-10810A, Fehlman:

“The use of water under this right in the SWNW, S04, T13S, R27E is limited to Tract 37.”

“The use of water under this right in the NESE, NWSE and the SWSE, S05, T13S, R27E is limited to Tract 38.”

DUST ABATEMENT:

27-07121, 27-07452, State of Idaho:

“The use of water for mining purposes is for dust abatement within the place of use described above, and for general mining purposes only within lease boundaries issued by the State of Idaho and the United States.”

From: Lester, Steve [<mailto:Steve.Lester@idwr.idaho.gov>]
Sent: Thursday, May 10, 2012 8:21 AM
To: Price, Fredric W
Cc: Dana@IdahoWaterLaw.com
Subject: RE: Basin and Range - Amended Transfer 77052 - 4072.1

Fred:

While I appreciate your and Dana's efforts to keep IDWR up to speed, it is better to avoid sending emails to this office in a protested matter, either by direct communication such as your 5/9 email or by copy from you and Dana in earlier emails. It is more appropriate for you and Dana to work on this between yourselves and then to submit something in writing (preferably not by email) for IDWR's review. Additionally, IDWR does not engage in "binding assurances" at least during this stage of a protest process. Something in that regard could certainly be discussed in a prehearing conference or similar setting.

It would be most helpful if you and Dana could avoid sending more emails in this matter to this office. Of course, we will make every effort to evaluate any written settlement etc. that you and the applicant come up with. But a more formal method than multiple emails is a more productive approach and more consistent with IDWR Rules of Procedure that must be used for a protested matter.

Thank you for considering these suggestions.

Steve

 Protest procedure
Reminder to parties

From: Price, Fredric W [<mailto:fwprice@blm.gov>]
Sent: Wednesday, May 09, 2012 2:34 PM
To: Lester, Steve
Cc: Dana Hofstetter (dana@idahowaterlaw.com)
Subject: FW: Basin and Range - Amended Transfer 77052 - 4072.1

Steve,

RE: Amended Transfer #77052, 63-03182 et.al

Hofstetter states in her 04-27-11 email that "Recital c is simply an incorrect statement of what I said to the SRBA Court." In order to completely eliminate any "he said she said" discussion, I obtained transcripts of the two Status Conferences and have attached them hereto (specific references below). The statements made by Ms. Hofstetter in the SRBA Court confirm the necessity for BLM's protest.

The standard U42 remark (Place of use does not include federal public lands) is acceptable to BLM, but it is NOT acceptable to include any "refinement on that language to cover this situation of a combined system where many water rights are diverted and applied in a small portion to federal land." Special Master Booth stated during the 11-22-11 Status Conference (Pg 15, line 11 through pg 17, line 2) that he saw no necessity for a modified remark due to Hofstetter's concerns.

I need binding assurances from either IDWR or the applicant that there will be no modification of U42 or any other separate condition which achieves the statements that Hofstetter has made in court. Hofstetter's modification of the Settlement Agreement that I circulated does not satisfy BLM's protest.

Fred

11-22-11 Status Conference: Pg 10, line 4 through pg 17, line 25:

Pg 13, line 13-22: Hofstetter: "...we may need to address the standard language which says something to the effect that this water right shall not be used on federal public land just because the factual circumstances presented by this particular case. I'm not suggesting that we list federal public land, but we may need some refinement on that language to cover this situation of a combined system where many water rights are diverted and applied in a small portion to federal public land."

Pg 14, line 4-7: Hofstetter: "We're certainly committed to the intent of the stipulation; but we need to maybe craft the language to make sure it fits with the factual circumstances."

Pg 14, line 20-25: Negri responds that Hofstetter's suggestion is unacceptable.

Pg 15, line 11 through pg 17, line 2: SM Booth explains that modification of the standard remark is not needed.

Pg 16, line 20-24: SM Booth: "On a year when it is irrigated, I think Idaho water law allows the commingling of water molecules in a common delivery system, and we don't need to figure out precisely which molecules of water originated as water bank water as opposed to private water right water."

Pg 17, line 14-18: Hofstetter: "I just want to make sure that everyone's on board with how this is going to occur in practice and that the language isn't, you know, somehow misconstrued to mean that a separate well has to be drilled, or something of the like, just to divert this other water."

Pg 17, line 20-23: Negri: "...from our viewpoint, the clear, typical language we always use is appropriate and necessary."

04-03-12 Status Conference: Pg 9, line 16 through pg 14, line 20:

Hofstetter is still talking about some modified remark.

From: Hofstetter Law Office [<mailto:Dana@IdahoWaterLaw.com>]
Sent: Friday, April 27, 2012 6:53 PM
To: Price, Fredric W
Cc: david.negri@usdoj.gov; steve.lester@idwr.idaho.gov
Subject: Re: Basin and Range - Amended Transfer 77052 - 4072.1

Fred:

I am not sure what you mean. The Amended Settlement Agreement with my revisions describes the points of diversion on private land 10 acre tracts and includes a remark clarifying that the place of use describes only private ground. Why doesn't this address your mixed quarter-quarter section concerns? This is the same resolution as all the other mixed quarter-quarter section cases BLM has been involved in. You seem to object to the revisions because recital c and paragraph 4 were deleted. (I am not sure though because you don't identify which revisions are unacceptable). Recital c is simply an incorrect statement of what I said to the SRBA Court. Paragraph 4 makes no sense as a water right does not authorize use outside of its place of use.

As I've mentioned repeatedly, this is an urgent matter. This cannot be held up because IDWR might approve Transfer 77052 to allow use of these water rights outside of their described permissible place of use when such an approval would be inconsistent with the very meaning of a permissible place of use. Crops are in the ground and the new wells will be needed before long. BLM previously consented to Transfer 77052. Amended Transfer 77052 simply adds only one additional well on private ground. BLM has no reasonable basis to withhold consent to Amended Transfer 77052, as long as the additional well is also described by its 10 acre private ground tract. What good would it serve BLM if Basin and Range were forced to withdraw its Amended Transfer 77052 and not construct a much needed well this year?

Dana

On 4/27/2012 5:27 PM, Price, Fredric W wrote:
Dana,

Your client's water rights involved in the transfer (63-03182 et al) describe a use of water on private land, BLM's protest was filed to ensure that your client's water rights are limited to use on private land and are precluded from being used on BLM ground. Your statements confirm the necessity for the protest. Your revisions are not acceptable.

Fred

From: Hofstetter Law Office [<mailto:Dana@IdahoWaterLaw.com>]
Sent: Friday, April 27, 2012 5:13 PM
To: Price, Fredric W
Cc: david.negri@usdoj.gov; steve.lester@idwr.idaho.gov
Subject: Re: Basin and Range - Amended Transfer 77052 - 4072.1

Fred:

If the revisions on the attached are acceptable to you, I think we can conclude this. As you will note, the primary revisions relate to comments you indicate I made in SRBA proceedings. I believe you may have misunderstood those comments. I commented that Basin and Range did not want remarks that could be interpreted to preclude use of their wells or water rights on BLM ground pursuant to a LUP and Water Supply Bank rental. Due to the impending irrigation season, your prompt attention to this matter continues to be appreciated.

Please let me know if you have any questions regarding these revisions, thank you,
Dana

On 4/25/2012 4:35 PM, Price, Fredric W wrote:
Attached is a Settlement Agreement that I am willing to enter into in order to resolve BLM's protest.

-----Original Message-----

From: Hofstetter Law Office [<mailto:Dana@IdahoWaterLaw.com>]
Sent: Tuesday, April 24, 2012 6:05 PM
To: Price, Fredric W
Cc: David.Negri@usdoj.gov; Steve.Lester@idwr.idaho.gov
Subject: Re: Basin and Range - Amended Transfer 77052 - 4072.1

Fred:

Perhaps, as you suggest in the Protest an even simpler solution instead of the place of use condition would be to also describe the places of use in the three (3) "mixed" quarter quarter sections in twenty acre private land tracts as follows:

N1/2SESW, S23, T06N, R5W
N1/2SWSE, S23, T06N, R5W
W1/2NWSW, S24, T06N, R5W

Please advise if this would be acceptable to BLM in lieu of the place of use condition.

Thank you,
Dana

solution On 4/24/2012 2:27 PM, Hofstetter Law Office wrote:

Fred:

I received your recent Protest to Amended Transfer 77052. As you may know, Transfer 77052 was in the final stages of processing when it became necessary to add another point of diversion on private ground. The need for this additional well is urgent with the irrigation season about to get underway. It was not expected that the addition of this well would represent a significant change and it was assumed that BLM would consent to this as it had previously provided consent to the original Transfer Application 77052. In reviewing BLM's recent Protest to Amended Transfer 77052, it appears that the BLM Protest can be resolved by describing Wells 2, 3 and 8 by their 10 acre tract locations and by adding a condition stating that "Place of use does not describe federal public lands." Please confirm that with these clarifications, BLM would consent to the processing of Amended Transfer 77052. Your immediate attention this matter is appreciated as crops have been planted and further delay in this matter could cause significant damages.

Thank you,
Dana Hofstetter