

Nelson, Dan

From: Nelson, Dan
Sent: Monday, August 22, 2011 12:34 PM
To: 'rharris@holdenlegal.com'
Cc: Van Bussum, Monica
Subject: RE: Telford Lands LLC letter regarding water bank
Attachments: Basic Approval of plan.pdf

Dear Mr. Harris,

I have reviewed the documents that you sent regarding possible mitigation for the Telford property in 2005 and 2006. I won't be able to discuss this information with Monica until later this week, but I wanted to make you aware of what I found. I will be going on an extended leave after August 31, so I wanted to give you every opportunity to supply any additional information you can acquire before that time.

In my review of this information, I was drawn to the May 27, 2005 letter from Steve Burrell, and Mick Miller's letter on October 18, 2005. In my reading of these letters, the temporary change application received May 13th, 2005 was returned unprocessed, so the Temporary Transfer cannot be considered as being part of an approved mitigation plan. In my review of the Water District files, I found no order recognizing that the 6,110 acre-feet of water described in the Temporary Transfer had been approved as part of a mitigation plan. I am not sure if an official approval notice would be necessary for the non-use of this land to be counted as mitigation, but I will need to find this information out before I can move forward with processing your Water Supply Bank application.

Another issue is that the water rights described in this Temporary Transfer are all surface water rights and do not include the ground water rights supplementing the surface water. The surface water and the ground water are tied to each other, so an equal portion of the ground water rights would have been needed to allow the Temporary Transfer to be approved. That could have been why the Temporary Transfer was returned unprocessed. The return of the unprocessed Temporary Transfer is also a concern.

In all of the Department's Water District 34 records, I could find no description of this Temporary Transfer being used for the mitigation requirement for Water District 34. I did find in the Water District 34 records that recharge was used to mitigate at least a portion of the call on the river. Nick Miller of our Water Distribution staff worked with Water District 34 during this period. Mr. Miller informed me that he believed the mitigation was accounted for on this project through the recharge described in the "2005 Consolidated Basin-Wide Mitigation Plan For Basin 34 Water Users" (a draft copy of this plan is attached to Gary Spackman's 3/18/2005 letter). Gary Spackman will be out of the office for the next several weeks, so I was unable to discuss this situation with him.

I have attached a letter from Gary Spackman dated March 18, 2005 to this email. The letter from Mr. Spackman suggests that if an approved mitigation had not been supplied and subsequent order issued, then the water user would not be allowed to divert any of their ground water rights. Considering the irrigation in 2005 and 2006, it is safe to assume that some sort of mitigation was approved to allow the ground to be irrigated in 2006 after the Temporary Transfer was returned. I couldn't find any orders issued approving a mitigation plan for the Water District, so I can say what was used for mitigation and what was not used for mitigation. I also cannot find any letters approving the mitigation proposed by the Temporary Transfer.

If the non-irrigation of the lands and the non-use of the water rights involved with the Water Supply Bank were approved for use for mitigation, then there must be some form of documentation available to allow them to irrigate in 2006. Unfortunately, I am not able to find it in the Department's records for Water District 34. All of the Department's records for the Water District can be found at:

<http://www.idwr.idaho.gov/WaterManagement/WaterDistricts/default.htm>

Under Water District record search type in the water district number "34" and the year of the records you wish to research.

I will discuss the information you supplied with Monica when she gets back into the office later this week to see if it is sufficient to move forward with the Water Supply Bank lease. If you can supply some type of approval letters or anything that approves the non-use of the 685 acres in 2005, it would strengthen your suggestion that this land was idled for mitigation purposes. Any letters of approved mitigation documents would have also been sent to the watermaster, so the water district may have information that may not have made it into our water district files.

If you can find any additional information, please don't hesitate to contact me.

Daniel A. Nelson
Staff Hydrologist
Planning Bureau
Idaho Department of Water Resources
Telephone # (208) 287-4856
Fax (208) 287-6700 (C/O Dan Nelson)

Sent: Friday, August 19, 2011 4:52 PM
To: Van Bussum, Monica
Cc: Mike Telford
Subject: Telford Lands LLC letter regarding water bank

Monica:

Attached is a letter regarding the Telford Lands LLC water bank application in Basin 34. Let me know if you have any questions.

Robert L. Harris
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Nelson, Dan

From: Rob Harris [rharris@holdenlegal.com]
Sent: Monday, August 22, 2011 11:16 PM
To: Nelson, Dan
Cc: Van Bussum, Monica; Mike Telford
Subject: RE: Telford Lands LLC letter regading water bank

Dan:

Thank you for the follow up email and the letter from Gary Spackman from 2005. The letter you attached lends further support for what we provided in our earlier letter. You are correct that the mitigation plan was ultimately never enforced, however, we do not necessarily agree that it had to have been enforced in order for the forfeiture exceptions to apply.

Based on your attached letter, and the other letters we previously submitted, water users were faced with Department enforcement of the conjunctive management rules. Faced with Department action, it was upon this basis that the Mickelsen acres were not planted or cultivated. The initial letters were sent in March, April, and May of 2005, the last month of which is after planting for grain and potatoes. Gary's letter is an approval of the plan in March, and the previous owner reasonably relied upon the approval of the plan. In fact, the temporary transfer submitted by Mr. Sorensen complies with page 2 of Gary's letter, which talks about approval of a "temporary transfer." This is exactly what Mr. Sorensen did in order to comply with the approved mitigation framework.

At the time the mitigation plan was approved, there were still questions about its implementation. While the water rights listed in the temporary transfer included surface water rights, the Department would likewise not have allowed them to be irrigated with ground water either. In other words, our understanding of IDWR mitigation is non-irrigation of acres, not just non-use of a water source. The delivery call in the Big Lost was based on conjunctive management. Page 5 of the letter states that enforcement of the delivery calls would be based upon "the Rules of Conjunctive Management."

Regarding mitigation, Page 2 of Gary's letter states that "A full 6,110 acre feet must be provided to augment the flows in the Big Lost River, and all ground water users in the Big Lost River Basin must be able to participate in the plan." (emphasis added). In other words, it would not be true mitigation if ground water users could pump their ground water early in the irrigation season when surface water was typically available and still irrigate their full acres—thereby still causing the same consumptive use of water—even though they reduced surface water use. As noted on page 3 of the letter, the presumption was that ground water pumping caused a 13% depletion of surface water flows. In short, because the ground water rights are supplemental to the surface water rights, complete non-irrigation would be necessary in order to be true mitigation. This principle has been in force in recent the recent spring delivery calls involving Thousand Springs.

Our understanding is that the delivery calls were not ultimately enforced because of, as best as I can put it, the potential for civil disobedience. One of the attorneys present during a meeting in 2005 where Gary Spackman talked about the mitigation plan and what would happen if people did not provide mitigation recounted to me (so it is admittedly based on hearsay, but is consistent with what other water users have relayed to me). My understanding at that point was that the water users were told that ground water rights would be curtailed by priority, not because of location, and some water users initially supporting of the call found themselves as potential recipients of curtailment orders because many water users in the Big Lost have supplemental ground water rights to their surface water. The water users thought they could target only certain ground water users. Gary informed them that was not the case, and that water rights would be enforced by priority. When asked how that could be done, Gary initially said that the watermaster would shut off wells or headgates for those that were junior to the cutoff or otherwise did not provide adequate mitigation. The watermaster, Bob Duke, was at the meeting and said he would not follow that order and turn off the wells and headgates. Gary then said that if the watermaster would not do that, he would have the local sheriff do what needed to

be done. The sheriff was in attendance, and he stood up and said he would not do that. As a result, my understanding is that the Department determined not continue forward. Mr. Sorensen, who ran the Mickelsen property at the time, and was present at this meeting, certainly could not have foreseen this result in the springtime when he responded responsibly to orders from IDWR.

In your email, you stated that "If the non-irrigation of the lands and the non-use of the water rights involved with the Water Supply Bank were approved for use for mitigation, then there must be some form of documentation available to allow them to irrigate in 2006," and that "[i]f you can supply some type of approval letters or anything that approves the non-use of the 685 acres in 2005, it would strengthen your suggestion that this land was idled for mitigation purposes." We submit that the documentation to begin irrigating the acres in 2006 was allowed based on the October letter from Nick Miller informing Mr. Sorensen that the temporary transfer was not processed, which Mr. Sorensen understood from follow up conversations was the result of the circumstances discussed above.

Also, while you are certainly entitled to obtain more information about this mitigation plan, it is clear that ultimately the plan was not enforced. We agree with your conclusion in that regard. However, we do not necessarily agree that in order for the forfeiture defense to apply, we had to obtain the specific approval of the non-irrigation of 685 acres. The non-irrigation of those acres was already approved with Gary's letter informing water users that they had to come up with over 6,000 acre feet of mitigation, and he had approved the overall framework to do so. We think this is sufficient to qualify under the statute.

In short, the question really is whether in the context of the a water bank lease application, the Department is justified in not allowing these acres to be qualified as water bank acres because you may consider 2005 as a year of non-use. This necessarily requires the Department to determine whether an exception to forfeiture applies, and the plain language of the statute does not require *enforcement* of a mitigation plan, but only speaks to non use in order to "*comply with the provisions of a ground water management plan approved by the director of the department of water resources*" (italics added). The plan was approved in March of 2005, and Mr. Sorensen complied with the Department's order.

At a minimum, the non-use would certainly be because of a circumstance over which the Mr. Sorensen had no control because he was ordered to come up with a mitigation plan by IDWR. While it is true that the veracity of such an argument under Idaho Code § 42-223 is to be made "on a "case-by-case basis," given Idaho law that makes it clear that forfeiture is "abhorred" and that all inferences should be made against a finding of forfeiture (See, e.g., *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681, 619 P.2d 1130, 1134 (1980) "This Court has frequent stated that 'forfeitures are abhorrent and all intendments are to be indulged against forfeiture.'" (quoting *Application of Boyer*, 73 Idaho 152, 159, 248 P.2d 540, 544 (1952))), we maintain that the acres set forth in the water bank lease application were "used" in 2005, and therefore, this defense to forfeiture applies.

Mr. Telford's intent in 2009 to begin the process to file a water bank lease application was to avoid this very situation well in advance of five years after the beginning of the 2006 irrigation season based upon his understanding of the what was done prior to his purchase of the property. The lease was done to protect these acres from forfeiture under subpart 5 of Idaho Code § 42-223, and we remain concerned about these issues, and hope that this additional information is useful in providing some additional context, and anticipate that you will need to visit with Monica and the Director when they are available to confirm the circumstances in 2005 in the Big Lost River Valley.

If you have any other information, or wish to discuss the matter by phone, do not hesitate to call. Thanks again for your prompt attention to this.

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Cc: Van Bussum, Monica
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Daniel A. Nelson
Staff Hydrologist
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Idaho Department of Water Resources
Telephone # (208) 287-4856
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