

Nelson, Dan

From: Rob Harris [rharris@holdenlegal.com]
Sent: Wednesday, August 31, 2011 4:47 PM
To: Nelson, Dan; Van Bussum, Monica
Cc: Mike Telford
Subject: RE: Telford Water Bank Leases

Dan:

Thanks for your quick review, and your thorough memo, and I'm sorry I didn't get the email back to you before you had to leave. I'll coordinate with Monica while you are out. While I do not know the nature of your need for leave, and shouldn't know, I sure hope it is something fun. If it's not something fun, I wish you the best.

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From: Nelson, Dan [mailto:Dan.Nelson@idwr.idaho.gov]
Sent: Wednesday, August 31, 2011 11:24 AM
To: Rob Harris; Van Bussum, Monica
Cc: Mike Telford
Subject: RE: Telford Water Bank Leases

Rob,

I am going to be out of the office starting tomorrow for the next 4 to 8 weeks. I do not have time to address all of the concerns listed in your email, so I will have to leave that in Monica's capable hands. I did want to mention a couple of them below.

I am not an attorney, so there may be way around this issue. Unfortunately, I can only follow the requirements of Section 10 of Idaho code 42-230 and the Water District 34 Distribution Rule 50.054 that requires that the Temporary Transfer be approved to protect those acres against forfeiture. I tried every way that I could think of, and I simply couldn't find anything that could bring the acres that were irrigated and the acres protected against forfeiture up to the 2124 acre amount from the 2004 irrigation season to the 2009 irrigation season. The latest decree was filed in June of the 2004 and the Water Supply Bank lease was received after the irrigation season in 2009. Therefore, we have to count both the 2004 and 2009 irrigation seasons, which brings the number of years the property was not fully irrigated up to 6 years.

I wish you the best in pursuing this matter, and I wish I could see it through to the end of the process.

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From: Rob Harris [mailto:rharris@holdenlegal.com]
Sent: Wednesday, August 31, 2011 10:27 AM
To: Van Bussum, Monica; Nelson, Dan
Cc: Mike Telford
Subject: Telford Water Bank Leases

Monica:

Thanks for your email, and detailed memo. It took some time for me to review it and research some of the transfers. This has proven to be much more complicated and analytical than I originally thought. Dan obviously did his homework. I think it would be helpful if Mike Telford met with you, Gary, and Dan in Boise when you are available. Let me know if there is a potential time for such a meeting. On the memo itself, I do have a couple of questions and comments on the memo.

1. On page 1, it states that the email in response to the April 25, 2011 deadline was received on June 23, 2011. This is correct, however, Brian Higgs tried to email them and they were caught up in IDWR email server because one of the attachments was fairly large. He tried to email them before that April 25th deadline. Also, my records show that I emailed them again on June 3rd to Monica, and they went through. This is not a big deal, but we did try and respond quickly, and the June 23rd date implies that we were not very responsive.
2. On page 2, you summarize a number of prior transfers for Mike Telford. I was initially confused by the description, but took the time to review them, and think your summary is correct. Water Right No. 34-618 should have been included in the water bank lease. Assuming we provide sufficient information to allow the application to be accepted, we can amend the water bank application and include it.
3. On the year to year acres calculation, could you email us each of the maps? The drop from 1864 to 1691 is surprising. Mike Telford tells me that nothing changed between 2009 and 2010, so we think this may be a mistake, but want to take a look at the maps.
4. I'm not sure it is critical, but on the bottom of page 2, you state that Transfer No. 71254 moved 222 acres to the PPOU of 2124, but I don't think that is correct—or at least I can't see that in the transfer documents. I reviewed the documents, and it appears that the intent of the transfer was to combine all of the water rights into a common place of use. The result for 34-618 after Transfer No. 71254 was a place of use of 139 acres. The subsequent Transfer No. 73320 then amended 34-618 to include the entire 2124 acre POU to allow Big Lost River water to be used on more acres than just the 139 acres.
5. One of the major questions we have is a legal question. On page 3, you state that the last decree date was 2004, and when the water bank documents were submitted in 2009, this was 5 years between the last decree date and receipt of the water bank leases. The decrees were entered in June of 2004, so I thought the water rights would be considered "used" in that year. This would mean that the forfeiture clock would begin running at the beginning of the 2005 calendar year, and then the forfeiture clock would be up at the end of 2009. We submitted the water bank lease documents in fall of 2009, which was before the end of 2009. The statute and cases on forfeiture are not clear on when the clock begins, and your memo does not cite to authority supporting that it began in June of 2004. Do you have any department memos or rules that would explain when the forfeiture clock begins? It seems to us that when we filed in 2009, we still filed within the 5 year period,

especially when considering that we thought the rights were also used in 2005 with the mitigation plan, so the clock would start running again in 2006. Let me know if you have any IDWR guidance on that issue.

6. On page 4, when the mitigation plan is discussed, we agree with what you have said regarding Gary's letter that a temporary transfer must be approved, but as we provided previously, the state of affairs was such that acres were not irrigated because Mickelsen and other ground water users anticipated the need to provide that mitigation. Acres would not have been planted late May, and the temporary transfer was filed on May 13, 2005. Mitch Sorensen can visit with you about this, but he indicated that he did not plant acres because of this impending mitigation requirement. So, while the mitigation temporary transfer was not yet approved, the mind-set of Mr. Sorensen was to not ignore IDWR's mitigation letters and he could not have known (as you point out) that the river actually flowed well that year and it does appear as though recharge was provided as mitigation. However, Gary's April letter approved the initial mitigation plan, subject to flesh being applied to the approved framework. Even if the mitigation temporary transfer was not technically approved, we still think at a minimum, the circumstances were beyond our control under Idaho Code section 42-223. This is not discussed in the memo and there is no explanation as to why it was not discussed.
7. In the conclusion, you state that "due to the fact that Mickelsen irrigated in 2005, there had to be some type of approved mitigation plan." This is where I think I agree with you. There was an approved plan, so Mickelsen irrigated, but not the acres he designated would be idled because this part of the plan was approved. The temporary transfer was the remaining step, but it seems as though we disagree as to whether approval of the temporary transfer was necessary in order for non-irrigation of acres to fall under the 42-223 exception. The quote from this memo seems to be contradictory, where you indicate that there was an approved plan, so Mickelsen could irrigate, but there was not an approved plan, so the acres may have been forfeited. It seems that it was either approved or not.
8. The watermaster document indicates that there was natural rainfall irrigation in early 2005, and this helped the water supply. It appears that this was also a reason why perhaps IDWR did not process the temporary transfer.

Our intent is to protect the water rights on Mike's farm, and we thought we were doing just that by submitted the water bank lease in 2009, which we thought was prior to the expiration of the forfeiture clock. We certainly hope to work with you in order to comply with the water bank rules, and think a meeting with Gary may be helpful. Prior to that, it would be helpful to know your position on the above questions. We hope we can come to an agreement or at least an understanding of some of the forfeiture issues.

Thanks,

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