

Keen, Shelley

From: Keen, Shelley
Sent: Wednesday, June 01, 2011 12:06 PM
To: 'Kristin M. Moore'
Cc: Cefalo, James
Subject: RE: bc properties llc

Kristin,

You have an interesting set of circumstances. Here's my assessment.

The surface water right, 22-13434, is protected from forfeiture as long as the SRBA claim is pending before the court. If the right is decreed as a valid right, we can apply the logic on page 22 of Transfer Memo 24, "The department will also presume that the right has not been forfeited when it is claimed in a pending adjudication **or initially decreed in an adjudication within the previous five-year period.**" To protect the right from forfeiture beyond five years after partial decree, some additional action, such as a WSB lease, would have to occur. Because of the uncertainty about its validity, IDWR would not likely accept this claim into the WSB at this time.

A supplemental ground water right is protected from forfeiture as long as the primary surface water right is being used. In this case, since the GW right is either not supplemental or the primary SW right is not being used, the GW right likely needs some forfeiture protection if it is also not being used. However, the uncertainty over its status as supplemental or primary would make this GW right hard to rent from the WSB, so IDWR would be unlikely to accept it into the WSB. In this case, you might consider a Request for Extension of Time to Avoid Forfeiture instead of a WSB lease.

I will copy this message to James Cefalo in our Idaho Falls office so he's aware you might file the extension request.

As always, call or email if you want to discuss it some more.

Shelley

From: Kristin M. Moore [mailto:kmoore@rockymountainenvironmental.com]
Sent: Tuesday, May 31, 2011 3:40 PM
To: Keen, Shelley
Subject: bc properties llc

Shelley,

We are working with BC Properties LLC, who own several pieces of ground in Teton Valley. One piece of ground that they own has two water rights appurtenant to it that are shown to be active in the IDWR database: a licensed water right 22-13582 from ground water and a recommendation on decreed water right no. 22-13434 from South Leigh Creek. Currently, the surface water right 22-13434 is tied up in an objection, filed by BC Properties, that the water right was abandoned at the time the ground water right was developed, making the ground water right a primary water right. The reason for appropriating the ground water right is because the surface water was no longer deliverable. No order has been made in the SRBA Court yet, and the next hearing is scheduled for October 2011.

Our goal is to help BC Properties LLC preserve their water rights until they can develop the ground and/or sell the water rights. As I was preparing an Application to Lease a Water Right to the Water Supply Bank for the water rights, we realized that there may be unwanted issues that could result from these water banking applications. Acceptance of the surface water right into the Bank would indicate that the right is active. However, the surface water right was

abandoned, and thus, it really does exist for lease or rent. By rental of the right, it could be considered a resumption of use, which would not be lawful either, since it was already abandoned. Resuming the use of the right could be problematic for the property since it can no longer be used on the property. It would cause concerns for primary and secondary water right usage.

If the Court decides that the surface water right was not abandoned and allow the existing active recommendation to remain, and we take no action to “preserve” the abandoned surface water right, then the surface water right may become subject to forfeiture from a period of at least 5 years of non-use. If the surface water right is forfeited, then the ground water right is also forfeited since it would then be considered a supplementary right. Yet, we know that the historical use of the ground water right is as a primary water right due to the abandonment of the surface water.

Roger and I have discussed the complications of this scenario and have come to a decision. We will still submit the Application to Lease the ground water right to the Water Bank. However, we will not lease the surface water right into the bank because of the potential of rental. Our question to you is this: If the Court decides that the surface water right was not abandoned and recommends a partial decree of the existing recommendation, is it likely that it could be protected through an Exception to Forfeiture since it was tied up in a Court proceeding? Are we approaching this in the best way? Or is there a better way to preserve the ground water right?

Please advise. We appreciate your attention to this matter.

Kristin Moore

Water Rights Analyst

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