

MEMORANDUM

TO: Water Right File 61-12144, 61-12145, 61-12146, and 61-12147
FROM: Daniel A. Nelson
DATE: March 22, 2011
SUBJECT: Barry J. and Phyllis M. Peterson Water Supply Bank Rental Application

SUMMARY

Barry J. and Phyllis M. Peterson filed four applications to lease all of water rights 61-12144, 61-12145, 61-12146, and 61-12147 for an indefinite term on March 3, 2010. Water rights 61-4002A and 61-4002B were decreed on October 26, 2000, and later split through ownership changes and transfers into water rights 61-12144, 61-12145, 61-12146, and 61-12147. Water right 61-12144 is in the name of Sunrise Park Inc. for 0.07 cfs, 22.4 af, and 5.6 acres. Water right 61-12145 is in the name of the Petersons for 0.23 cfs, 68 af, and 17 acres. Water right 61-12146 is in the name of the Petersons for 0.01 cfs, 0.4 af, and 0.2 acres. Water right 61-12147 is in the name of the Petersons for 0.16 cfs, 28.1 af, and 6.9 acres and includes a stockwater component. When water rights 61-12145 and 61-12147 are combined they are limited to a total of 23.9 acres of irrigation in a single season.

Water right transfer 73953 was filed on water rights 61-4002A and 61-4002B to create the 4 water rights described in water rights 61-12144, 61-12145, 61-12146, and 61-12147. Ownership was a major issue with these water rights. Water right 61-4002A was decreed in the name of Barry J. and Phyllis M. Peterson. Water right 61-4002B was decreed in the name of Devlin Inc. Apparently the Petersons sold a portion of their water rights to Devlin Inc. to develop a subdivision. The Petersons intended to withhold the water rights, but the Warranty Deeds did not reflect the wish to withhold the water rights from the sale of the properties.

The Petersons then embarked on a lengthy process to have the water rights assigned back to them. Unfortunately, the Petersons were not able to bring all of these two water rights back into their control resulting in the water right splits shown above. The Petersons actually own water rights 61-12145 and 61-12147. Water right 61-12146 does show the Petersons as the owner, but they could not acquire the 0.01 cfs, 0.4 af, and 0.2 acres of water right 61-4002B that was sold to Devlin Inc. The new owners of the water right 61-12146 has not filed a change of ownership for this water right. Water right 61-12144 is in the name of Sunrise Park Inc. Therefore, the Petersons can only place water rights 61-12145 and 61-12147 into the water bank. The water bank leases for water rights 61-12144 and 61-12146 will need to be denied.

These water rights have not been used since the mid-1990s. The water right was protected from forfeiture in the Snake River Basin Adjudication process through October 26, 2000. In 2005, the Petersons, filed the water right transfer and an extension of time to avoid forfeiture for these water rights. The extension of time to avoid forfeiture was not processed due to the ownership issues described in the water right transfer. It was determined that the water right transfer would protect the water rights during the application process. The water right transfer was approved in March of 2008. This would give the Petersons approximately 1 year to accomplish the changes to the water right transfer.

Two requests for an extension of time to complete the changes proposed by the water right transfer were approved in 2009 and 2010, but these extensions did not protect the water rights from forfeiture. The applications to lease the water rights into the water bank were also received in 2010 with a letter requesting the water rights not be considered forfeited based on section 6 of Idaho Code 42-223. This portion of the code claims that no portion of any water right shall be lost or forfeited for non use for circumstances beyond the owner's control.

The letter from the Petersons' state that Mr. Peterson contracted cancer, and with the subsequent medical expenses and the earlier ownership problems, they were prevented them from putting these water rights back to use due to circumstances beyond their control. Staff has discussed this issue, and all of the staff agrees that the non-use of this water right during the time that the Petersons were trying to correct the ownership placed the water rights outside of their control. Not having control of the water rights due to the ownership and Mr. Petersons medical issues do qualify for a defense against forfeiture, so these water rights can be placed in the water bank.

AUTHORITY TO FILE

The tax lot information and other ownership information suggest that the Petersons are the current owner of the property, and have the authority to file and sign this application for water rights 61-12145 and 61-12147. The Petersons do not have the authority to file and sign an application to lease water to the water bank for water rights 61-12144 and 61-12146.

SUFFICIENCY OF SUPPLY

The aquifer levels in the Mountain Home area have fallen for several years suggesting that the sufficiency of the water resource in this area is suspect. However, the water right transfer in 2008 was put before the Mountain Home Groundwater Management Area Advisory Committee, and they found no issues with the water right transfer. Care will need to be taken when renting this water right to ensure that the movement of water does not cross over the perched or shallow aquifer and the regional or deep aquifer. A request for analysis of any movement of the water right from the Hydrology staff may be in order if this water right is rented.

INJURY

There is evidence to suggest that this water right has surpassed the time period allowed for forfeiture of the water right. However, the applicant has provided reasonable proof against for forfeiture showing that the non-use was beyond their control. In order to prevent injury, care will be taken when renting this water right to ensure that the movement of water does not cross over the perched or shallow aquifer and the regional or deep aquifer. A request for analysis of the move from the Hydrology staff may be in order if this water right is rented.

ENLARGEMENT

No enlargement is being proposed.

BENEFICIAL USE

The application proposes beneficial use consistent with conservation of water resources in Idaho.

LOCAL PUBLIC INTEREST

These two water rights have recently gone through the test of going through the water right transfer process. No issues were raised during that water right transfer process, so I don't foresee any issues with the water bank lease.

WATER DISTRICT

Ground water in the area described by this water right is not currently being regulated by a watermaster.

RECOMMENDATION

I recommend that water rights 61-12144 and 61-12146 not be accepted into the water bank due to ownership issues preventing the Petersons the authority to place these water rights into the water bank. These two rights should be returned without further processing.

I recommend that water rights 61-12145 and 61-12147 be placed in the water bank with the conditions placed on the water rights by water right transfer 73953. The term for the water bank lease should be from March 3, 2010 to March 15, 2015.