

Keen, Shelley

From: Keen, Shelley
Sent: Friday, December 17, 2010 3:09 PM
To: Yenter, Cindy
Subject: RE: G&H unused irrigation well, water right no. 36-~~8396~~
7847

Cindy,

Thanks for the update. Since the right holder seems to be making an effort to save some of the water right, and since you are monitoring the progress of that effort, I will put the file away for a while. I'll probably check in again about March 1, 2011.

Shelley Keen
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From: Yenter, Cindy
Sent: Friday, December 17, 2010 2:55 PM
To: Keen, Shelley
Subject: RE: G&H unused irrigation well, water right no. 36-8396

Shelley, there has been a transfer drafted which is based on the accomplished transfer position #2, below – that the irrigation use was resumed as commercial use and moved to the existing dairy wells, beginning in 2004 when the present owners bought the dairy and began expanding. However the applicant and their consultant (GF) just can't get it together on the final details so Jeannie doesn't have a complete application to data enter.

We've talked about this one a few times in staff meetings but you probably didn't make the connection. The application has the use calculations evidencing the growth between 2004 and now. Problem is they don't have any historic crop data so Jeannie told them they could convert at the minimum CIR of 2.0 AF/ac if that provided enough volume, which it does, barely. Then we haggled over inclusion of the domestic rights, inclusion of the third well etc, etc, and now finally they can't make up their mind on the final rate of flow for the application! They may also be waiting on a lienholder letter.

In the meantime, a second transfer was drafted to add the unused irrigation well as a third irrigation well on two nearby irrigation rights. There are issues with that draft as well; Jeannie has sent both back to Gary but has yet to get either returned in an acceptable format.

And so, I have a couple of potential NOV's, one for excess use at the dairy and another next year if they use the old well for irrigation without an approved transfer. However there has been response so I will probably wait until after the first of the year to make any move. I would like to at least see completed applications. I might send a message to this gal Linda to make sure she is aware that we are still waiting on Gary. They might think everything is a done deal.

From: Keen, Shelley
Sent: Friday, December 17, 2010 2:02 PM

To: Yenter, Cindy

Subject: RE: G&H unused irrigation well, water right no. 36-8396

Cindy,

Have you received a reply to the email below?

Shelley

From: Yenter, Cindy

Sent: Thursday, September 02, 2010 1:28 PM

To: 'linda_jccllc@qwestoffice.net'

Cc: Knowles, Corbin; Keen, Shelley

Subject: G&H unused irrigation well, water right no. 36-8396

Linda --

Idaho Code 42-222 governs forfeiture of water rights, extensions of time to avoid forfeiture, and resumption of use. You can read the full text at www.idaho.gov if you search on this statute number. In section 4(d), this statute says, in part: "If the use of the water has not been resumed and report thereon made on or before the date set for resumption of use such right shall revert to the state..." G&H did make a resumption of use statement in 2009, but irrigation under the right did not resume. IDWR has confirmed that the well has been disconnected, and aerial photography shows the area in lagoons and corrals since about 2004.

Since irrigation is not occurring and has not occurred under 36-⁷⁸⁴⁷~~8396~~ since 2009, the right has technically forfeited and reverted to the state. Sometimes there are defenses to forfeiture, but the burden of proof is on the water right holder to come forward with the evidence. Exceptions or defenses to forfeiture may be reviewed in Idaho Code 42-223.

Because this land is in a Water District, and in a water call area, and it was brought to my attention, **as watermaster I have to consider any irrigation here not authorized at this time, because I have evidence of forfeiture. The well should not be operated.**

As a right holder, you *might* have the following defenses:

1. Resumption of use of an irrigation right *outside* the appurtenant place of use can be a defense to forfeiture, but irrigation use must have resumed in another place BEFORE the extension of time expired in 2009. We consider this an accomplished water right transfer. It is still a water right violation, but it can prevent forfeiture. Increased irrigation use would have to be proven somewhere else and from some other well, and a proper water right transfer filing would be required to make the change legal.
2. The right holder could make the argument that use was resumed prior to 2009 within the appurtenant place of use, but the nature of the water use was changed to stockwater and/or commercial. Diversion would have been changed to the two dairy wells. This can also be considered an accomplished transfer, requiring a filing to be made legal. With a change in nature of use the right holder must document the extent of historic use under the irrigation right. I don't see real strong evidence of use of this well after about 1998, although it may have been used as a supplemental source. If this argument can be made I suspect the resulting approval will be only a fraction of the original right, and it will likely not include any irrigation use.

If you pursue either of these options, I recommend you seek the services of a professional engineering or consulting firm familiar with water right filing processes. Staff at IDWR's offices are not able to assist in the preparation of complex water right transfers which require supporting technical documentation.

After you have read this I realize you still may have some questions. Please feel free to contact me again.

Cindy Yenter

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