

Notes

By: Shelley W. Keen *SWK*

Date: March 18, 2010

Subject: Forfeiture of irrigation rights

Jeff Peppersack, on the advice of Phil Rassier, determined that IDWR should not find forfeiture of an irrigation right until non-use at the beginning of the irrigation season in the sixth year. For example, a water right used in 2004 but not used during the 2005-2009 irrigation seasons would not be considered forfeited until it is not used at the beginning of the 2010 irrigation season. This is possible because irrigation could not have occurred after the end of the irrigation season in 2004 and, therefore, the five-year period of non-use does not begin accruing until the first day of the irrigation season in 2005. This determination is important because it allows irrigators to take action to protect their rights from forfeiture after the fifth irrigation season of non-use.

Besides resuming use, the most common actions to prevent forfeiture are obtaining an extension of time to avoid forfeiture and leasing the water right to the Water Supply Bank. Based on the determination above, forfeiture would not occur if one of these actions were completed during the late fall or winter after the fifth season of non-use.

Also, applying to lease a water right to the Water Supply Bank is not protection against forfeiture. The water right must be accepted into the WSB to be protected from forfeiture, and there is no guarantee of acceptance. However, if a right is accepted into the WSB, the acceptance will be retroactive to the date the lease application was received by IDWR.

Finally, it would be difficult to write an order denying an extension of time or a transfer application of the basis of five years of non-use without also concluding that the subject water right has been forfeited. However, it may be possible to reject a transfer application without finding forfeiture when the applicant has not provided sufficient information for IDWR to draw a conclusion about the period of non-use. For more information about denying and rejecting transfers, see p. 17 of the 12/21/2009 version of the *Transfer Processing Policies and Procedures* memo.

MEMORANDUM

RECEIVED

DATE: February 29, 2008

MAR 03 2008

TO: Aaron Marshall



DEPARTMENT OF
WATER RESOURCES

FROM: Cindy Yenter, Water District 130 Watermaster

RE: Watermaster Opinion Regarding Water Supply Bank Leases and Rentals for
Acres Excluded from CREP Approvals

A water user contacted me recently to assist him in filing WSB lease applications for acres which were not eligible for payment under his CREP contract, and which will not be irrigated for the duration of the CREP contract, but which did not get included in the Agreement Not To Divert (ANTD) signed with IDWR. The ANTD specifically protects identified water right acres from forfeiture for the duration of the CREP contract. The original intent was to include in the ANTD, any non-eligible or excluded water right acres which were fully contained within the boundary of an otherwise CREP-eligible field. The excluded in-field acres are usually comprised of rock outcroppings or areas of marginal soils, but they are usually included in the appurtenant water right because they are under the irrigation system and cannot be left selectively dry. Water right transfer protocol typically prohibits the "cherry picking" of water rights from rock outcrops and other non-cultivated land features within irrigated fields, to other irrigated areas due to the potential for enlargement of the right(s). Similarly, the idea to fold the excluded water right acres into the ANTD was to prevent opportunistic leasing and rental of those water right acres, which are wetted but have not historically been used to irrigate crops.

I am aware of more recent CREP approvals where the excluded "rock pile" acres are not included in the ANTD. Over time these acres will technically be subject to forfeiture if challenged. In reality, wetting rock piles is not considered a beneficial use, but is recognized as an associated use so long as irrigation of the surrounding lands is occurring. I suspect IDWR would be hesitant to declare forfeiture in a situation such as this, but some land owners are compelled to place excluded rock pile acres in the WSB to ensure their protection for the term of the CREP contract. I think this is fine, at the owner's discretion. I don't believe we should require or encourage it. I will, however, object to the rental of strictly "rock pile" water right acres, due to the enlargement issue.

The distinction must be made between non-eligible acres which are rock outcrops or other *non-cultivated* areas, and non-eligible acres which are cultivated fields, contiguous portions of fields, or pivot corners, where the cropping or irrigation history simply did not meet FSA's and/or IDWR's eligibility criteria for CREP entry. For some of these acres the water user may choose to suspend irrigation anyway, and wish to place the appurtenant rights in the WSB. Unless there are other forfeiture issues, lease and rental of these rights should not be restricted.

For future watermaster reviews, I will attempt to identify and flag any water right acres which should be considered not available for rental due to their status as excluded non-cultivated areas associated with CREP contracts.