

Cefalo, James

From: Cefalo, James
Sent: Thursday, October 5, 2023 10:51 AM
To: 'Dave Tuthill'
Cc: terripehrson@atcnet.net; 'Fritz Haemerle'; 'mx222moss@aol.com'; 'sjohns@olsentaggart.com'; Kristin Moore; 'jafrancis307@gmail.com'; 'rdpehrson@yahoo.com'; Whitney, Rob
Subject: FW: Water Delivery on the Big Lost River
Attachments: fwd (3).zip

Dave,

The protestants to Application for Transfer 87484 (filed by Moss Farms Inc.) raised these same concerns about water delivery during the informal settlement conference for that contested case. I have been assigned to serve as the hearing officer for contested Application for Transfer 87484. Pursuant to Rule 414 of the Department's Rules of Procedure, I am prohibited from communicating with a party or their representative about any substantive issue in the contested case. Consistent with Rule 414, I am notifying all the parties of your email and including them in this response.

In my role as Regional Manager, I have not prepared watermaster instructions for water districts within the Eastern Region. Watermaster instructions are generally prepared by the Water Distribution Section of the Boise office and reviewed by the Director. I have included Rob Whitney, Section Manager for the Water Distribution Section, on this email. Please work with him and his team on this or any future requests for watermaster instructions.

James



James Cefalo | Regional Manager
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From: Dave Tuthill <dave@idahowaterengineering.com>
Sent: Thursday, October 5, 2023 6:10 AM
To: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Cc: Byron Pehrson Mackay BLID <terripehrson@atcnet.net>; Fritz Haemmerle <fxh@haemlaw.com>; Holliday, Michael <Michael.Holliday@idwr.idaho.gov>
Subject: Water Delivery on the Big Lost River

Good morning, James.

I am writing about a problem you are already aware of. I am proposing a remedy for your consideration.

Water Right Transfer No. 79972 added a point of diversion to water right no. 34-82, among others. Michael Holliday prepared the "Review & Evaluation of Sufficiency of Information" dated June 15, 2015. His assessment of injury to other water rights is as follows:

Injury to Other Water Rights:

Other rights will not be injured by the proposed changes. The watermaster reviewed the appl did not oppose its approval. Although the proposed new point of diversion is located downstr the current point of diversion on a losing river reach, discussion with the watermaster reveale conveyance losses are uniformly charged to all diversions between Mackay Dam and Arco, n of their location on the river. The quantity authorized to be diverted will not change as a resul transfer. The transfer application was advertised and no protests were filed.

What Michael states is correct in a good water year. What his memo fails to address, and what apparently Michael was not aware of when he wrote the memo, is that during a water-short year, diversions downstream from the original point of diversion for this water right have historically not been delivered due to a futile call. The Watermaster who provided the comments for this transfer, Lucas Yokey, has described to my client Byron Pehrson that was not thinking about this when he made his recommendation to Michael. I am told by Byron that Lucas is now prepared to testify to this oversight, and to the fact that in a poor water year delivery downstream from the original point of diversion of this water right, through the Darlington Sinks, was historically determined to be futile.

Since this transfer has been approved, delivery on the river has been changed, to the detriment of third parties. Recently, I am told, as much as 6,000 or 7,000 miners inches of water have been sent past the original point of diversion of this water right to push the 320 miners inches of this water right to the new point of diversion. This is a new change caused by approval of this transfer. Prior to approval of this transfer, this 6,000 or 7,000 inches would have been used to satisfy upstream 1884 and 1885 water rights rather than to be lost in the Darlington Sinks.

As we both know, a basic tenet of western water law is that a transfer of an existing water right should not be allowed to adversely impact third parties. That is what the delivery of this water right as transferred has done.

I have been thinking that a condition should be added to the transfer approval to address this aspect of the transfer. But given the difficulties of correcting an error through this process, I think there is a much more straightforward way to make things right -- via instructions to the Watermaster.

One of the conditions of approval of Transfer No. 79972 is as follows:

CONDITIONS OF APPROVAL

- 6. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 34.**

The Watermaster, as directed and supervised by IDWR, is responsible for determining futile calls on a river. In this case if the futile call determination is made to be the same after the transfer as before, the problem above is remedied without the need to change the transfer in any way. Thus, my request to you is to consider issuing instructions to the Watermaster in this regard.

One other aspect of this transfer is of additional concern but not to the degree of the concern above. Normally when a water right is allowed to be removed from a ditch, the carry water aspect of the water right is required to be left in the ditch, to avoid negative impacts to third parties. This has always been a consideration in the transfers I have been involved with. In this case it is my understanding Michael had been led to believe the 3 in 1 ditch was no longer used. That is not the case, as demonstrated by the attached water district records. If other transfers are requested in the future, I would recommend that IDWR review this aspect more fully before allowing all of the water to be removed from a common ditch. Examples of the requirement to leave water in a common ditch can be found on the Hiawatha Canal in Hailey.

Thank you for your review of this matter, and I look forward to seeing your thoughts.

Regards, Dave

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