

Lafortune, Thomas

From: Kristin Moore <kristin.rmea@gmail.com>
Sent: Tuesday, February 13, 2024 2:31 PM
To: Lafortune, Thomas
Cc: 'Paul Zumberge'; 'Mark Brandt'
Subject: RE: Water Right 23-11493 Transfer

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Thomas,

We've considered your comments regarding resumption of use and forfeiture. This is a rather long email, but here's some additional information we were made aware of, as well as some thoughts regarding resumption. I've copied the applicant, as well as his attorney on this email.

Paul Zumberge is the legal counsel for the applicant. He personally knows Grant Frearson, partner of the entity that owned the property prior to the applicant, and made a phone call to Mr. Frearson to obtain some additional history. Here's the information that Mr. Zumberge sent to me:

"They did use the water to irrigate through flood irrigation from time to time. The water ultimately came through the neighbor's property through a head gate by Melvin Weeks property upstream."

A subdivision was added up stream between the Weeks head gate and the Brandt property and several ponds were put in place for fire suppression. Apparently that and the activity associated with the subdivision impacted the delivery ditch through the neighboring property. He was growing alfalfa on the (now) Brandt property for some years prior to the subdivision and ponds being established."

It is my understanding from Mr. Zumberge, that when the Brandt's purchased the property, the old ditches were still in place across the Place of Use, but there was no longer direct access to get the water delivered from Palisades Canal. I'm not certain if the ditches within the subdivision were buried or if they were just not maintained. Hence, the Brandts began installation of the new pumping station and other irrigation infrastructure to ensure water delivery.

In regards to the resumption of use statute, a third party has not made a claim of right because the water was not made available to a third party by nonuse pursuant to an existing water right. This is primarily because pertaining water rights, reportedly, were always diverted into the canal but never make it beyond the Palisades Canal because the Palisades Canal does not drain to the Snake River.

Palisades Canal is an unusual canal. Palisades Irrigation Company owns high flow water rights with 1900 and 1916 priority dates. The senior rights that are diverted down the canal are privately owned by individual landowners, who pay Palisades Canal for the conveyance of their water rights. The privately owned rights are primarily splits of a few parent rights with priorities of 1886, 1889, 1890, 1893, 1898, and 1899. There's a few more high water rights post-1916 priorities, but I don't consider them at issue. In addition to everyone's privately decreed rights, Palisades Canal also delivers quite a bit of storage water (Palisades Water Users) to its patrons. Palisades Canal has consistently diverted water right 23-11493 when it is in priority, whether the water right holder was irrigating with it or not. This fact, I verified with Blake Jacobsen, who is the former water master for Palisades Canal. He confirmed that they divert to the greatest extent based on rights pertaining to the canal that were in priority. No one downstream of Palisades Canal headgate has ever made use of this water right...because it wasn't ever made available to them. It does not pass the Palisades Canal headgate and drain into the Snake River or otherwise.

From my understanding in discussions with the president and water master on operations of Palisades Canal in past years; as long as the Palisades Irrigation Co. 1900 rights were in priority, everyone had more than enough water. There was no shortage of water and everyone could take what they needed when they needed it.

I also evaluated the last 5 years of water district records to see if it were possible that someone else was enjoying this water right if it was not being used. The 1898 and 1899 priority dates essentially enjoy about the same administration as the 1900 priority. The 1898 priority date was delivered 666 days from 2019-2023. The 1900 priority date was delivered 663 days from 2019-2023. As long as the 1900 water rights were being delivered, the 1898 rights were being delivered and there was no shortage of water conveyed in the Canal system. These users have not benefited from any non-use of 23-11493.

The other users that could potentially benefited from the non-use of the right would have been the senior priority users. I researched their places of use and all but two of the POU's are located up the ditch from the place of use of right 23-11493. I don't feel anyone upstream of 23-11493 would be impacted by the use of this water right. Not only is it junior to them, but it would be diverted from the Canal further downstream from where they take their water. Any benefit they receive from this right is in helping with conveyance losses. They receive that benefit whether the water right holder uses the water right or not.

Water rights 23-11529 owned by Chapel Ranch, LLC and 23-106B owned by Theron Ashment are located down ditch and are senior to 23-11493 with an 1886 priority. If water is not making it to these two POU's, they have prior right to the use of the water in the canal and can protect their rights to delivery through a priority call for delivery. Internal administration on Palisades Canal should protect these users. According to Blake Jacobsen, this is how the system operates. They turn off junior users in order to deliver to senior users. Any benefit these users have made from the non-use of 23-11493 will be preserved through administration.

Water rights with the same priority of 1893 may receive some benefit of the non-use of this right, perhaps through conveyance. However, they are not entitled to divert 23-11493 for their own benefit. Again, I believe delivery of the 1893 priorities would be considered by the water master through rotation practices.

The current water master, Travis Weeks, is aware of the use of this water right and willingly delivered the water right for irrigation at the place of use. If there were objections to this resumption of the water right, he would know. He did not report any.

Thanks,

Kristin Moore

Senior Water Rights Analyst

482 Constitution Way, Ste 303, Idaho Falls, ID 83402

E-Mail: kristin.rmea@gmail.com

VOICE: 208-524-2353, Ext #104 ||| FAX: 208-524-1795



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From: Lafortune, Thomas [mailto:Thomas.Lafortune@idwr.idaho.gov]
Sent: Thursday, February 08, 2024 11:01 AM
To: Kristin Moore <kristin.rmea@gmail.com>
Subject: RE: Water Right 23-11493 Transfer

Kristin,

I don't believe I have received these shapefiles yet. Would you mind sending those when you have a chance?

Also, I wanted to discuss the partial forfeiture concerns. You stated that resumption of use has occurred. The resumption of use section of Idaho Code, 42-223(12), states:

No portion of any water right shall be lost or forfeited for nonuse if, after the five (5) year period of nonuse, use of the water is resumed prior to a claim of right by a third party. A third party has made a claim of right if the party has:

- (a) Instituted proceedings to declare a forfeiture;
- (b) Obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use; or
- (c) Used the water made available by nonuse pursuant to an existing water right.

In the Snake River Basin, I don't believe that resumption of use is a valid defense to forfeiture because the basin is fully appropriated. You did mention the right is curtailed some years. Is there any other evidence of defense to forfeiture you would like to present before I proceed with the application?

Thanks,

Tom

From: Lafortune, Thomas
Sent: Wednesday, December 20, 2023 2:11 PM
To: Kristin Moore <kristin.rmea@gmail.com>
Subject: RE: Water Right 23-11493 Transfer

On a side note, could you please send me the shapefiles for this transfer?

From: Kristin Moore <kristin.rmea@gmail.com>
Sent: Wednesday, December 20, 2023 1:18 PM
To: Lafortune, Thomas <Thomas.Lafortune@idwr.idaho.gov>
Cc: paulzumberge@gmail.com; 'Mark Brandt' <mark@brandtco.net>
Subject: RE: Water Right 23-11493 Transfer

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Thomas,

The Brandt's purchased the property in fall of 2020. We cannot verify at this point in time the irrigation practices previous to that time. It would take some additional research to provide details on that. After they purchased the property, however, they began upgrades to irrigate the property by sprinkler. In 2021, they began the process with the power company to install necessary electrical boxes and connections. Then immediately following, they pursued

mainline and sprinkler infrastructure. Due to supply delays following COVID-19, it took some time to obtain all of the parts and get contractors out to complete all of the work. Extensive work was performed in 2022 to get the native grasses/pasture sprayed and the ground prepared for crops. During 2023, the irrigation system was all up and running and crops grown, harvested, and sold. Short water years have also resulted in curtailments of their water right. For the 2023 season, they even rented from the small rental pool enough water to complete the irrigation of their crops.

We can provide you more specifics if you need them. But in general, I feel that the Brandts' have diligently pursued active irrigation of the property since they have owned it. And resumption of use has occurred.

Kristin Moore

Senior Water Rights Analyst

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From: Lafortune, Thomas [<mailto:Thomas.Lafortune@idwr.idaho.gov>]

Sent: Wednesday, December 20, 2023 11:06 AM

To: Kristin Moore <kristin.rmea@gmail.com>

Cc: paulzumberge@gmail.com

Subject: RE: Water Right 23-11493 Transfer

Kristin,

This was based off the 2017 NAIP. The 26 acres was just a quick estimate, there could have been more or less if I dig into it more. I just wanted to make you aware of my concern that is not immediately obvious that all the acreage has been consistently irrigated since the right was decreed.

Tom

From: Kristin Moore <kristin.rmea@gmail.com>

Sent: Wednesday, December 20, 2023 10:29 AM

To: Lafortune, Thomas <Thomas.Lafortune@idwr.idaho.gov>

Cc: paulzumberge@gmail.com

Subject: RE: Water Right 23-11493 Transfer

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Thomas,

Thank you for considering this before sending to advertising. Can you tell me what year you identified the 26 acres of irrigation? If it isn't a NAIP, can you send me a snapshot? I've copied Paul Zumberge on this email string. He is the attorney for the Brandt's and has been working with me through this process. He has some personal knowledge of the property, where I don't have nearly as much.

Kristin Moore

Senior Water Rights Analyst

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From: Lafortune, Thomas [<mailto:Thomas.Lafortune@idwr.idaho.gov>]

Sent: Wednesday, December 20, 2023 9:40 AM

To: Kristin Moore <kristin.rmea@gmail.com>

Subject: Water Right 23-11493 Transfer

Kristin,

I have received the transfer application you prepared for Mark & Ellen Brandt Family Trust. Based on your cover letter, I believe you are already aware that I may have partial forfeiture concerns. Just taking a quick look at past aerial imagery, the best I can find is about 26 acres of irrigation. I am curious if you have any additional thoughts or information you would like to provide before I proceed to advertising.

Thanks,

Thomas Lafortune

Water Resource Agent, Sr.

(208) 497-3779

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