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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,	)	Case No. 1:22-cv-00236-DKG
	)	
Plaintiff,	)	
	)	
v.	)	<b>FIRST AMENDED COMPLAINT FOR</b>
	)	<b>DECLARATORY AND INJUNCTIVE</b>
	)	<b>RELIEF</b>
STATE OF IDAHO; IDAHO	)	
DEPARTMENT OF WATER RESOURCES,	)	
an agency of the State of Idaho; and GARY	)	
SPACKMAN, in his official capacity as	)	
Director of the Idaho Department of Water	)	
Resources,	)	
	)	
Defendants.	)	
	)	

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Plaintiff United States of America alleges as follows:

## **I. INTRODUCTION**

1. The United States owns millions of acres of land within the State of Idaho on behalf of the American people, and it makes most of those acres available for livestock grazing by federal permittees. *See generally* U.S. Const. art. IV, § 3, cl. 2 (providing that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”); Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315c (authorizing the federal grazing program); Organic Administration Act of 1897, 16 U.S.C. §§ 551 *et seq.* (authorizing the regulation of use and occupancy of the national forests); Granger-Thye Act of 1950, 16 U.S.C. § 580l (authorizing the issuance of livestock grazing permits). To enable this federal grazing program, the United States holds thousands of water rights in Idaho that have been decreed or licensed for use by livestock on federal grazing allotments (“stockwater rights”). The water that is the subject of these stockwater rights is generally available for use by any livestock owner who holds a permit to graze livestock on the federal lands on which the water right is located.

2. A series of Idaho statutes, enacted in the last five years and codified primarily at Idaho Code (“I.C.”) §§ 42-113, 42-224 and 42-501 through -507, threatens to forfeit these federally owned stockwater rights, and, as a result, to undermine the congressionally authorized federal grazing program. These Idaho statutes prohibit any “agency of the federal government” from acquiring stockwater rights unless the agency itself owns livestock; make certain stockwater rights associated with federal lands appurtenant to the private property of federal permittees, rather than to the place of use; and establish a framework for widespread forfeiture of existing

federally owned stockwater rights. *See* I.C. §§ 42-113(2)(b), 42-224, 42-502.

3. On May 13, 2022, as a direct result of the enactment of these statutes, the State of Idaho and the Idaho Department of Water Resources (“IDWR”), acting through the Director of IDWR (collectively, “the Defendants”), issued three show-cause orders requiring the United States, acting through the United States Bureau of Land Management (“BLM”), to show cause within twenty-one days why fifty-seven federally owned stockwater rights should not be forfeited. *See* Ex. 1 (Am. Order to Show Cause, Docket No. P-OSC-2021-001 (Crane Creek Allotment); Am. Order to Show Cause, Docket No. P-OSC-2021-002 (Paddock Valley Allotment); Am. Order to Show Cause, Docket No. P-OSC-2021-004 (Butcher Bar and China Creek Allotments)) (collectively, “May 2022 Orders”). On June 22, 2022, also as a direct result of the enactment of these Idaho statutes, the Defendants issued a fourth show-cause order requiring the United States, acting through the U.S. Department of Agriculture, Forest Service (“Forest Service,”), to show cause within twenty-one days why eleven federally owned stockwater rights should not be forfeited. *See* Ex. 2 (Order to Show Cause, Docket No. P-OSC-2022-001 (Fourth of July Creek Allotment)) (“June 2022 Order”). Under the most recent of these statutes, signed into law on March 24, 2022, these show-cause orders initiate a process under which IDWR and the Idaho Attorney General must take a series of mandatory actions, culminating in a civil action for forfeiture against the United States in Idaho state court. The United States anticipates that IDWR may issue similar successor orders to show cause for other stockwater rights held by the United States for use on other federal lands managed by the BLM or Forest Service.

4. These newly enacted statutes, and the forfeiture proceedings resulting from their enactment, are contrary to the Supremacy, Property, and Contract Clauses of the United States Constitution; the principle of federal sovereign immunity; and the Retroactivity Clause of the

Idaho Constitution. Thus, they cannot lawfully be enforced against the United States.

5. The United States brings this action to seek a judgment against the Defendants declaring that these provisions of the Idaho Code are invalid, either facially or as applied to the United States, and permanently enjoining their enforcement.

## **II. JURISDICTION**

6. This is a civil action brought by the United States in part under the Constitution of the United States and in part under other laws. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), 1345 (United States as plaintiff), 1367 (supplemental jurisdiction), and 2201(a) and 2202 (Declaratory Judgment Act).

## **III. VENUE**

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because (1) all Defendants reside here, (2) a substantial part of the events giving rise to this Complaint occurred here, and (3) the water rights at issue in this Complaint are located and have their places of use here.

## **IV. PARTIES**

8. Plaintiff is the United States of America, suing on its own behalf and on behalf of its executive departments and their subdivisions (hereinafter, “the agencies” or “the federal agencies”), including but not limited to those listed in Paragraphs 9 and 10 below.

9. The BLM is a federal agency within the United States Department of the Interior, charged by Congress with managing the National System of Public Lands. BLM manages 11.8 million acres of public lands in Idaho. BLM’s mandate, as set by Congress, includes authorizing and overseeing livestock grazing on millions of acres of these public lands.

10. The Forest Service is a federal agency within the United States Department of



Agriculture, charged by Congress with managing the National Forest System. The Forest Service manages 20.4 million acres of National Forest System lands in Idaho. The Forest Service’s mandate, as set by Congress, includes authorizing and overseeing livestock grazing on millions of acres of these National Forest System lands.

11. Defendant State of Idaho is a state of the United States.

12. Defendant IDWR is an agency of the State of Idaho and is responsible for administering water rights within the State pursuant to State law, including the challenged statutes.

13. Defendant Gary Spackman is the Director of IDWR and, in his official capacity as Director, the show-cause orders at issue in this case were either signed by him or signed by an Acting Director on his behalf. *See* ¶ 3, *supra*.

## V. GENERAL ALLEGATIONS

### A. Legal Background

14. The Property Clause of the United States Constitution provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. Const. art. IV, § 3, cl. 2.

15. The Supremacy Clause of the United States Constitution provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2.

16. The Contract Clause of the United States Constitution provides that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. Const. art.1, § 10.

17. Under the doctrine of sovereign immunity, the United States is immune from suit, including by states, absent an express waiver by Congress. *Block v. North Dakota*, 461 U.S. 273, 280 (1983).

18. The McCarran Amendment is a limited waiver of the United States' sovereign immunity. It only provides consent "to join the United States as a defendant in" a "suit" for "the adjudication of rights to the use of water of a river system or other source," or "the administration of such [decreed] rights." 43 U.S.C. § 666(a). As a waiver of sovereign immunity, the Amendment "must be strictly construed in favor of the United States," *United States v. Idaho ex. rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 7 (1993) (citation omitted), and does not constitute a general waiver of federal sovereign immunity for every kind of state action related to the use or allocation of water. *Miller v. Jennings*, 243 F.2d 157, 159 (5th Cir. 1957), *cert. denied*, 355 U.S. 827 (1957).

19. The Retroactivity Clause of the Idaho Constitution provides that "[t]he legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation." Idaho Const. art. XI, § 12. A law is retroactive "when it operates upon . . . rights which have been acquired . . . prior to its passage." *Frisbie v. Sunshine Mining Co.*, 457 P.2d 408, 411 (Idaho 1969).

## **B. Federal Land Management and Grazing**

20. The Taylor Grazing Act of 1934 authorizes the Secretary of the Interior to establish grazing districts and regulate their use, to protect and preserve the land and resources within such districts, to specify the amount of grazing permitted in each district, to issue permits for grazing, and to facilitate the constructions of wells, reservoirs and other improvements necessary to the care and management of the permitted livestock. 43 U.S.C. §§ 315-315c.

21. The basic unit of BLM's livestock grazing program is an allotment, which is an area of public land designated for grazing and made available via permits or leases, typically for renewable ten-year terms. BLM grazing allotments in Idaho can vary in size from a few hundred

acres to tens of thousands of acres. BLM may authorize grazing for a single permittee or multiple permittees within a single allotment. Allotments on federal lands managed by BLM are not exclusively devoted to livestock grazing; rather, such lands are generally concurrently managed for other purposes and available for other uses, ranging from recreation, to mineral development, to treaty-protected Native American uses.

22. A variety of sources, including natural streams and artificial ponds or troughs fed by water pipelines, may provide water for livestock consumption on BLM grazing allotments. Pipeline systems can extend for significant distances. In Idaho, it is not uncommon for a water pipeline system to provide water to multiple grazing allotments.

23. The Organic Administration Act of 1897 authorizes the Forest Service to regulate the occupancy and use of national forest land. 16 U.S.C. § 551.

24. The Supreme Court affirmed the Forest Service's authority to regulate grazing on National Forest lands over a century ago. *United States v. Grimaud*, 220 U.S. 506 (1911).

25. Through its regulatory permitting process, the Forest Service administers and controls many aspects of domestic livestock grazing on the federal lands it manages, including limiting the numbers and location of stock and authorizing, funding, facilitating, and/or constructing wells, reservoirs and other water developments. Forest Service administration of stockwater rights has the important benefit of allowing efficient use of water resources by multiple or successive permittees on the same allotment.

26. Other federal agencies also manage federal lands within Idaho. Some of these agencies allow grazing on certain of those lands and hold water rights to support their grazing programs. Those grazing programs are managed under other provisions of federal law.

27. The Idaho Supreme Court has previously recognized the critical importance of federally

owned water rights to the administration of the federal lands grazing program, noting that such water rights are necessary “to ensure the perpetual use of the water for stockwatering purposes by whichever member of the public happens at any time to have the grazing permit.” *United States v. State of Idaho*, 959 P.2d 449, 452-53 (Idaho 1998).

28. From 1939 to 2017, Idaho statutes authorized BLM to “appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain.” Former I.C. § 42-501 (repealed 2017). During this time period, like today, the United States owned few livestock; rather, the vast majority of livestock on public lands were privately owned livestock authorized to graze on federal land by BLM or the Forest Service. As explained further below, the Snake River Basin Adjudication (“SRBA”), which began in 1987 and culminated in 2014, decreed thousands of stockwater rights to the United States for use by such federally permitted, but privately owned, livestock.

### **C. The Snake River Basin Adjudication and Federal Stockwater Rights**

29. The Snake River watershed is the tenth largest watershed in North America and covers 108,000 square miles in portions of six states (Wyoming, Idaho, Nevada, Utah, Oregon, and Washington). The largest part of the watershed is located in Idaho.

30. The State commenced the SRBA as a general stream adjudication on November 19, 1987.

31. In the SRBA, the United States sought and obtained decrees for thousands of water rights. The United States obtained some of these rights pursuant to the substantive law of the state (“state-based rights”), and others pursuant to federal laws that reserved them (“federal reserved rights”). Alongside other water rights, the SRBA decreed to the United States thousands of state-based stockwater rights arising from the consumption of water by livestock

owned by federal grazing permittees, who grazed their livestock on federal lands managed by the federal agencies under the statutory authorizations discussed in Paragraphs 20-25, *supra*. Most of the stockwater rights that are the subject of the State’s forfeiture proceedings were decreed to the United States through the SRBA.<sup>1</sup>

32. Many of the stockwater rights sought by the United States, and decreed by the SRBA court, were created by putting water to beneficial use without obtaining a prior permit or license from the IDWR. These rights were decreed consistent with the longstanding recognition under Idaho law of instream stockwatering as a beneficial use appropriate for federal acquisition of water rights. Water rights of this kind, which are based directly on the Idaho Constitution, are commonly called “constitutional” water rights (by contrast to water rights based on a prior permit or license). *See generally* Idaho Const. art. XV, § 3 (“The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.”). Although such rights generally cannot be created today, in light of the enactment of the State’s mandatory surface water permitting code in 1971, constitutional rights acquired before 1971 remain valid.<sup>2</sup>

33. In the SRBA, the United States often sought state-based stockwater rights even when federal reserved rights might have been available, because the constitutional method of obtaining state-based water rights provided the earliest priority date for the rights.

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<sup>1</sup> All of the water rights listed in the orders to show cause are decreed water rights, except for six water rights listed in the June 2022 Order: 75-4236, 75-4241, 75-7672, 75-7279, 75-7288, and 75-7335, which are “licensed” or “statutory” rights. “Licensed” rights are rights obtained through filing for a permit and license under Idaho law. *See* I.C. § 42-201. “Statutory” rights are “constitutional” rights, as discussed in paragraph 32, for which a statutory claim has been filed under I.C. § 42-243.

<sup>2</sup> Idaho’s water code exempts from the permit requirement the use of water for instream watering of stock, *see* I.C. § 42-113(1), as well as the use of groundwater for “domestic” uses which can, in some instances, include small amounts of stockwater, *see* I.C. § 42-227.

34. The State and a small group of federal grazing permittees contested many of the United States' claims during the SRBA, and many of the United States' decrees resulted from settlements approved by the SRBA court.

35. In 2002, the United States reached a settlement with one such group of contesting permittees, known informally as the Federal Stockwater Group ("FSG"). The FSG settlement allowed both the United States and the FSG permittees to hold stockwater rights on water sources located on federal land and used by the permittees, with the permittees' rights typically accorded a senior priority date relative to the United States' rights. The settlement also included explicit agreements by the permittees to withdraw their objections to the United States' stockwater claims, to withdraw their challenges to stockwater decrees already issued to the United States, and to refrain from challenges to any other stockwater decrees issued to the United States. *See* Ex. 3.

36. In many other cases, however, no permittees contested the United States' claims or filed claims of their own, and the United States was the only party decreed stockwater rights on a given water source.

37. The FSG and other settlements, along with the United States' uncontested claims, resulted in the adjudication of thousands of stockwater rights to the United States in the SRBA, through a series of partial decrees issued under Rule 54(b)(1) of the Idaho Rules of Civil Procedure ("*Certificate of Partial Judgment as Final*"). This system of issuing fully binding partial decrees allowed the SRBA to progress through individual claims rather than requiring the full completion of the entire Snake River watershed prior to issuing any decree. In this way, the SRBA court decreed to the United States over 15,000 stockwater rights associated with lands managed by the BLM, of which approximately 6,485 were for instream stockwatering (that is,

consumption of water by livestock directly from a water source, without the use of a pipeline or other development), while the remaining water rights were for stockwatering at developed water sources (such as troughs, stockponds, or other developments) or were decreed based on federal law. The SRBA court decreed to the United States nearly 9,000 stockwater rights associated with lands managed by the Forest Service, over half of which were for stockwatering at developed water sources.

38. A few federal permittees chose not to settle, however, and instead continued to pursue litigation. In 2007, the Idaho Supreme Court ruled in favor of one such permittee in *Joyce Livestock Co. v. United States*, 156 P.3d 502 (Idaho 2007).<sup>3</sup> *Joyce Livestock* dealt exclusively with claims related to a single class of stockwater rights – constitutional stockwater rights acquired through instream stockwatering – and held that, “[u]nder Idaho law, a landowner does not own a water right obtained by an appropriator using the land with the landowner’s permission unless the appropriator was acting as agent of the owner in obtaining the water right.” *Id.* at 519.

39. The *Joyce Livestock* decision did not affect any of the water rights that had already been decreed to the United States. In fact, the SRBA court continued to decree claims sought by the United States for constitutional instream stockwater rights even after *Joyce Livestock*, noting that “[u]nder the ruling in *Joyce*, there are still factual scenarios by which it would be legally possible for the United States to acquire [an instream constitutional] water right[,] such as through an agency relationship or agreement with the appropriator of the water right.” *In Re SRBA*, Case No. 39576, #74-15468, slip op. at 2 (Idaho Dist. Ct. Feb. 28, 2007).

40. On August 25, 2014, the SRBA court entered a Final Unified Decree that incorporated all

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<sup>3</sup> In a companion case decided the same day, the court applied its reasoning in *Joyce Livestock* to similar facts. *LU Ranching Co. v. United States*, 156 P.3d 590 (Idaho 2007).

the partial decrees into one final order covering 158,600 water rights. *See* Final Unified Decree, *In Re SRBA*, Case No. 39576 (Idaho 5th Jud. Dist. Ct., Aug. 25, 2014). This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin with a priority date prior to November 19, 1987, except for a group of deferred claims.<sup>4</sup>

#### **D. Idaho’s Legislation Targeting Federal Stockwater Rights**

41. In 2017 – a decade after the Idaho Supreme Court’s *Joyce Livestock* decision – the State of Idaho enacted Senate Bill (“S.B.”) 1111, the first in a long series of laws targeting the federal stockwater rights decreed in the SRBA and other general stream adjudications. This series of laws has culminated, most recently, in the March, 2022, enactment of House Bill (“H.B.”) 608, which led directly to the currently pending forfeiture proceedings. This section describes these statutes, and their evolving but ever-present threat to federally-held stockwater rights.

##### **1. S.B. 1111: The State of Idaho attempts to terminate federal stockwater rights.**

42. In 2017, the State enacted its first significant modification to its stockwater rights regime through S.B. 1111. *See* 64th Leg., 1st Reg. Sess., 2017 Idaho Sess. Laws 408 (repealing and replacing Chapter 5 of Title 42 of the Idaho Code). The Idaho Governor signed S.B. 1111 into law on March 27, 2017, and, because the bill included an “emergency” clause, the law entered into effect, as a matter of Idaho law, that same day. 2017 Idaho Sess. Laws 409.

43. S.B. 1111 declared that “[n]o agency of the federal government, nor any agent acting on its behalf, shall acquire a stockwater right unless the agency owns livestock and puts the water to

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<sup>4</sup> Two categories of claims were not included in the Final Unified Decree: (1) eighty-eight claims that remained under litigation at the time of the Final Unified Decree; and (2) claims known as “deferred claims,” small domestic and stockwater claims for which adjudication was “deferred” without regard to established filing deadlines in the SRBA. *See* Order Governing Procedures in the SRBA For Adjudication of Deferred De Minimis Domestic and Stockwater Claims (June 28, 2012); *see also supra* n.2.



beneficial use.” I.C. § 42-502 (2018). The statute went even further, prohibiting federal grazing permittees from acting as “agent[s] of the federal government” for purposes of obtaining stockwater rights. *Id.*

44. While S.B. 1111 purported to “codify and enhance . . . important points of law from the *Joyce* case,” *see* I.C. § 42-501, the bill in fact departed from that decision in several ways.

45. First, unlike the *Joyce Livestock* decision, S.B. 1111 applied only to the United States.

46. Second, rather than merely protecting federal permittees from “unwittingly acting as . . . agent[s] of a federal agency,” as asserted in the statement of legislative intent, *see id.*, the statute completely eliminated – solely for federal agencies and their permittees – the exception recognized in *Joyce Livestock* for cases in which a permittee served as an agent on behalf of the federal landowner. *See Joyce Livestock*, 156 P.3d at 519 (holding that “a landowner does not own a water right . . . unless the appropriator was acting as agent of the owner” and noting that “[t]he United States [did] not contend that any of the ranchers who obtained the water rights at issue did so as an agent of the United States” (emphasis added)).<sup>5</sup> The statutory prohibition applied even in cases where a permittee would choose to enter into such a relationship voluntarily and expressly.

47. Third, S.B. 1111 extended not only to constitutional stockwater rights for instream use, but also to constitutional stockwater rights for developed sources, and to licensed statutory stockwater rights as well. The Idaho Supreme Court, in *Joyce Livestock*, expressly distinguished the constitutional, instream stockwater rights at issue in that case from other types of stockwater rights, including licensed statutory rights. *See Joyce Livestock*, 156 P.3d at 520. In particular, the court noted that its decision did not affect, and was not affected by, a longstanding state

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<sup>5</sup> *Joyce Livestock* cites *First Security Bank of Blackfoot v. State*, 291 P. 1064, 1066 (Idaho 1930) for this exception.

statute, enacted in 1939, which explicitly authorized the United States to obtain a stockwater right on grazing allotments administered by the BLM, because “[t]he constitutional method of appropriation and the [statutory] permit method were two separate means for acquiring water rights.” *See id.*; *see also* I.C. § 42-501 (2016) (“The bureau of land management of the department of interior of the United States may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain.”). S.B. 1111, however, repealed this longstanding statute. *See* S.B. 1111 § 1.

48. S.B. 1111 therefore represented a dramatic shift in the State of Idaho’s public policy towards federal stockwater rights, going far beyond what the Idaho Supreme Court had done in *Joyce Livestock*. At the same time, many of the changes made by S.B. 1111 appeared to have only a prospective effect, limiting the future acquisition of stockwater rights by the United States but not affecting existing federal stockwater rights.

**2. H.B. 718: The State of Idaho adopts a novel procedure for forfeiting decreed federal stockwater rights.**

49. In March, 2018, the Secretaries of the Interior and Agriculture, who oversee the BLM and the Forest Service, respectively, each received a letter from the Idaho Governor, the Speaker of the Idaho House of Representatives, and the President Pro Tem of the Idaho Senate. The letter advised that “[a]dditional legislation [was] pending to clarify that federal stockwater rights not put to beneficial use will be forfeited under State law.” The letter went on to “strongly urge [the Secretaries] to instruct [their] departments to abandon all their Idaho stockwater rights acquired based on a claim of beneficial use.” Included as an attachment was a form from IDWR entitled “Notice of Abandonment of Water Right.”

50. In March, 2018, the State enacted H.B. 718, which coupled the substantive legal changes of S.B. 1111 with an aggressive new procedure designed for the sole purpose of eliminating

previously decreed federal stockwater rights.

51. H.B. 718 had two purposes. First, it gave retroactive effect to S.B. 1111 by expressing the intent of the legislature “that stockwater rights acquired in a manner contrary to the *Joyce* decision are subject to forfeiture.” *See* H.B. 718 § 1, 64th Leg., 2d Reg. Sess., 2018 Idaho Sess. Laws 747 (amending I.C. § 42-501). Second, it created a new administrative procedure devoted solely to eliminating federal stockwater rights previously decreed to the United States by the SRBA court. *See id.* § 2 (amending I.C. § 42-503).

52. The procedure created by H.B. 718 applied to all constitutional stockwater rights held by the United States, whether instream or developed, but not to licensed statutory rights. *Id.* H.B. 718 did not apply to stockwater rights owned by any person or entity other than the United States.

53. H.B. 718 required IDWR, within ninety days, to compile a list of water rights owned by the United States purportedly subject to forfeiture and send the list “to the appropriate federal agencies.” *Id.* (enacting I.C. § 42-503(1)). Thereafter, if the governor approved the list, H.B. 718 required IDWR to issue orders to show cause as to “why the stockwater right or rights should not be lost or forfeited.” *Id.* (enacting I.C. § 42-503(2)).

54. The statute gave the federal agencies three weeks after a show-cause order to request an administrative hearing before the IDWR or risk forfeiture of the listed water rights. *Id.* (enacting I.C. § 42-503(5)). H.B. 718 authorized judicial review in Idaho state court of any resulting forfeiture decision by IDWR. *Id.* (enacting I.C. § 42-503(6)).

55. On July 9, 2018, Governor Otter sent letters to the Secretaries of the Interior and Agriculture informing them that “[t]he Director of the Idaho Department of Water Resources has begun compiling a list of stockwater rights held by” the agencies, as required by H.B. 718.

56. On August 28, 2018, the BLM, the Forest Service, and several other federal agencies received a spreadsheet from the Director of IDWR that listed 17,995 purportedly federally owned water rights allegedly subject to the forfeiture process established by H.B. 718. The spreadsheet identified each water right only by an alphanumeric identifier consisting of a “Basin,” a “Sequence,” and a “Suffix,” a priority date, and a “Source List.” The spreadsheet did not identify which federal agency manages each water right, whether each water right is instream or developed, or provide any other information.

57. Although IDWR compiled this list purporting to identify water rights owned by the United States that were subject to forfeiture, the Governor of Idaho never formally approved the list compiled by IDWR, as required to trigger H.B. 718’s forfeiture proceedings. As described below, the State subsequently amended its stockwater legislation several times, to eliminate the State Executive Branch’s discretion over the initiation of anti-federal forfeiture proceedings.

**3. S.B. 1305: The State of Idaho makes federally owned stockwater rights appurtenant to the permittees’ private property.**

58. At the same time that the State enacted H.B. 718, it also enacted S.B. 1305, 64th Leg., 2d Reg. Sess., Idaho Sess. Laws 303. S.B. 1305 amended I.C. § 42-113(2), which deals with “rights to the use of water for in-stream or out-of-stream livestock purpose, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation” – that is, to constitutional stockwater rights located on federal lands, whether owned by the United States or by its permittees.

59. S.B. 1305 added a new provision to this statute, according to which “[t]he water right shall be an appurtenance to the base property.” *See* I.C. § 42-113(2)(b).<sup>6</sup> The statute also

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<sup>6</sup> Under the Taylor Grazing Act and associated regulations, the federal government gives a preference to owners of stock who own “base property,” *i.e.*, private land or water rights

purports to authorize the owner of the base property – rather than the federal agency – to convey the water right in the event that the federal grazing permit “is transferred or otherwise conveyed to a new owner.” *Id.*

60. S.B. 1305 therefore modified existing, federally owned stockwater rights by making those water rights appurtenant to the permittees’ privately owned base property, rather than to the federally owned lands that constitute place of use (as is generally the rule in Idaho). This enactment, too, represents a change in longstanding public policy, designed to target federally owned stockwater rights. While *Joyce Livestock* held that constitutional, instream stockwater rights owned by federal grazing permittees are appurtenant to those permittees’ base property, *see Joyce Livestock*, 156 P.3d at 514, the Idaho Supreme Court did not address the appurtenance of constitutional stockwater rights owned by the United States, including rights associated with physical diversions or rights for which the United States and its grazing permittee are in a principal/agent relationship – which, as noted above, were not at issue in that decision. The State of Idaho, in enacting S.B. 1305, did what the Idaho Supreme Court in *Joyce Livestock* did not purport to do, and could not have done.

61. The statutory changes enacted through S.B. 1305 remain in place to this day.

**4. H.B. 592: The State of Idaho removes the Governor’s check on forfeiture proceedings and makes other changes to H.B. 718.**

62. In March 2020, the State enacted H.B. 592, 65th Leg., 2d Reg. Sess., Idaho Sess. Laws

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sufficient to support their herds on federal lands. *See, e.g., Pub. Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000); 43 U.S.C. § 315b. The BLM defines “base property,” for purposes of BLM grazing permits, as “(1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing.” 43 C.F.R. § 4100.0-5 (2005). “Base property” is defined for Forest Service purposes as “land and improvements owned and used by the permittee for a farm or ranch operation and specifically designated by him to qualify for a term grazing permit.” 36 C.F.R. § 222.1(b)(3) (2021).

738, which made substantial amendments to the sections of the Idaho Code previously created or modified through S.B. 1111 and H.B. 718. H.B. 592 did not change the section of the Idaho Code created through S.B. 1305.

63. H.B. 592 amended the forfeiture proceeding created by H.B. 718 to remove the requirements that IDWR compile a list of federally owned stockwater rights and that the Governor approve that list. Instead, H.B. 592 provided that whenever the director of IDWR “receives a petition making a prima facie showing, or finds, on his own initiative based on available information, that a stockwater right has not been put to beneficial use for a term of five (5) years,” the director “shall expeditiously issue” an order to show cause to the owner of the stockwater right. H.B. 592, § 1 (codified at I.C. § 42-224 (2020)). After service of the IDWR director’s order to show cause, the stockwater right owner would once again have twenty-one days to “request in writing a hearing” before IDWR. If the owner did not request such a hearing, the stockwater right “shall be considered forfeited.” *Id.* at § 42-224(5).

64. The new forfeiture procedures enacted through H.B. 592 applied to “all stockwater rights except those stockwater rights decreed to the United States based on federal law” – that is, to all state-law-based stockwater rights, regardless of ownership. *Id.* at § 42-224(9).

65. While the forfeiture procedures created by H.B. 592 were not limited to stockwater rights owned by the United States, the statute did contain special notice provisions applicable only when “the order affects a stockwater right where the place of use is a federal grazing allotment.” I.C. § 42-224(4) (2020). In such an instance, “the director [of IDWR] shall provide a copy of the order to the holder or holders of any livestock grazing permit or lease for said allotment.” *Id.*

66. Before the enactment of H.B. 592, a longstanding provision of the Idaho Code, section 42-222(2), provided that “[a]ll rights to the use of water acquired under this chapter or otherwise

shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated.” Until H.B. 592 was enacted in 2020, however, no specific statutory procedures existed for applying I.C. § 42-222(2), and the provision was rarely applied. In the words of the Idaho Supreme Court, before the enactment of H.B. 592, “abandonments and forfeitures [we]re not favored” under Idaho law. *Sagewillow, Inc. v. Idaho Dep’t of Water Res.*, 70 P.3d 669, 674 (Idaho 2003) (citing *Zezi v. Lightfoot*, 68 P.2d 50 (Idaho 1937)). Therefore, like its predecessors, H.B. 592 represented a change in Idaho’s longstanding public policy, designed to target federally owned stockwater rights.

67. H.B. 592 also removed the portions of Idaho Code section 42-502 introduced by S.B. 1111 that prohibited permittees from serving as agents on behalf of the federal agency, but retained a prohibition against an “agency of the federal government” acquiring a stockwater right “unless the agency owns livestock and puts the water to beneficial use.” H.B. 592, § 3 (modifying I.C. § 42-502). In place of the omitted provision, H.B. 592 specified that a forfeiture order would not be issued under the new procedures if a livestock grazing permittee “asserts a principal/agent relationship with the federal agency managing the grazing allotment.” H.B. 592, § 1 (creating I.C. § 42-224(10)). The statute did not specifically recognize the right of the United States, rather than the permittee, to “assert[]” such a relationship.

68. Finally, H.B. 592 modified I.C. § 42-504 by removing the ability of the State to approve a purpose of use for the water right other than “watering of livestock,” and instead adding language to limit in perpetuity the place of use for a stockwater right currently located on a federal allotment to “the federal grazing allotment that is the place of use for that stockwater right.” H.B. 592, § 5 (modifying I.C. § 42-504).

69. On October 27, 2021 – a year and a half after the enactment of H.B. 592 – IDWR issued

its first show-cause order to the United States under the State's new stockwater forfeiture laws. Specifically, IDWR issued an order to the Forest Service to show cause before the Director why forty-five stockwater rights held by the United States have not been lost through forfeiture ("the October 2021 Order"). *See* Ex. 4. The October 2021 Order further provided that if the United States did not respond to the Order within twenty-one days, the stockwater rights would be forfeited. *Id.*

70. The stockwater rights at issue in the October 2021 Order were decreed by the SRBA, and supported grazing by two separate Forest Service permittees. On November 5, 2021, two weeks after IDWR's October 2021 Order, one of the two permittees signed an agreement with the Forest Service stating as follows: "The Parties agree that the availability of water on the listed grazing allotments is critical for the grazing management of the allotments, and when domestic livestock owned by the Permittee and located on the listed grazing allotments make use of water by drinking from places, or sources located on [Forest Service] lands, that such use will be deemed beneficial under Idaho state law, and is made by the Permittee acting as a limited agent of the United States for the purposes of establishing and maintaining stockwater rights for the United States within grazing allotments located on [Forest Service] lands, and for no other purposes."

71. On November 12, 2021, IDWR issued an order withdrawing its October 2021 Order, on grounds that the agency agreement executed between the Forest Service and the permittee satisfied the agency-relationship defense codified under H.B. 592. *See* Ex. 5 at 3 (Order Withdrawing Order to Show Cause; Order Dismissing Pet. (Cow Creek Allotment)) (citing I.C. § 42-224(10) (2020)).

72. Although IDWR received additional petitions seeking to initiate forfeiture proceedings



against federal stockwater rights, it did not act on any of these petitions before the State of Idaho again amended its anti-federal forfeiture laws.

**5. H.B. 608: The State of Idaho removes IDWR’s discretion over forfeiture proceedings, attempts to insulate new policy from review in federal court, and imposes limits on permittee agency relationships.**

73. On March 24, 2022, the State of Idaho enacted yet another new statute – H.B. 608, 66th Leg., 2d Reg. Sess., Ch. 215 – designed to eliminate the State Executive Branch’s remaining discretion over forfeiture proceedings, to further weaken the agency-relationship defense recognized in *Joyce Livestock*, and to try to insulate its legislative changes against judicial review in federal court.

74. First, H.B. 608 eliminates most of IDWR’s discretion over the handling of forfeiture proceedings, providing that “[w]ithin thirty (30) days of receipt . . . of a petition or other information” seeking forfeiture of a stockwater right, IDWR “must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture.” I.C. § 42-224(1) (2022). If IDWR determines that the petition “contains prima facie evidence of forfeiture due to nonuse,” it “must within thirty (30) days issue an order to the stockwater right owners to show cause . . . why the stockwater right has not been lost through forfeiture.” I.C. § 42-224(2) (2022). As under the prior laws, the owner of the stockwater right has twenty-one days to respond to the show-cause order. I.C. § 42-224(6) (2022).

75. Second, H.B. 608 attempts to weaken further the agency-relationship defense recognized in *Joyce Livestock*. The statute now codifies this defense by specifying that IDWR “shall not issue an order to show cause where the director has or receives written evidence signed by the principal and the agent, prior to issuance of said order, that a principal/agent relationship existed

during the five (5) year term [preceding the date of the petition] or currently exists between the owners of the water right as principal and a permittee or lessee as agent for the purpose of obtaining or maintaining the water right.” I.C. § 42-224(4) (2022).

76. This codification narrows the common-law defense recognized in *Joyce Livestock* by requiring express “written evidence signed by the principal and the agent” – apparently excluding evidence of an implied principal/agent relationship. Even more restrictively, the version of the defense codified in the statute requires the agency relationship agreement to be signed and submitted to IDWR “prior to issuance of” the show-cause order. This new requirement, if upheld, would preclude the United States from presenting such agreements in response to a show-cause order, as it did in the case of the October 2021 Order. Moreover, because H.B. 608 requires IDWR to act on any “information” indicating that a stockwater right is eligible for forfeiture, and does not require notice to the owner of the stockwater right until the show-cause order is issued, *see* I.C. § 42-224(1), (3) (2022), the statutory deadline for presenting such an agreement to IDWR may in some cases elapse before the United States receives any notice that a particular stockwater right is at risk of forfeiture.

77. Finally, H.B. 608 also includes certain provisions that appear to be intended to insulate the State’s legislative changes from judicial review in federal court, without eliminating those proceedings’ threat to federal interests. In particular, H.B. 608 now provides that any determination by IDWR that a stockwater right has been forfeited “shall have no legal effect” on its own. *See* I.C. § 42-224(9) (2022). Instead, such a determination triggers a mandatory provision according to which “the state of Idaho, by and through the office of the attorney general, *must* initiate a civil action” in State court within sixty days of IDWR’s determination. *See* I.C. § 42-224(10) (2022) (emphasis added). In the subsequent judicial proceedings, IDWR

“shall not be a party,” but its determination of forfeiture “shall constitute prima facie evidence that the right has been forfeited.” *See* I.C. § 42-224(11) (2022).

78. On April 25, 2022, IDWR issued three show-cause orders requiring the United States to show cause within twenty-one days why eighty-one federally owned stockwater rights used on lands managed by the BLM should not be forfeited. Order to Show Cause, Docket No. P-OSC-2021-001 (Crane Creek Allotment); Order to Show Cause, Docket No. P-OSC-2021-002 (Paddock Valley Allotment); Order to Show Cause, Docket No. P-OSC-2021-004 (Butcher Bar and China Creek Allotments) (“the April 2022 Orders). The April 2022 Orders were served on the United States on April 28, 2022.

79. On May 10, 2022, the United States informed the Idaho Attorney General’s office that twenty-four of the federally owned stockwater rights listed in the April 2022 Orders were decreed based on federal law.<sup>7</sup> On May 13, IDWR withdrew, amended, and reissued the three Orders, deleting the twenty-four water rights, stating that they “should not have been included in the list of water rights subject to the order to show cause.” May 2022 Orders, each Order at 1 (“This section applies to all stockwater rights except those stock water rights decreed to the United States based on federal law.”) (citing Idaho Code § 42-224(14)). The May 2022 Orders were served on the United States on May 16, 2022. Under I.C. § 42-224(6) and (7), the United States therefore had until June 6, 2022, to respond to the orders, or face an administrative forfeiture determination by default. To avoid this default determination, on June 3, the United States, through the Office of the Solicitor of the Department of the Interior, filed a letter specially

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<sup>7</sup> The federal-law basis for these water rights is a 1926 Presidential Executive Order, Public Water Reserve 107, issued pursuant to the Pickett Act, 43 U.S.C. § 141, and the Stock Raising Homestead Act, 43 U.S.C. § 300 (repealed 1976), that reserved “every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole.”

appearing before IDWR to request a hearing, but noting that the United States contests jurisdiction and requesting that the hearing be stayed pending completion of this litigation. On June 24, IDWR issued orders staying the hearing in all three administrative proceedings, “pending the outcome of [this case] or until otherwise ordered by the Director.”

80. On June 22, 2022, IDWR issued a fourth show-cause order requiring the United States to show cause within twenty-one days why eleven federally owned stockwater rights used on lands managed by the Forest Service should not be forfeited. *See* June 2022 Order. The June 2022 Order was served on the United States on June 27, 2022. Under I.C. § 42-224(6) and (7), the show-cause order set a July 18, 2022, deadline to respond, or face an administrative forfeiture determination by default. To avoid this default determination, on July 13, the United States, through the Office of the General Counsel of the United States Department of Agriculture, filed a letter specially appearing before IDWR to request a hearing, but noting that the United States contests jurisdiction and requesting that the hearing be stayed pending completion of this litigation. IDWR has not yet responded to that letter.

81. In sum, H.B. 608 represents the latest in a five-year series of enactments designed to target federal stockwater rights for forfeiture and to render them appurtenant to grazing permittees’ private property; to eliminate the discretion of the State Executive Branch over the handling of these forfeiture proceedings; and to restrict or eliminate the common-law agency-relationship defense recognized by the Idaho Supreme Court in *Joyce Livestock*. While the details of the forfeiture procedures have evolved over time, and some of the most egregiously unlawful elements (such as H.B. 718’s explicit singling out of federally owned property) have fallen by the wayside, H.B. 608 continues to pose a threat to the congressionally authorized federal grazing program.

## VI. DECLARATORY RELIEF ALLEGATIONS

82. There is an actual controversy between the United States and the Defendants with respect to the validity of H.B. 608 and S.B. 1305.

83. The United States asserts that sections 42-113(2)(b), 42-222(2), 42-224, 42-501, 42-502, and 42-504 of the Idaho Code, which were enacted through S.B. 1111, H.B. 718, S.B. 1305, H.B. 592, and/or H.B. 608, and which in combination seek to divest the United States of its property rights, namely the fifty-seven water rights listed in the May 2022 Orders, the eleven water rights listed in the June 2022 Order, and any federally owned water rights listed in similar successor orders,<sup>8</sup> and to improperly regulate federal property and the use of federal property, are, as applied to the United States, contrary to the United States Constitution, the Idaho Constitution, and principles of sovereign immunity. They are therefore invalid, and they may not be lawfully applied or enforced against the United States or its agencies.

84. The United States also asserts that sections 42-113(2)(b), 42-502, and 42-504 of the Idaho Code are invalid on their face in violation of the United States Constitution and the Idaho Constitution and, therefore, are each invalid and may not lawfully be applied or enforced against the United States or its agencies.

85. Upon information and belief, the Defendants, by contrast, assert that these provisions of

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<sup>8</sup> The United States is amending its complaint to include the June 2022 Order because that Order is directed at stockwater rights held by the United States for use on lands managed by the Forest Service, unlike the May 2022 Orders, which are all directed at stockwater rights held by the United States for use on lands managed by the BLM. Counsel for the State has represented to undersigned counsel that it will issue an order staying administrative proceedings related to the June 2022 Order, as the United States has requested by letter dated July 13, 2022. The United States anticipates that similar show-cause orders are likely to be issued in the future for other stockwater rights held by the United States for use on other federal lands managed by the BLM or the Forest Service. The United States reserves the right to seek to further amend its complaint to specifically include such future orders as circumstances may justify, including to the extent the State does not agree to voluntarily stay administrative proceedings on such future orders until this litigation is concluded, as it has done with the May 2022 Orders.

the Idaho Code are valid. The Defendants have begun to apply and enforce those statutes against the United States and its agencies, and, upon information and belief, they intend to continue to do so.

86. Pursuant to 28 U.S.C. § 2201(a), this Court has, and should exercise, the authority to declare the legal rights and obligations of the parties with respect to these provisions of the Idaho Code and their application or enforcement. *See* 28 U.S.C. § 2201(a) (“any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”). Federal Rule of Civil Procedure 57 further states that a “court may order a speedy hearing of a declaratory-judgment action.”

#### **VII. FIRST CLAIM FOR RELIEF (Federal Sovereign Immunity)**

87. The United States incorporates by reference its previous allegations as though fully set forth herein.

88. H.B. 608 created a new procedure designed for the sole purpose of forfeiting stockwater rights owned by the United States, including previously decreed rights.

89. Such an administrative proceeding is not a “suit . . . for the adjudication of rights to the use of water of a river system or other source, or . . . for the administration of such rights,” within the meaning of the McCarran Amendment, 43 U.S.C. § 666.

90. Because there is no applicable waiver of the United States’ sovereign immunity, Defendants cannot lawfully apply section 42-224 to the United States.

#### **VIII. SECOND CLAIM FOR RELIEF (Supremacy Clause of the U.S. Constitution–Intergovernmental Immunity)**

91. The United States incorporates by reference its previous allegations as though fully set forth herein.

92. Sections 42-113(2)(b), 42-222(2), 42-224, 42-501, 42-502, and 42-504 of the Idaho Code unlawfully target the stockwater rights of the United States, including previously decreed rights, for regulation in a discriminatory manner in violation of the Supremacy Clause of the United States Constitution.

93. Section 42-113(2)(b) of the Idaho Code discriminates against the United States and its agencies because it makes constitutional stockwater rights “associated with grazing on federally owned or managed land”— including such rights owned by the United States – appurtenant to the grazing permittees’ private property, rather than to the federally owned lands that constitute the place of use.

94. Section 42-502 of the Idaho Code discriminates against the United States and its agencies because it prohibits the United States from owning stockwater rights unless it owns livestock.

95. Section 42-504 of the Idaho Code discriminates against the United States and its agencies because it provides limitations on stockwater rights located upon federal grazing allotments that are not applicable to stockwater rights located on other lands, including those lands held by private owners or the State of Idaho.

96. In so discriminating against the United States and its agencies, sections 42-502 and 42-504 violate the Supremacy Clause of the United States Constitution.

97. In addition, the challenged Idaho laws, taken together, evidence Defendants’ intent to treat the water rights of the United States in a discriminatory manner in violation of the Supremacy Clause of the United States Constitution.

### **IX. THIRD CLAIM FOR RELIEF (Property Clause of the U.S. Constitution)**

98. The United States incorporates by reference its previous allegations as though fully set forth herein.

99. Sections 42-113(2)(b), 42-222(2), 42-224, 42-501, and 42-502 of the Idaho Code as applied by Defendants purport to divest the United States and its agencies of vested property decreed to the United States by the SRBA court or licensed by IDWR. The Property Clause of the United States Constitution, however, provides that the “[p]ower to release or otherwise dispose of the rights and property of the United States is lodged in the Congress.” *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941).

100. By purporting to divest the United States and its agencies of property without congressional authorization, sections 42-113(2)(b), 42-222(2), 42-224, 42-501, and 42-502 of the Idaho Code violate the Property Clause of the United States Constitution.

**X. FOURTH CLAIM FOR RELIEF  
(Contract Clause of the U.S. Constitution)**

101. The United States incorporates by reference its previous allegations as though fully set forth herein.

102. Idaho Code sections 42-113(2)(b), 42-222(2), 42-224, 42-501, and 42-502 collectively abrogate legal settlements negotiated and agreed to by the United States and numerous other parties.

103. An explicit condition of these settlements, agreed to by the other settling parties in return for substantial concessions granted by the United States, was the decree by the SRBA court to the United States of numerous water rights now threatened with divestiture and/or forfeiture by Idaho Code sections 42-113(2)(b), 42-222(2), 42-224, 42-501, and 42-502. Securing decrees for these water rights was one of the primary benefits obtained by the United States in entering into these settlements.

104. By operating as a substantial impairment of this contractual relationship, Idaho Code sections 42-113(2)(b), 42-222(2), 42-224, 42-501, and 42-502 violate the Contract Clause of the



United States Constitution.

**XI. FIFTH CLAIM FOR RELIEF  
(Retroactivity Clause of the Idaho Constitution)**

105. The United States incorporates by reference its previous allegations as though fully set forth herein.

106. Idaho Code Section 42-224 provides a forfeiture proceeding by which to eliminate stockwater rights that were previously lawfully decreed to or otherwise acquired by the United States.

107. Idaho law provides that “when any right to the use of water shall be lost through . . . forfeiture such rights to such water shall . . . be again subject to appropriation.” I.C. § 42-222(2). Therefore, forfeiture of the United States’ stockwater rights would benefit other water users by making the water currently subject to those federal stockwater rights available for appropriation by other water users.

108. By operating retroactively for the benefit of other water users by forfeiting the United States’ previously obtained water rights, Idaho Code § 42-224 violates the Retroactivity Clause of the Idaho Constitution, Idaho Const. art. XI, § 12.

109. In addition, by retroactively declaring stockwater rights appurtenant to a grazing permit holder’s private property and not to the place of use (federal property), Idaho Code § 42-113(2)(b), by retroactively invalidating contractual agreements entered into by the United States and confirmed by Idaho courts, and by retroactively imposing limitations on the purpose and place of use of federally owned stockwater rights, I.C. § 42-504, the Idaho statutes violate the Retroactivity Clause of the Idaho Constitution, Idaho Const. art. XI, § 12.

**XII. PRAYER FOR RELIEF**

110. Wherefore, Plaintiff United States of America prays that the Court enter judgment against

the Defendants and award the following relief:

- (a) a declaration that Idaho Code sections 42-113(2)(b), 42-222(2), 42-224, 42-501, and 42-502, which together purport to divest and/or forfeit water rights of the United States, are invalid as applied to the United States of America and its agencies;
- (b) a declaration that sections 42-113(2)(b), 42-502, and 42-504 are invalid on their face and as applied to the United States of America and its agencies;
- (c) orders temporarily and permanently enjoining application of sections 42-113(2)(b), 42-222(2), 42-224, 42-501, 42-502, and 42-504 to the United States of America or its agencies;
- (d) the United States' costs; and
- (e) such other and further relief as the Court deems just and proper.

Respectfully submitted, this 15th day of July, 2022.

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# EXHIBIT 1

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF CERTAIN BASIN 67  
WATER RIGHTS, IN THE NAME OF THE  
UNITED STATES OF AMERICA ACTING  
THROUGH THE DEPARTMENT OF  
INTERIOR, BUREAU OF LAND  
MANAGEMENT

Docket No. P-OSC-2021-001

**AMENDED ORDER PARTIALLY  
GRANTING PETITION; AMENDED  
ORDER TO SHOW CAUSE**

**(CRANE CREEK ALLOTMENT)**

**GROUND FOR AMENDED ORDER**

On April 25, 2022, the Director of the Idaho Department of Water Resources (“Department”) issued an *Order Partially Granting Petition; Order to Show Cause* in this matter. In it, the Director ordered the United States of America acting through the Department of Interior, Bureau of Land Management to show cause why the following stockwater rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2): 67-12395, 67-12396, 67-12399, 67-12400, 67-12401, 67-12427, 67-12429, 67-12431, 67-12433, 67-12435, 67-12443, 67-12445, 67-12447, 67-12740, 67-12741, 67-12743, 67-12744, 67-12745, 67-12746, 67-12747, 67-12748, 67-12749, 67-12750, 67-12753, 67-12754, 67-13008, 67-13009, 67-13010, 67-13013, and 67-13140. It has come to the Department’s attention that of the water rights subject to the order to show cause, the following water rights are based on federal law: 67-12427, 67-12429, 67-12431, 67-12433, 67-12435, 67-12443, 67-12445, and 67-12447. These federal water rights should not have been included in the list of water rights subject to the order to show cause. *See* Idaho Code § 42-224(14) (“This section applies to all stockwater rights except those stock water rights decreed to the United States based on federal law.”). Pursuant to Rule 760 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01.760), the Director hereby withdraws the April 25, 2022 order and replaces it with this *Amended Order Partially Granting Petition; Amended Order to Show Cause*. This amended order removes water rights 67-12427, 67-12429, 67-12431, 67-12433, 67-12435, 67-12443, 67-12445, and 67-12447 from the list of water rights subject to the order to show cause.

**BACKGROUND**

On September 16, 2021, Soulen Livestock Co. and Soulen Grazing Association, LLC (collectively, “Petitioners”) filed with the Department a *Verified Petition for Order to Show Cause* (“Petition”).<sup>1</sup> Petitioners ask the Department to issue an order pursuant to Idaho Code § 42-224(1) “to show cause why the Water Rights [(see Petition Exhibit A, “BLM Overlapping Water Rights”)]” on the federal grazing allotment known as the Crane Creek Allotment

<sup>1</sup> When submitting the Petition, Petitioners failed to include copies of the exhibits referenced in the Petition. Petitioners submitted the supporting exhibits (Exhibit A and Exhibit B) to the Department on September 23, 2021.

(“Allotment”) “have not been lost through forfeiture pursuant to Idaho Code § 42-222(2).” *Petition* at 1.<sup>2</sup>

Petitioners assert that the water rights listed in Exhibit A, under “BLM Overlapping Water Rights” (“BLM Water Rights”) are owned by the United States of America acting through the Department of Interior, Bureau of Land Management (“BLM”). *Id.* ¶ 1; *see Petition* Ex. A. Additionally, Petitioners assert that the points of diversion and places of use for the BLM Water Rights are located on the Allotment. *Petition* ¶ 3. Petitioners claim that no other water rights, other than the water rights owned by Soulen Livestock Co., share “the same place of use or point of diversion” as the BLM Water Rights. *Id.* ¶ 4.

Petitioners maintain that Soulen Grazing Association has, for at least the last five years, held a valid BLM grazing permit for livestock grazing on the Allotment. *Id.* ¶ 5; *see Petition* Ex. B. Petitioners assert that Soulen Grazing Association’s livestock have grazed on the Allotment “each year of the permit term.” *Petition* ¶ 6. Petitioners claim that Soulen Grazing Association’s members have “regularly visited the Allotment each grazing season of use and at other times outside the season of use each year for more than the past five years.” *Id.* ¶ 7. Petitioners allege that “[a]t no time over the past five years have Petitioners, their officers, employees, or agents witnessed, read about, or heard of the existence of livestock owned or controlled by the BLM” on the Allotment to use water under the BLM Water Rights. *Id.* ¶ 8, at 2. Petitioners allege that at no time since Soulen Grazing Association has been authorized to use the Allotment “has either Petitioner, their members or their agents or employees ever witnessed, read about, or heard of the BLM applying the [BLM] Water Rights to the beneficial use of watering livestock that the BLM owns or controls on the Allotment.” *Id.* ¶ 10. Petitioners assert that no agency relationship exists between Petitioners and the BLM “for the purpose of acquiring water rights for the BLM on the Allotment.” *Id.* ¶ 11. The Petition is verified by Harry C. Soulen, President of Soulen Livestock Co. and manager of Soulen Grazing Association, LLC. *Id.* at 3–4.

To comply with the statutory service requirements of Idaho Code § 42-224(4),<sup>3</sup> the Department submitted a Freedom of Information Act (“FOIA”) request to the BLM on September 23, 2021, for a copy of all active grazing permits on the Crane Creek Allotment and the adjoining Paddock Valley Allotment. On October 8, 2021, in response to the Department’s FOIA request, the BLM sent copies of four grazing permits. One permit sent by the BLM matches Permit No. 1101236, issued March 4, 2016, that Petitioners filed as Exhibit B. On October 21, 2021, the BLM confirmed that they sent one permit in error and that it is not

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<sup>2</sup> On the same day, Petitioners also filed a second verified petition, seeking an order to show cause why certain BLM water rights on the federal grazing allotment known as the Paddock Valley Allotment have not been lost through forfeiture. *See Verified Petition for Order to Show Cause, In re Basin 65 & 67 Water Rts., In Name of U.S. Dep’t of Interior, Bureau of Land Mgmt.*, No. P-OSC-2021-002 (Idaho Dep’t of Water Res. Sep. 16, 2021), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/P-OSC-2021-002/20210916-Verified-Petition-for-Order-to-Show-Cause.pdf> [hereinafter Paddock Valley Petition].

<sup>3</sup> Idaho Code § 42-224(4) was amended during the Second Regular Session of the Sixty-sixth Idaho Legislature, effective March 24, 2022. Both prior to and after the 2022 amendment, the service requirements outlined within Idaho Code § 42-224(4) are substantially the same regarding the persons who must be served a copy of an order to show cause issued by the Department.

currently active. The remaining two permits, sent by the BLM, are active Crane Creek Allotment grazing permits held by the following: Jerome and Jill Grandi, and David Maddox.

### **APPLICABLE LAW**

Idaho Code § 42-224 states in pertinent part:

(1) Within thirty (30) days of receipt by the director of the department of water resources of a petition or other information that a stockwater right has not been put to beneficial use for a term of five (5) years, the director must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture pursuant to section 42-222(2), Idaho Code. If the director determines the petition or other information, or both, is insufficient, he shall notify the petitioner of his determination, which shall include a reasoned statement in support of the determination, and otherwise disregard for the purposes of this subsection the other, insufficient, information.

(2) If the director determines the petition or other information, or both, contains prima facie evidence of forfeiture due to nonuse, the director must within thirty (30) days issue an order to the stockwater right owner to show cause before the director why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code. Any order to show cause must contain the director's findings of fact and a reasoned statement in support of the determination.

....

(14) This section applies to all stockwater rights except those stock water rights decreed to the United States based on federal law.

I.C. § 42-224(1)–(2), (14) (current version as amended in 2022). Therefore, to issue an order to show cause as Petitioners have requested, the Director must conclude that the Petition makes a “prima facie showing” that the BLM has not put its BLM Water Rights, decreed based on state law, to beneficial use for at least five years. “Prima facie” is defined by *Black’s Law Dictionary* as: “Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue <a prima facie showing>.” *Prima facie*, *Black’s Law Dictionary* (11th ed. 2019).

### **FINDINGS OF FACT**

After careful review of the Petition (including Exhibit A and Exhibit B), the Department’s associated research memorandum,<sup>4</sup> and Petitioners’ concurrently filed Paddock Valley Petition, the Director issues the following findings:

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<sup>4</sup> For the Director to give a reasoned statement supporting a determination in favor of or opposing forfeiture pursuant to Idaho Code § 42-222(2), Department staff utilized the Department’s water right files and database to thoroughly review, analyze, and document the locations of the places of use for the water rights listed in Exhibit A of the Petition. See Mem. from Glen Gardiner & Craig Saxton, Water Allocations Analyst and Adjudication

1. Petitioners requested the Department issue an order to the BLM to show cause why the BLM's Water Rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2). *See Petition* at 1. The following is a list of the water rights at issue: 67-12395, 67-12396, 67-12397, 67-12398, 67-12399, 67-12400, 67-12401, 67-12405, 67-12408, 67-12409, 67-12427, 67-12429, 67-12431, 67-12433, 67-12435, 67-12437, 67-12443, 67-12445, 67-12447, 67-12508, 67-12509, 67-12740, 67-12741, 67-12742, 67-12743, 67-12744, 67-12745, 67-12746,<sup>5</sup> 67-12747, 67-12748,<sup>6</sup> 67-12749, 67-12750, 67-12753, 67-12754, 67-13006, 67-13008, 67-13009, 67-13010, 67-13013, 67-13014, 67-13015, 67-13140. *See Petition* Ex. A; *Memorandum*.

2. The Director has reviewed the partial decrees for the BLM Water Rights. The following water rights are based on federal law: 67-12427, 67-12429, 67-12431, 67-12433, 67-12435, 67-12437, 67-12443, 67-12445, and 67-12447. In accordance with Idaho Code § 42-224(14), any further consideration of water rights based on federal law is unwarranted in this matter. The remaining water rights at issue are based on state law and subject to further consideration by the Director.

3. Using the Department's water rights database, the Department reviewed the places of use for the Water Rights. *Memorandum* at 1.

4. Petitioners' allegations in the Petition are specific to non-use within the Allotment and do not extend to use beyond the Allotment. *See Petition* at 1–2.

5. Based on the Memorandum, the Director finds that the places of use for the following water rights, are entirely within the Allotment: 67-12395, 67-12396, 67-12399, 67-12400, 67-12401, 67-12740, 67-12743, 67-12744, 67-12746, 67-12747, 67-12748, 67-12749, 67-12750, 67-12753, 67-12754, 67-13008, 67-13009, 67-13010, and 67-13013. *See Memorandum* at 1, 5.

6. Harry C. Soulen is an officer and member in Soulen Livestock Co. and Soulen Grazing Association, LLC. *Petition* at 3–4. The allegations in the Petition attribute observations of nonuse of water in the Allotment to the officers and members of Soulen Livestock Co. and Soulen Grazing Association, LLC. *Id.* at 1–2. Accordingly, the Director finds that Harry C. Soulen's statements are based on personal knowledge.

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Section Manager, Idaho Dep't of Water Res., to Shelley Keen, Water Allocation Bureau Chief, Idaho Dep't of Water Res. 1 (Nov. 8, 2021) (attached to this Order as Attachment A) [hereinafter Memorandum].

<sup>5</sup> Exhibit A of the Petition identifies water right 67-12764 as one of the BLM's overlapping water rights. The inclusion of water right 67-12764 appears to be a typographical error as 67-12764 is out of sequence with the other water rights listed in Exhibit A and the Department has no record of a water right with that number. *Memorandum* at 1 n.2. The intended water right number is believed to be 67-12746, as water right 67-12746 is a BLM water right with a point of use located within the Allotment. *Id.* at 1. In this matter, the Director will substitute water right 67-12746 in place of 67-12764, since this is most likely a simple transposition of numbers.

<sup>6</sup> Exhibit A of the Petition includes water right 67-12749 twice. This appears to be another typographical error. Based on the Department's review, it is believed that the first reference to 67-12749 in Exhibit A should have been 67-12748. *See Memorandum* at 5. In this matter, the Director will substitute water right 67-12748 for the first reference to water right 67-12749.



7. As described in footnote 2 above, on September 16, 2021, Petitioners filed the Paddock Valley Petition. The Paddock Valley Petition is similar to the Petition, except it contains specific allegations related to the Paddock Valley Allotment. Within the Paddock Valley Petition, Harry C. Soulen, an officer and member in Soulen Livestock Co. and Soulen Grazing Association, LLC, alleges nonuse of water by the BLM. Petitioners' allegations in the Paddock Valley Petition are specific to non-use within the Paddock Valley Allotment and do not extend to use beyond the Paddock Valley Allotment. *See Paddock Valley Petition* at 1–2.

8. The Paddock Valley Petition attributes allegations of non-beneficial use of water, authorized by federal water rights within the Paddock Valley Allotment, to the officers and members of Soulen Livestock Co. and Soulen Grazing Association, LLC. *Paddock Valley Petition* ¶¶ 8–10. Accordingly, the Director finds that Harry C. Soulen's statements in the Paddock Valley Petition are based on personal knowledge.<sup>7</sup>

9. Based on the Memorandum, the Director finds that the places of use for three of the water rights, 67-12741, 67-12745, and 67-13140, are entirely within both the Allotment and the Paddock Valley Allotment. *Memorandum* at 3, 5.

10. The Director finds that some of the water rights at issue have a place of use that extends beyond both the Allotment and the Paddock Valley Allotment. The water rights with a place of use that extends beyond the boundaries of the Allotment and the Paddock Valley Allotment are: 67-12397, 67-12398, 67-12405, 67-12408, 67-12409, 67-12508, 67-12509, 67-12742, 67-13006, 67-13014, and 67-13015. *See Memorandum* at 2–5.

11. The Director has not received written evidence that a principal/agent relationship existed, during the five-year period calculated pursuant to Idaho Code § 42-224(1), between the BLM and any Crane Creek Allotment or Paddock Valley Allotment livestock grazing permit or lease holders for the purpose of maintaining the BLM Water Rights.

## ANALYSIS

Forfeiture is disfavored in Idaho law. *Application of Boyer*, 73 Idaho 152, 159, 248 P.2d 540, 544 (1952) (“Forfeitures are abhorrent and all intendments are to be indulged against a forfeiture.”). To make a prima facie showing that the BLM has not beneficially used water authorized by its water rights for five years, for each water right at issue here, Petitioners must present sufficient evidence establishing forfeiture over the entire place of use—not just those portions of the place of use within the Allotment. The Department's Memorandum, which includes an analysis of its associated due diligence investigation, clarifies that some of the places of use of the BLM Water Rights extend beyond the boundaries of the Allotment and the related Paddock Valley Allotment. *See Memorandum* at 2–5. As noted in findings 4 and 7 above, Petitioners do not offer evidence of BLM's non-use of water beyond the boundaries of the

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<sup>7</sup> The Paddock Valley Petition is also addressed in the Director's *Order Partially Granting Petition; Order to Show Cause (Paddock Valley Allotment)*. Order Part. Granting Pet.; Order to Show Cause (Paddock Valley Allot't), *In re Basin 65 & 67 Water Rts., In Name of U.S. Dep't of Interior, Bureau of Land Mgmt.*, No. P-OSC-2021-002 (Idaho Dep't of Water Res. Apr. 25, 2022), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/P-OSC-2021-002/P-OSC-2021-002-20220425-Order-to-Show-Cause-Paddock-Valley>.



Allotment and the Paddock Valley Allotment. Therefore, the Petition, even when combined jointly with the Paddock Valley Petition, does not include sufficient evidence for the Director to issue an order to show cause to the extent that Petitioners have requested.

The Department must limit the scope of an order to show cause issued in this matter to only those BLM Water Rights based on state law and with a place of use that is located entirely within the property boundaries for which the Department has received supporting statements alleging non-use of water. Accordingly, for those BLM Water Rights that have a place of use that is located either entirely or partially outside of the Allotment and the Paddock Valley Allotment (see finding 10 above), Petitioners have failed to make a “prima facie showing” in accordance with Idaho Code § 42-224 that the BLM has not beneficially used water authorized by its water rights for five years. However, Petitioners’ statements based on personal knowledge (see findings 6 and 8 above), when combined with the analysis within the Department’s Memorandum, amount to a “prima facie showing” in accordance with Idaho Code § 42-224 that the BLM has not beneficially used water authorized by its water rights that have a place of use entirely within the Allotment and the Paddock Valley Allotment within the last five years.

### CONCLUSION OF LAW

The Director concludes that the “prima facie showing” burden of proof, set forth in Idaho Code § 42-224, has been satisfied to the extent that he should partially grant Petitioners’ request and issue an order to the BLM to show cause before the Director why those BLM Water Rights based on state law and that have a place of use entirely within the Allotment and the Paddock Valley Allotment have not been lost through forfeiture pursuant to Idaho Code § 42-222(2).

### ORDER

Based on the foregoing, the following are HEREBY ORDERED:

1. The *Verified Petition for Order to Show Cause* at issue is GRANTED for ONLY the following water rights: 67-12395, 67-12396, 67-12399, 67-12400, 67-12401, 67-12740, 67-12741, 67-12743, 67-12744, 67-12745, 67-12746, 67-12747, 67-12748, 67-12749, 67-12750, 67-12753, 67-12754, 67-13008, 67-13009, 67-13010, 67-13013, and 67-13140.
2. The *Verified Petition for Order to Show Cause* at issue is DENIED for the following water rights: 67-12397, 67-12398, 67-12405, 67-12408, 67-12409, 67-12427, 67-12429, 67-12431, 67-12433, 67-12435, 67-12437, 67-12443, 67-12445, 67-12447, 67-12508, 67-12509, 67-12742, 67-13006, 67-13014, and 67-13015.
3. In accordance with Idaho Code § 42-224(2), the United States of America acting through the Department of Interior, Bureau of Land Management must show cause before the Director of the Idaho Department of Water Resources why the following stockwater rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2): 67-12395, 67-12396, 67-12399, 67-12400, 67-12401, 67-12740, 67-12741, 67-12743, 67-12744, 67-12745, 67-12746, 67-12747, 67-12748, 67-12749, 67-12750, 67-12753, 67-12754, 67-13008, 67-13009, 67-13010, 67-13013, and 67-13140.

4. In accordance with Idaho Code § 42-224(6), the United States of America acting through the Department of Interior, Bureau of Land Management has 21 days from completion of service of this order to request in writing a hearing pursuant to Idaho Code § 42-1701A(1)–(2). If the United States requests such a hearing, it must also serve a copy of the request upon the petitioners and the livestock grazing permit holders listed on the included certificate of service.

5. In accordance with Idaho Code § 42-224(7), if the United States fails to respond to the above order to show cause within 21 days, the stockwater rights for which the *Verified Petition for Order to Show Cause* has been partially granted shall be considered forfeited, and the Director shall issue an order within 14 days stating the stockwater rights have been forfeited pursuant to Idaho Code § 42-222(2).

6. In accordance with Idaho Code §§ 42-224(1) and 42-224(4), Soulen Livestock Co., Soulen Grazing Association, LLC, and all active Crane Creek Allotment and Paddock Valley Allotment livestock grazing permit or lease holders will be served a copy of this order.

DATED this 13th day of May 2022.



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MAT WEAVER for GARY SPACKMAN  
Acting Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13th day of May 2022, I caused to be served a true and correct copy of the foregoing *Amended Order Partially Granting Petition; Amended Order to Show Cause (Crane Creek Allotment)*, by the method indicated below, upon the following:

Soulen Livestock Co. & Soulen Grazing Association, LLC P.O. Box 827 Weiser, ID 83672  <i>Petitioners</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
Jerome & Jill Grandi 2294 Weiser River Rd. Weiser, ID 83672  <i>Livestock Grazing Permit Holder</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
David Maddox 1021 Lower Crane Rd. Weiser, ID 83672  <i>Livestock Grazing Permit Holder</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
USDI BLM Idaho State Office 1387 S. Vinnell Way Boise, ID 83709  <i>Stockwater Right Owner</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<i>Courtesy Copy:</i>	
David Negri United States Department of Justice Environment and Natural Resources Division 550 W. Fort St., MSC 033 Boise, ID 83724 <a href="mailto:david.negri@usdoj.gov">david.negri@usdoj.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
William G. Myers III HOLLAND & HART LLP P.O. Box 2527 Boise, ID 83701 <a href="mailto:wmyers@hollandhart.com">wmyers@hollandhart.com</a>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email



Sarah Tschohl  
Legal Assistant

## Memorandum

**To:** Shelley Keen

**Prepared by:** Glen Gardiner & Craig Saxton  
*GG* *CS*

**Date:** November 8, 2021

**Re:** Review of Federal water rights within the Crane Creek Allotment (#361) which were identified as Exhibit A of Soulen Livestock Co's Verified Petition for Order to Show Cause.

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### Comparison of Partial Decrees to IDWR Database Records and Shapefiles

On September 16, 2021, Soulen Livestock Company and Soulen Grazing Association, LLC ("Soulen") petitioned the Director of the Idaho Department of Water Resources ("IDWR") to issue a show cause order pursuant to Idaho Code § 42-224(1) for a list of water rights "located on a federal grazing allotment known as the Crane Creek Allotment (#361)." Soulen's petition refers to the list of water rights as Exhibit A. For each of the water rights on Exhibit A, we compared information on SRBA partial decrees to information in IDWR's water rights database. Fields compared included Name and Address, Source, Quantity, Priority Date, Point of Diversion, Purpose and Period of Use, and Place of Use. We found no discrepancies, although the Names on the partial decrees are abbreviated to USDI BLM, IDAHO STATE OFFICE, whereas IDWR's database refers to the Names as UNITED STATES OF AMERICA ACTING THROUGH USDI BUREAU OF LAND MANAGEMENT, IDAHO STATE OFFICE.

IDWR stores digitized water right places of use ("POU") in its geographic information system ("GIS"). We verified the digitized POU for each of the water rights listed on Exhibit A matches the POU described in the water rights database. No discrepancies were found. To complete our analysis, we then used GIS to overlay the digitized POU for each water right in Exhibit A onto the digital boundaries of the Crane Creek Allotment and neighboring grazing allotments.<sup>1</sup>

### Crane Creek Allotment Analysis

Based on digital overlay, the POUs for the following water rights exist completely within the Crane Creek Allotment:

67-12395, 67-12396, 67-12400, 67-12401, 67-12427, 67-12429, 67-12443, 67-12445, 67-12447, 67-12740, 67-12744, 67-12746<sup>2</sup>, 67-12747, 67-12749, 67-12750, 67-12753, 67-12754, 67-13008, 67-13009, 67-13010, and 67-13013.

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<sup>1</sup> The digital shapes of the allotment boundaries were created by U.S. Department of the Interior, Bureau of Land Management with a publication date of 06-30-2017 and downloaded from the website

[https://gis.blm.gov/arcgis/rest/services/range/BLM\\_Natl\\_Grazing\\_Allotment/MapServer](https://gis.blm.gov/arcgis/rest/services/range/BLM_Natl_Grazing_Allotment/MapServer)

<sup>2</sup> The inclusion of 67-12764 was clearly a typographical error as 67-12764 is out of sequence with the other water rights and no valid water right exists under this number. For purpose of this analysis, we are substituting 67-12746 for 67-12764.



Water rights 67-12399, 67-12431, 67-12433, 67-12435, and 67-12743, authorize water use from either a spring or a stream where the point of diversion or the instream stockwater use reach is entirely within the Crane Creek allotment. However, because the decrees list the places of use for these rights in quarter-quarters or government lots, small portions of the decreed place of use tracts (less than 1.5 acres) for each of these rights extend outside the Crane Creek Allotment boundary. Based on IDWR's review, water from the decreed sources and points of diversion or instream use reaches would not be conveyed to – or used in -- the portions of the place of use tracts outside the Crane Creek Allotment boundary.

POUs for the following water rights exist partially within the Crane Creek Allotment and partially outside the Crane Creek Allotment:

67-12397, 67-12398, 67-12405, 67-12408, 67-12409, 67-12437, 67-12508, 67-12509, 67-12741, 67-12742, 67-12745, 67-13006, 67-13014, 67-13015 and 67-13140.

The analysis below describes water rights from Exhibit A having all or portions of their authorized POU's outside the Crane Creek Allotment.

**(Boundary Water Rights, All Split between Two or More Allotments)**

**67-12397:**

Water right 67-12397 is an instream stockwater right on the Weiser River. The POU is T12N, R4W, Sec 22, NESE & SESE and Sec 27, NENE & NWNE. The POU for water right 67-12397 is a stretch of the Weiser River that is the boundary of the Crane Creek Allotment. The Mann Creek Allotment is on the opposite side of the river from the Crane Creek Allotment. It appears this stretch of the Weiser River, and therefore this water right, can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America except for a narrow stretch bordering the Weiser River owned by the Friends of Weiser River Trail.

**67-12398:**

Water right 67-12398 is an instream stockwater right on the Weiser River. The POU is T12N, R4W, Sec 15, NESW, SWSW, SESW; T12N, R4W, Sec 22, NENE, NWNE, SENE, NENW, NWNW, SWNW, and SENW. The POU for water right 67-12398 is a stretch of the Weiser River that is the boundary of the Crane Creek Allotment. The Mann Creek Allotment and Thousand Springs Allotment are on the opposite side of the river from the Crane Creek Allotment. It appears this stretch of the Weiser River, and therefore this water right, can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America except for a narrow stretch bordering the Weiser River owned by the Friends of Weiser River Trail.

**67-12405**

Water right 67-12405 is an instream stockwater right on the Weiser River. The POU is T12N, R4W, Sec 28, NWSE, SWSE. The POU for water right 67-12405 is a stretch of the Weiser River that is the boundary of the Crane Creek Allotment. The Mann Creek Allotment is on the opposite side of the river from the Crane Creek Allotment. It appears this stretch of the Weiser River, and therefore this water right, can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America except for a narrow stretch bordering the Weiser River owned by the Friends of Weiser River Trail.

**67-12408**

Water right 67-12408 is an instream stockwater right on an unnamed stream, tributary to Weiser River. The POU is T11N, R4W, Sec 3, SWNE. The POU for water right 67-12408 is a stretch of the Weiser River that is the boundary of the Crane Creek Allotment. The Mann Creek Allotment is on the opposite side of the river from the Crane Creek Allotment. It appears this stretch of the Weiser River, and therefore this water right, can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America except for a narrow stretch bordering the Weiser River owned by the Friends of Weiser River Trail.

**67-12409**

Water right 67-12409 is an instream stockwater right on the Weiser River. The POU is T11N, R4W, Sec 3, SWNE, NWSE, and SWSE. The POU for water right 67-12409 is a stretch of the Weiser River that is the boundary of the Crane Creek Allotment. The Lund FFR Allotment and Mann Creek Allotment are on the opposite side of the river from the Crane Creek Allotment. It appears this stretch of the Weiser River, and therefore this water right, can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America except for a narrow stretch bordering the Weiser River owned by the Friends of Weiser River Trail.

**67-12508**

Water right 67-12508 is an instream stockwater right on the Weiser River. The POU is T12N, R4W, Sec 11, SWNE. The POU for water right 67-12508 is a stretch of the Weiser River that is the boundary of the Crane Creek Allotment. The Carr Individual Allotment is on the opposite side of the river from the Crane Creek Allotment. It appears this stretch of the Weiser River, and therefore this water right, can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America except for a narrow stretch bordering the Weiser River owned by the Friends of Weiser River Trail.

**67-12741**

Water right 67-12741 is an instream stockwater right on Crane Creek. The POU is T12N, R3W, Sec 25, NENW, SENW, NESW, SESW. The POU for water right 67-12741 is a stretch of Crane Creek that is the boundary of the Crane Creek Allotment. The Paddock Valley Allotment is on the opposite side of the creek from the Crane Creek Allotment. It appears this stretch of Crane Creek, and therefore this water right, can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America.

**67-12745**

Water right 67-12745 is an instream stockwater right on an unnamed stream, tributary to Crane Creek. The POU within Crane Creek Allotment is T11N, R3W, Sec 3, L2(NWNE), SWNE, L3(NENW), L4(NWNW); T11N, R3W, Sec 4, L1(NENE); T12N, R3W, Sec 33, NESE, SESE; and T12N, R3W, Sec 34, NWSW, SWSW, SESW. The POU described as T11N, R03W, Sec 3, SENE and NESE are in both the Crane Creek Allotment and Paddock Valley Allotment. Therefore, this water right can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America.



**67-13014**

Water right 67-13014 is an instream stockwater right on an unnamed stream, tributary to the Weiser River. The POU is T12N, R4W, Sec 26, NENW, NWNW; and T12N, R4W, Sec 27, NENE. The POU for water right 67-13014 is a stretch of the Weiser River that is the boundary of the Crane Creek Allotment. The Mann Creek Allotment is on the opposite side of the river from the Crane Creek Allotment. It appears this stretch of the Weiser River, and therefore this water right, can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America except for a narrow stretch bordering the Weiser River owned by the Friends of Weiser River Trail.

**67-13015**

Water right 67-13015 is an instream stockwater right on an unnamed stream, tributary to the Weiser River. The POU is T12N, R4W, Sec 27, NWNE. The POU for water right 67-13015 is a stretch of the Weiser River that is the boundary of the Crane Creek Allotment. The Mann Creek Allotment is on the opposite side of the river. It appears this stretch of the Weiser River, and therefore this water right, can be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America except for a narrow stretch bordering the Weiser River owned by the Friends of Weiser River Trail.

**(Misc. Issues)**

**67-12437**

Water right 67-12437 describes the source as a spring, tributary to the Weiser River. The POU is T12N, R4W, Sec 26, SWSE. The POU is within the Crane Creek Allotment and extends into an undesignated area outside the Crane Creek Allotment. The entire POU is managed by Bureau of Land Management, United States of America.

**67-12509**

Water right 67-12509 is an instream stockwater right on the Weiser River. The POU is T12N, R4W, Sec 10, NENE, SWNE, SENE; T12N, R4W, Sec 11, NWNW. The POU for water right 67-12509 is a stretch of the Weiser River that is the boundary of the Crane Creek Allotment. The Carr Individual Allotment and Thousand Springs Allotment are on the opposite side of the river from the Crane Creek Allotment. It appears this stretch of the Weiser River, and therefore this water right, can be accessed from multiple allotments. Part of the POU area within the Crane Creek Allotment is owned by Soulen Livestock Co and part is managed by Bureau of Land Management, United States of America. Part of the area outside Crane Creek Allotment is managed by Bureau of Land Management, United States of America and part of the area is owned by Friends of Weiser River Trail.

**67-12742**

Water right 67-12742 is an instream stockwater right on Crane Creek. The POU is T11N, R3W, Sec 7, NENE, NWNE; T11N, R3W, Sec 8, NENE, NWNE, NENW, NWNW; T11N, R3W, Sec 9, SWNE, SENE, NWNW, SWNW, SENW. The POU for water right 67-12742 exists on Crane Creek Allotment, Bear Creek Allotment, and Paddock Valley Allotment. It is not clear if the right is intended to be accessed from multiple allotments. The entire POU is managed by Bureau of Land Management, United States of America.

**67-13006**

The POU for water right 67-13006 places one of five quarter-quarters (QQs) outside the Crane Creek Allotment on private property. POU T12N, R04W, S19, Lot 3 (NWSW) is five miles to the west of the remaining four QQs. There are four separate parcels within this QQ, individually owned by Angelea M Halvorson, Brian Roe, Hagen Farms, Inc, and Donna G Stout. The remaining 4 QQs are within the Crane Creek Allotment. POU's T12N, R4W, S24, SWNE, SENW, NESE, NWSE, are managed by the Bureau of Land Management, United States of America. The identified legal description would make sense if the Range was changed to R03W. This would place the QQ adjacent to the remaining water right.

**67-13140**

The POU for water right 67-13140 is an instream stockwater right on Crane Creek, tributary to the Weiser River. The POU is T11N, R3W, Sec 2, NWNE, NENW, NWNW, SWNW; T11N, R3W, Sec 3, SENE, SWSW, SESW, NESE, NWSE, SWSE; T11N, R3W, Sec 10, NWNW; T12N, R3W, Sec 35, NENE, SENE, NESE, SWSE, SESE. The POU for water right 67-13140 exists on Crane Creek Allotment and Paddock Valley Allotment. It is not clear if the right is intended to be accessed from one or both allotments. The entire POU is managed by Bureau of Land Management, United States of America.

**67-12748 (not listed on Exhibit A)**

Exhibit A of Soulen Livestock Co's "Verified Petition for Order to Show Cause" lists water right 67-12749 twice. In Exhibit A, Soulen Livestock Co water rights 67-15233 and 67-15234 are both associated with 67-12749. This appears to be a typographical error on Exhibit A. Based on the numbering sequences and POU locations, it appears 67-15233 should correlate with 67-12748. Water right 67-15234 is correctly associated with water right 67-12749.

Water right 67-12748 is an instream stockwater right on Cougar Canyon, tributary to Crane Creek. POU's T11N, R3W, Sec 3, (L1)NENE, (L2) NWNE, SENE are within the Crane Creek Allotment. However, because the decree lists the place of use for this right in quarter-quarters and government lots, a small portion (less than 0.7 acres) of the decreed place of use in T11N, R03W, Sec 3, SENE, extends into the Paddock Valley Allotment. Based on IDWR's review, water from the instream use reach would not be used in the portions of the place of use tracts outside the Crane Creek Allotment boundary. The entire POU is managed by Bureau of Land Management, United States of America.

-end-



**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF CERTAIN BASIN 65  
AND 67 WATER RIGHTS, IN THE NAME OF  
THE UNITED STATES OF AMERICA  
ACTING THROUGH THE DEPARTMENT OF  
INTERIOR, BUREAU OF LAND  
MANAGEMENT

Docket No. P-OSC-2021-002

**AMENDED ORDER PARTIALLY  
GRANTING PETITION; AMENDED  
ORDER TO SHOW CAUSE**

**(PADDOCK VALLEY ALLOTMENT)**

**GROUND FOR AMENDED ORDER**

On April 25, 2022, the Director of the Idaho Department of Water Resources (“Department”) issued an *Order Partially Granting Petition; Order to Show Cause* in this matter. In it, the Director ordered the United States of America acting through the Department of Interior, Bureau of Land Management to show cause why the following stockwater rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2): 65-19685, 65-19812, 65-19814, 65-19818, 65-19820, 65-19822, 65-20003, 65-20010, 65-20011, 65-20012, 65-20015, 65-20055, 65-20057, 65-20059, 65-20061, 65-20063, 65-20065, 65-20067, 65-20069, 65-20071, 65-20390, 65-20464, 65-20468, 65-20475, 65-20476, 65-20477, 65-20479, 65-20480, 65-20487, 65-20488, 65-20489, 65-20597, 67-12386, 67-12751, 67-12752, 67-12775, 67-12809, 67-12810, 67-12841, 67-13085, 67-13086, 67-13141, 67-13142, 67-13147, and 67-13148. It has come to the Department’s attention that of the water rights subject to the order to show cause, the following water rights are based on federal law: 65-19812, 65-19814, 65-19818, 65-19820, 65-19822, 65-20055, 65-20057, 65-20059, 65-20061, 65-20063, 65-20065, 65-20067, 65-20069, 65-20071 and 67-12386. These federal water rights should not have been included in the list of water rights subject to the order to show cause. *See* Idaho Code § 42-224(14) (“This section applies to all stockwater rights except those stock water rights decreed to the United States based on federal law.”). Pursuant to Rule 760 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01.760), the Director hereby withdraws the April 25, 2022 order and replaces it with this *Amended Order Partially Granting Petition; Amended Order to Show Cause*. This amended order removes water rights 65-19812, 65-19814, 65-19818, 65-19820, 65-19822, 65-20055, 65-20057, 65-20059, 65-20061, 65-20063, 65-20065, 65-20067, 65-20069, 65-20071 and 67-12386 from the list of water rights subject to the order to show cause.

**BACKGROUND**

On September 16, 2021, Soulen Livestock Co. and Soulen Grazing Association, LLC (collectively, “Petitioners”) filed with the Department a *Verified Petition for Order to Show Cause* (“Petition”).<sup>1</sup> Petitioners ask the Department to issue an order pursuant to Idaho Code §

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<sup>1</sup> When submitting the Petition, Petitioners failed to include copies of the exhibits referenced in the Petition. Petitioners submitted the supporting exhibits (Exhibit A and Exhibit B) to the Department on September 23, 2021.

42-224(1) “to show cause why the Water Rights [(see Petition Exhibit A, yellow columns)]” on the federal grazing allotment known as the Paddock Valley Allotment (“Allotment”) “have not been lost through forfeiture pursuant to Idaho Code § 42-222(2).” *Petition* at 1.<sup>2</sup>

Petitioners assert that the water rights listed in the yellow columns of Exhibit A (“BLM Water Rights”) are owned by the United States of America acting through the Department of Interior, Bureau of Land Management (“BLM”). *Id.* ¶ 1; *see Petition* Ex. A. Additionally, Petitioners assert that the points of diversion and places of use for the BLM Water Rights are located on the Allotment. *Petition* ¶ 3. Petitioners claim that no other water rights, other than the water rights owned by Soulen Livestock Co., share “the same place of use or point of diversion” as the BLM Water Rights. *Id.* ¶ 4.

Petitioners maintain that Soulen Grazing Association has, for at least the last five years, held a valid BLM grazing permit for livestock grazing on the Allotment. *Id.* ¶ 5; *see Petition* Ex. B. Petitioners assert that Soulen Grazing Association’s livestock have grazed on the Allotment “each year of the permit term.” *Petition* ¶ 6. Petitioners claim that Soulen Grazing Association’s members have “regularly visited the Allotment each grazing season of use and at other times outside the season of use each year for more than the past five years.” *Id.* ¶ 7. Petitioners allege that “[a]t no time over the past five years have Petitioners, their officers, employees, or agents witnessed, read about, or heard of the existence of livestock owned or controlled by the BLM” on the Allotment to use water under the BLM Water Rights. *Id.* ¶ 8, at 2. Petitioners allege that at no time since Soulen Grazing Association has been authorized to use the Allotment “has either Petitioner, their members or their agents or employees ever witnessed, read about, or heard of the BLM applying the [BLM] Water Rights to the beneficial use of watering livestock that the BLM owns or controls on the Allotment.” *Id.* ¶ 10. Petitioners assert that no agency relationship exists between Petitioners and the BLM “for the purpose of acquiring water rights for the BLM on the Allotment.” *Id.* ¶ 11. The Petition is verified by Harry C. Soulen, President of Soulen Livestock Co. and manager of Soulen Grazing Association, LLC. *Id.* at 3–4.

To comply with the statutory service requirements of Idaho Code § 42-224(4),<sup>3</sup> the Department submitted a Freedom of Information Act (“FOIA”) request to the BLM on September 23, 2021, for a copy of all active grazing permits on the Paddock Valley Allotment and the adjoining Crane Creek Allotment. On October 8, 2021, in response to the Department’s FOIA request, the BLM sent copies of four grazing permits. One permit sent by the BLM matches Permit No. 1101236, issued March 4, 2016, that Petitioners filed as Exhibit B. On October 21, 2021, the BLM confirmed that they sent one permit in error and that it is not

<sup>2</sup> On the same day, Petitioners also filed a second verified petition, seeking an order to show cause why certain BLM water rights on the federal grazing allotment known as the Crane Creek Allotment have not been lost through forfeiture. *See Verified Petition for Order to Show Cause, In re Basin 67 Water Rts., In Name of U.S. Dep’t of Interior, Bureau of Land Mgmt.*, No. P-OSC-2021-001 (Idaho Dep’t of Water Res. Sep. 16, 2021), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/P-OSC-2021-001/20210916-Verified-Petition-for-Order-to-Show-Cause.pdf> [hereinafter Crane Creek Petition].

<sup>3</sup> Idaho Code § 42-224(4) was amended during the Second Regular Session of the Sixty-sixth Idaho Legislature, effective March 24, 2022. Both prior to and after the 2022 amendment, the service requirements outlined within Idaho Code § 42-224(4) are substantially the same regarding the persons who must be served a copy of an order to show cause issued by the Department.

currently active. The remaining two permits, sent by the BLM, are active Crane Creek Allotment grazing permits held by the following: Jerome and Jill Grandi, and David Maddox.

### **APPLICABLE LAW**

Idaho Code § 42-224 states in pertinent part:

(1) Within thirty (30) days of receipt by the director of the department of water resources of a petition or other information that a stockwater right has not been put to beneficial use for a term of five (5) years, the director must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture pursuant to section 42-222(2), Idaho Code. If the director determines the petition or other information, or both, is insufficient, he shall notify the petitioner of his determination, which shall include a reasoned statement in support of the determination, and otherwise disregard for the purposes of this subsection the other, insufficient, information.

(2) If the director determines the petition or other information, or both, contains prima facie evidence of forfeiture due to nonuse, the director must within thirty (30) days issue an order to the stockwater right owner to show cause before the director why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code. Any order to show cause must contain the director's findings of fact and a reasoned statement in support of the determination.

. . . .

(14) This section applies to all stockwater rights except those stock water rights decreed to the United States based on federal law.

I.C. § 42-224(1)–(2), (14) (current version as amended in 2022). Therefore, to issue an order to show cause as Petitioners have requested, the Director must conclude that the Petition makes a “prima facie showing” that the BLM has not put its BLM Water Rights, decreed based on state law, to beneficial use for at least five years. “Prima facie” is defined by *Black’s Law Dictionary* as: “Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue <a prima facie showing>.” *Prima facie*, *Black’s Law Dictionary* (11th ed. 2019).

### **FINDINGS OF FACT**

After careful review of the Petition (including Exhibit A and Exhibit B), the Department’s associated research memorandum,<sup>4</sup> and Petitioners’ concurrently filed Crane Creek Petition, the Director issues the following findings:

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<sup>4</sup> For the Director to give a reasoned statement supporting a determination in favor of or opposing forfeiture pursuant to Idaho Code § 42-222(2), Department staff utilized the Department’s water right files and database to thoroughly review, analyze, and document the locations of the places of use for the water rights listed in Exhibit A of the Petition. See Mem. from Glen Gardiner & Craig Saxton, Water Allocations Analyst and Adjudication

1. Petitioners requested the Department issue an order to the BLM to show cause why the BLM's Water Rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2). *See Petition* at 1. The following is a list of the water rights at issue: 65-19685, 65-19750, 65-19812, 65-19814, 65-19816, 65-19818, 65-19820, 65-19822, 65-19824, 65-19894, 65-19897, 65-20003, 65-20010, 65-20011, 65-20012, 65-20015, 65-20055, 65-20057, 65-20059, 65-20061, 65-20063, 65-20065, 65-20067, 65-20069, 65-20071, 65-20370, 65-20388, 65-20390, 65-20464, 65-20468, 65-20469, 65-20471, 65-20472, 65-20475, 65-20476, 65-20477, 65-20478, 65-20479, 65-20480, 65-20484, 65-20486, 65-20487, 65-20488, 65-20489, 65-20597, 67-12386, 67-12751, 67-12752, 67-12775, 67-12776, 67-12777, 67-12809, 67-12810, 67-12841, 67-12900, 67-12999, 67-13085, 67-13086, 67-13141, 67-13142, 67-13147, 67-13148. *See Petition* Ex. A; *Memorandum*.

2. The Director has reviewed the partial decrees for the BLM Water Rights. The following water rights are based on federal law: 65-19750, 65-19812, 65-19814, 65-19816, 65-19818, 65-19820, 65-19822, 65-19824, 65-20055, 65-20057, 65-20059, 65-20061, 65-20063, 65-20065, 65-20067, 65-20069, 65-20071 and 67-12386. In accordance with Idaho Code § 42-224(14), any further consideration of water rights based on federal law is unwarranted in this matter. The remaining water rights at issue are based on state law and subject to further consideration by the Director.

3. Using the Department's water rights database, the Department reviewed the places of use for the Water Rights. *See Memorandum* at 1.

4. Petitioners' allegations in the *Petition* are specific to non-use within the Allotment and do not extend to use beyond the Allotment. *See Petition* at 1–2.

5. Based on the *Memorandum*, the Director finds that the places of use for the following water rights, are entirely within the Allotment: 65-19685, 65-20003, 65-20010, 65-20011, 65-20012, 65-20015, 65-20390, 65-20464, 65-20468, 65-20475, 65-20476, 65-20477, 65-20479, 65-20480, 65-20487, 65-20488, 65-20489, 65-20597, 67-12751, 67-12775, 67-12809, 67-12810, 67-12841, 67-13085, 67-13086, 67-13141, 67-13142, 67-13147, and 67-13148. *See Memorandum* at 1.

6. Harry C. Soulen is an officer and member in Soulen Livestock Co. and Soulen Grazing Association, LLC. *Petition* at 3–4. The allegations in the *Petition* attribute observations of nonuse of water in the Allotment to the officers and members of Soulen Livestock Co. and Soulen Grazing Association, LLC. *Id.* at 1–2. Accordingly, the Director finds that Harry C. Soulen's statements are based on personal knowledge.

7. As described in footnote 2 above, on September 16, 2021, Petitioners filed the Crane Creek *Petition*. The Crane Creek *Petition* is similar to the *Petition*, except it contains specific allegations related to the Crane Creek Allotment. Within the Crane Creek *Petition*, Harry C. Soulen, an officer and member in Soulen Livestock Co. and Soulen Grazing Association, LLC,

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Section Manager, Idaho Dep't of Water Res., to Shelley Keen, Water Allocation Bureau Chief, Idaho Dep't of Water Res. 1 (Nov. 9, 2021) (attached to this Order as Attachment A) [hereinafter *Memorandum*].

alleges nonuse of water by the BLM. Petitioners' allegations in the Crane Creek Petition are specific to non-use within the Crane Creek Allotment and do not extend to use beyond the Crane Creek Allotment. *See Crane Creek Petition* at 1–2.

8. The Crane Creek Petition attributes allegations of non-beneficial use of water, authorized by federal water rights within the Crane Creek Allotment, to the officers and members of Soulen Livestock Co. and Soulen Grazing Association, LLC. *Crane Creek Petition* ¶¶ 8–10. Accordingly, the Director finds that Harry C. Soulen's statements in the Crane Creek Petition are based on personal knowledge.<sup>5</sup>

9. Based on the Memorandum, the Director finds that the place of use for water right 67-12752 is entirely within both the Allotment and the Paddock Valley Allotment. *Memorandum* at 3.

10. The Director finds that some of the water rights at issue have a place of use that extends beyond both the Allotment and the Crane Creek Allotment. The water rights with a place of use that extends beyond the boundaries of the Allotment and the Crane Creek Allotment are: 65-19894, 65-19897, 65-20370, 65-20388, 65-20469, 65-20471, 65-20472, 65-20478, 65-20484, 65-20486, 67-12776, 67-12777, 67-12900, and 67-12999. *See Memorandum* at 2–5.

11. The Director has not received written evidence that a principal/agent relationship existed, during the five-year period calculated pursuant to Idaho Code § 42-224(1), between the BLM and any Paddock Valley Allotment or Crane Creek Allotment livestock grazing permit or lease holders for the purpose of maintaining the BLM Water Rights.

### ANALYSIS

Forfeiture is disfavored in Idaho law. *Application of Boyer*, 73 Idaho 152, 159, 248 P.2d 540, 544 (1952) (“Forfeitures are abhorrent and all intendments are to be indulged against a forfeiture.”). To make a prima facie showing that the BLM has not beneficially used water authorized by its water rights for five years, for each water right at issue here, Petitioners must present sufficient evidence establishing forfeiture over the entire place of use—not just those portions of the place of use within the Allotment. The Department's Memorandum, which includes an analysis of its associated due diligence investigation, clarifies that some of the places of use of the BLM Water Rights extend beyond the boundaries of the Allotment and the related Crane Creek Allotment. *See Memorandum* at 2–5. As noted in findings 4 and 7 above, Petitioners do not offer evidence of BLM's non-use of water beyond the boundaries of the Allotment and the Crane Creek Allotment. Therefore, the Petition, even when combined jointly with the Crane Creek Petition, does not include sufficient evidence for the Director to issue an order to show cause to the extent that Petitioners have requested.

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<sup>5</sup> The Crane Creek Petition is also addressed in the Director's *Order Partially Granting Petition; Order to Show Cause (Crane Creek Allotment)*. Order Part. Granting Pet.; Order to Show Cause (Crane Creek Allot't), *In re Basin 67 Water Rts., In Name of U.S. Dep't of Interior, Bureau of Land Mgmt.*, No. P-OSC-2021-001 (Idaho Dep't of Water Res. Apr. 25, 2022), <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/P-OSC-2021-001/P-OSC-2021-001-20220425-Order-to-Show-Cause-Crane-Creek>.

The Department must limit the scope of an order to show cause issued in this matter to only those BLM Water Rights based on state law and with a place of use that is located entirely within the property boundaries for which the Department has received supporting statements alleging non-use of water. Accordingly, for those BLM Water Rights that have a place of use that is located either entirely or partially outside of the Allotment and the Crane Creek Allotment (see finding 10 above), Petitioners have failed to make a “prima facie showing” in accordance with Idaho Code § 42-224 that the BLM has not beneficially used water authorized by its water rights for five years. However, Petitioners’ statements based on personal knowledge (see findings 6 and 8 above), when combined with the analysis within the Department’s Memorandum, amount to a “prima facie showing” in accordance with Idaho Code § 42-224 that the BLM has not beneficially used water authorized by its water rights that have a place of use entirely within the Allotment and the Crane Creek Allotment within the last five years.

### CONCLUSION OF LAW

The Director concludes that the “prima facie showing” burden of proof, set forth in Idaho Code § 42-224, has been satisfied to the extent that he should partially grant Petitioners’ request and issue an order to the BLM to show cause before the Director why those BLM Water Rights based on state law and that have a place of use entirely within the Allotment and the Crane Creek Allotment have not been lost through forfeiture pursuant to Idaho Code § 42-222(2).

### ORDER

Based on the foregoing, the following are HEREBY ORDERED:

1. The *Verified Petition for Order to Show Cause* at issue is GRANTED for ONLY the following water rights: 65-19685, 65-20003, 65-20010, 65-20011, 65-20012, 65-20015, 65-20390, 65-20464, 65-20468, 65-20475, 65-20476, 65-20477, 65-20479, 65-20480, 65-20487, 65-20488, 65-20489, 65-20597, 67-12751, 67-12752, 67-12775, 67-12809, 67-12810, 67-12841, 67-13085, 67-13086, 67-13141, 67-13142, 67-13147, and 67-13148.
2. The *Verified Petition for Order to Show Cause* at issue is DENIED for the following water rights: 65-19750, 65-19812, 65-19814, 65-19816, 65-19818, 65-19820, 65-19822, 65-19824, 65-19894, 65-19897, 65-20055, 65-20057, 65-20059, 65-20061, 65-20063, 65-20065, 65-20067, 65-20069, 65-20071, 65-20370, 65-20388, 65-20469, 65-20471, 65-20472, 65-20478, 65-20484, 65-20486, 67-12386, 67-12776, 67-12777, 67-12900, and 67-12999.
3. In accordance with Idaho Code § 42-224(2), the United States of America acting through the Department of Interior, Bureau of Land Management must show cause before the Director of the Idaho Department of Water Resources why the following stockwater rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2): 65-19685, 65-20003, 65-20010, 65-20011, 65-20012, 65-20015, 65-20390, 65-20464, 65-20468, 65-20475, 65-20476, 65-20477, 65-20479, 65-20480, 65-20487, 65-20488, 65-20489, 65-20597, 67-12751, 67-12752, 67-12775, 67-12809, 67-12810, 67-12841, 67-13085, 67-13086, 67-13141, 67-13142, 67-13147, and 67-13148.



4. In accordance with Idaho Code § 42-224(6), the United States of America acting through the Department of Interior, Bureau of Land Management has 21 days from completion of service of this order to request in writing a hearing pursuant to Idaho Code § 42-1701A(1)–(2). If the United States requests such a hearing, it must also serve a copy of the request upon the petitioners and the livestock grazing permit holders listed on the included certificate of service.

5. In accordance with Idaho Code § 42-224(7), if the United States fails to respond to the above order to show cause within 21 days, the stockwater rights for which the *Verified Petition for Order to Show Cause* has been partially granted shall be considered forfeited, and the Director shall issue an order within 14 days stating the stockwater rights have been forfeited pursuant to Idaho Code § 42-222(2).

6. In accordance with Idaho Code §§ 42-224(1) and 42-224(4), Soulen Livestock Co., Soulen Grazing Association, LLC, and all active Paddock Valley Allotment and Crane Creek Allotment livestock grazing permit or lease holders will be served a copy of this order.

DATED this 13th day of May 2022.



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MAT WEAVER for GARY SPACKMAN  
Acting Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13th day of May 2022, I caused to be served a true and correct copy of the foregoing *Amended Order Partially Granting Petition; Amended Order to Show Cause (Paddock Valley Allotment)*, by the method indicated below, upon the following:

Soulen Livestock Co. & Soulen Grazing Association, LLC P.O. Box 827 Weiser, ID 83672  <i>Petitioners</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
Jerome & Jill Grandi 2294 Weiser River Rd. Weiser, ID 83672  <i>Livestock Grazing Permit Holder</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
David Maddox 1021 Lower Crane Rd. Weiser, ID 83672  <i>Livestock Grazing Permit Holder</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
USDI BLM Idaho State Office 1387 S. Vinnell Way Boise, ID 83709  <i>Stockwater Right Owner</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<i>Courtesy Copy:</i>	
David Negri United States Department of Justice Environment and Natural Resources Division 550 W. Fort St., MSC 033 Boise, ID 83724 <a href="mailto:david.negri@usdoj.gov">david.negri@usdoj.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
William G. Myers III HOLLAND & HART LLP P.O. Box 2527 Boise, ID 83701 <a href="mailto:wmyers@hollandhart.com">wmyers@hollandhart.com</a>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

  
 Sarah Tschohl  
 Legal Assistant



## Memorandum

**To:** Shelley Keen

**Prepared by:** Glen Gardiner & Craig Saxton  
AB CS

**Date:** November 9, 2021

**Re:** Review of Federal water rights within the Paddock Valley Allotment (#370) which were identified in Exhibit A of Soulen Livestock Co's Verified Petition for Order to Show Cause.

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### Comparison of Partial Decrees to IDWR Database Records and Shapefiles

On September 16, 2021, Soulen Livestock Company and Soulen Grazing Association, LLC ("Soulen") petitioned the Director of the Idaho Department of Water Resources ("IDWR") to issue a show cause order pursuant to Idaho Code § 42-224(1) for a list of water rights "located on a federal grazing allotment known as the Paddock Valley Allotment (#370)." Soulen's petition refers to the list of water rights as Exhibit A. For each of the water rights in Exhibit A, we compared information on the SRBA partial decree to information in IDWR's water rights database. Fields compared included Name and Address, Source, Quantity, Priority Date, Point of Diversion, Purpose and Period of Use, and Place of Use. We found no discrepancies, although the Names on the partial decrees are abbreviated to USDI BLM, IDAHO STATE OFFICE, whereas IDWR's database refers to the Names as UNITED STATES OF AMERICA ACTING THROUGH USDI BUREAU OF LAND MANAGEMENT, IDAHO STATE OFFICE.

IDWR stores digitized water right places of use ("POU") in its geographic information system ("GIS"). We verified the digitized POU for each of the water rights listed in Exhibit A matches the POU described in the water rights database. No discrepancies were found. To complete our analysis, we then used GIS to overlay the digitized POU for each water right in Exhibit A onto the digital boundaries of the Paddock Valley Allotment and neighboring grazing allotment<sup>1</sup>:

### Paddock Valley Allotment Analysis

Based on digital data, the POUs for the following water rights exist completely within the Paddock Valley Allotment:

65-19685, 65-19812, 65-19814, 65-19818, 65-19820, 65-19822, 65-20003, 65-20010, 65-20011, 65-20012, 65-20015, 65-20055, 65-20057, 65-20059, 65-20061, 65-20063, 65-20065, 65-20067, 65-20069, 65-20071, 65-20390, 65-20464, 65-20468, 65-20475, 65-20476, 65-20477, 65-20479, 65-20480, 65-20487, 65-20488, 65-20489, 65-20597, 67-12386, 67-12751, 67-12775, 67-12809, 67-12810, 67-12841, 67-13085, 67-13086, 67-13141, 67-13142, 67-13147, 67-13148.

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<sup>1</sup> The digital shapes of the allotment boundaries were created by U.S. Department of the Interior, Bureau of Land Management with a publication date of 06-30-2017. The digital allotment boundaries can be downloaded from the website [https://gis.blm.gov/arcgis/rest/services/range/BLM\\_Natl\\_Grazing\\_Allotment/MapServer](https://gis.blm.gov/arcgis/rest/services/range/BLM_Natl_Grazing_Allotment/MapServer)

POUs for the following water rights exist partially within the Paddock Valley Allotment and partially outside the Paddock Valley Allotment:

65-20469, 65-20471, 65-20472, 65-20484, 65-19750, 65-19816, 65-19824, 65-19894, 65-19897, 65-20370, 65-20388, 65-20478, 65-20486, 67-12752, 67-12776, 67-12777, 67-12900, 67-12999.

The analysis below describes water rights in Exhibit A having all or portions of the authorized POU's exist outside the Paddock Valley Allotment boundary.

#### **(Water Rights extending onto Paddock Valley Reservoir)**

The unnamed streams identified as the source for rights 65-20469, 65-20471, 65-20472, and 65-20484, appear to be sources of water supplying Paddock Valley Reservoir. Stock have access to this water from the decreed POU when the reservoir is full enough to extend into the decreed POU.

##### **65-20469**

Water right 65-20469 is an instream stockwater right on an unnamed stream, tributary to Little Willow Creek. The POU is T11N, R2W, Sec 32, NESE, and is within the boundary of Paddock Valley Allotment except for the area extending onto Paddock Valley Reservoir. The portion of the POU not within the reservoir is managed by Bureau of Land Management, United States of America. The area within Paddock Valley Reservoir is owned by Little Willow Irrigation District.

##### **65-20471**

Water right 65-20471 is an instream stockwater right on an unnamed stream, tributary to Little Willow Creek. The POU is T10N, R2W, Sec 5, (L4)NWNW, SENW, and is within the boundary of Paddock Valley Allotment. An area within the POU extends onto Paddock Valley Reservoir. The portion of the POU not within the reservoir is managed by Bureau of Land Management, United States of America. The owner within Paddock Valley Reservoir is unidentified in IDWR's digital layer.

##### **65-20472**

Water right 65-20472 is an instream stockwater right on an unnamed stream, tributary to Little Willow Creek. The POU is T10N, R2W, Sec 5, SENE, and is within the boundary of Paddock Valley Allotment. An area within the POU extends onto Paddock Valley Reservoir. The portion of the POU not within the reservoir is managed by Bureau of Land Management, United States of America. The owner within Paddock Valley Reservoir is unidentified in IDWR's digital layer.

##### **65-20484**

Water right 65-20484 is an instream stockwater right on an unnamed stream, tributary to Little Willow Creek. The POU is T10N, R2W, Sec 17, SWNE, SENE, and is within the boundary of Paddock Valley Allotment, extending across Paddock Valley Reservoir, onto land on the opposite side. The portion of the POU not within the reservoir is managed by Bureau of Land Management, United States of America. The owner within Paddock Valley Reservoir is unidentified in IDWR's digital layer.

**(Within both Paddock Valley and Crane Creek Allotment)****67-12752**

Water right 67-12752 is an instream stockwater right on an unnamed stream, tributary to Crane Creek. The POU is described as T12N, R3W, Sec 35, SESE and is in both the Paddock Valley Allotment and Crane Creek Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**(Boundary Water Rights, All Split between Two or More Allotments)****65-19750**

Water right 65-19750 is for a spring, tributary to Holland Gulch. The POU is T10N, R3W, Sec 11, SENW, and is in both the Paddock Valley Allotment and Holland Gulch Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**65-19816**

Water right 65-19816 is for a spring, tributary to Dry Creek. The POU is 9N, R2W, Sec 23, NENW, and is in both the Paddock Valley Allotment and Willow Ridge Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**65-19824**

Water right 65-19824 is for a spring, tributary to Dry Creek. The POU is T9N, R2W, Sec 27, SENE, and is in both the Paddock Valley Allotment and Willow Ridge Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**65-19894**

Water right 65-19894 is an instream stockwater right on an unnamed stream, tributary to Little Willow Creek. The POU described as T10N, R1W, Sec 7, SESW, SWSE, and T10N, R1W, Sec 18, NWNE, NENE, SENE is within the Paddock Valley Allotment. POU described as T10N, R1W, Sec 17, SWNW, SENW, SWNE, SENE, NWSE, NESE is within the Willow Ridge Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**65-19897**

Water right 65-19897 is an instream stockwater right on Indian creek, tributary to Little Willow Creek and an unnamed stream, tributary to Indian Creek. The POU described as T10N, R1W, Sec 30, SWNE, SENW, SWSW, SWSE, NWSE, NESE, SESE, SESW, (L2)SWNW, NWSW: T10N, R1W, Sec 31, (L2)SWNW, SENE, NESW, (L1)NWNW is within the Paddock Valley Allotment. The POU described as T10N, R1W, Sec 28, SESW; T10N, R1W, Sec 32, SWNW, SENE, NWNW, NWNE, NENW; T10N, R1W, Sec 33, NWNW, NENW, SENW, NWSW, NWSE, NESW, SWNE, SWNW is within the Willow Ridge Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**65-20370**

Water right 65-20370 is an instream stockwater right on an unnamed stream, tributary to Indian Creek. The POU described as T10N, R1W, Sec 30, SENE, NENE, SWNE is within the Paddock Valley Allotment. The POU described as T10N, R1W, Sec 27, SWNE; T10N, R1W, Sec 28, SENW, SWNW, SWNE, SENE, NWSW, NWNW, NENW; T10N R1W, Sec 29, NWSE, NESE, NENE, NWNW, NESW, SESW, NWNE, NENW, NWSW, SWNE, SWNW; T10N, R1W, Sec 30, SENE, NENE, SWNE is within the Willow Ridge Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**65-20388**

Water right 65-20388 is an instream stockwater right on an unnamed stream, tributary to Little Willow Creek. The POU described as T10N, R1W, Sec 6, SESW, SWSE, SESE are within the Paddock Valley Allotment. The POU described as T10N, R1W, Sec 5, SWSW, is within Paddock Valley Allotment and Minnie Allotment. The POU described as T10N, R1W, Sec 5, SESW, is in the Minnie Allotment. The POU described as T10N, R1W, Sec 8, NWNE is in the Foothills Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**65-20478**

Water right 65-20478 is an instream stockwater right on George Way Gulch, tributary to Little Willow Creek and an unnamed stream, tributary to George Way Gulch. The POU described as T10N, R1W, Sec 18, NWSW(L3), SWSW(L4), SESW; T10N, R1W, Sec 19, NENE, NWNE, SENE, NENW; T10N, R1W, Sec 13, SWNE, NESW, NESE, NWSE is within the Paddock Valley Allotment. The POU described as T10N, R1W, Sec 20, SWNW is in the Willow Ridge Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**65-20486**

Water right 65-20486 is an instream stockwater right on Dry Creek, tributary to Big Willow Creek and an unnamed stream, tributary to Dry Creek. The POU described as T9N, R1W, Sec 6, NENE, (L2)NWNE, SWNE, SENE, (L3)NENW, SENW, NESW, (L6)NWSW, SESW, NWSE, SWSE; T10N, R1W, Sec 31, NESE, NWSE, SWSE, SESE within the Paddock Valley Allotment. The POU described as T9N, R1W, Sec 4, NWSW; T9N, R1W, Sec 5, NENE, NWNE, NENW, SWNW, NESW, SWSW, SESW, NESE, NWSE; T10N, R1W, Sec 32, NESW, SWSW, SESW, NWSE, SWSE, SESE is within the Willow Ridge Allotment. The POU described as T9N, R1W, Sec 6, (L7)SESE; T9N, R1W, Sec 7, NWNE, NENW is in both Paddock Valley Allotment and Willow Ridge Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**67-12776**

Water right 67-12776 is an instream stockwater right on an unnamed stream, tributary to Crane Creek. The POU is described as T12N, R2W, Sec 29, SWNW, SENW, NWSW are within the Paddock Valley Allotment. The POU in T12N, R2W, Sec 29, SWNE is in both Paddock Valley Allotment and Crane Creek Individual Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

**67-12777**

Water right 67-12777 is an instream stockwater right on an unnamed stream, tributary to Crane Creek. The POU described as T12N, R2W, Sec 29, SWSE is in the Paddock Valley Allotment. The POU described as T12N, R2W, Sec 29, NWNE, SWNE, NWSE is within both Paddock Valley Allotment and Crane Creek Individual Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America, except for a portion of T12N, R2W, Sec 29, NWNE which extends onto Crane Creek Reservoir. The area within the boundary of Crane Creek Reservoir is owned by the Tracy B Baker Trust.

**67-12900**

Water right 67-12900 is an instream stockwater right on Crane Creek, tributary to Weiser River. The POU described as T12N, R2W, Sec 29, NWNE, NWNW is within the Paddock Valley Allotment. The POU described as T12N, R2W, Sec 29, NWNE is in both Paddock Valley Allotment and Crane Creek Individual Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America, except for portions of each quarter/quarter which extend onto Crane Creek Reservoir. The area within the boundary of Crane Creek Reservoir is owned by the Tracy B Baker Trust.

**67-12999**

Water right 67-12999 is an instream stockwater right on an unnamed stream, tributary to South Crane Creek. The POU described as T10N, R1W, Sec 6, SENW is in the Paddock Valley Allotment. The POU described as T10N, R1W, Sec 6, (L3)NENW is in both Paddock Valley Allotment and Minnie Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by Bureau of Land Management, United States of America.

-end-

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF CERTAIN BASIN 79  
WATER RIGHTS, IN THE NAME OF THE  
UNITED STATES OF AMERICA ACTING  
THROUGH THE DEPARTMENT OF  
INTERIOR, BUREAU OF LAND  
MANAGEMENT

Docket No. P-OSC-2021-004

**AMENDED ORDER PARTIALLY  
GRANTING PETITION; AMENDED  
ORDER TO SHOW CAUSE**

**(BUTCHER BAR AND CHINA  
CREEK ALLOTMENTS)**

**GROUND FOR AMENDED ORDER**

On April 25, 2022, the Director of the Idaho Department of Water Resources (“Department”) issued an *Order Partially Granting Petition; Order to Show Cause* in this matter. In it, the Director ordered the United States of America acting through the Department of Interior, Bureau of Land Management to show cause why the following stockwater rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2): 79-11372, 79-11373, 79-11374, 79-11376, 79-11756, and 79-11784. It has come to the Department’s attention that water right 79-11784 is a water right based on federal law and should not have been included in the list of water rights subject to the order to show cause. *See* Idaho Code § 42-224(14) (“This section applies to all stockwater rights except those stock water rights decreed to the United States based on federal law.”). Pursuant to Rule 760 of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01.760), the Director hereby withdraws the April 25, 2022 order and replaces it with this *Amended Order Partially Granting Petition; Amended Order to Show Cause*. This amended order removes water right 79-11784 from the list of water rights subject to the order to show cause.

**BACKGROUND**

On October 15, 2021, Gill Family Ranches, LLC (“Petitioner”) filed with the Department a *Verified Petition for Order to Show Cause* (“Petition”). Petitioner asked the Department to issue an order pursuant to Idaho Code § 42-224(1) “to show cause why the Water Rights [(see Petition Exhibit A)] have not been lost through forfeiture pursuant to Idaho Code [§] 42-222(2).” *Petition* at 1.

Petitioner asserts that the water rights listed in Exhibit A (“BLM Water Rights”) are owned by the United States of America acting through the Department of Interior, Bureau of Land Management (“BLM”). *Id.* ¶ 1; *see Petition* Ex. A. Additionally, Petitioner asserts that the “points of diversion or places of use” for the BLM Water Rights are located on federal grazing allotments identified by the BLM as the Butcher Bar Allotment and the China Creek Allotment (“Allotments”). *Petition* ¶ 3. Petitioner claims that no other water rights share “the same place of use, source, and point of diversion” as the BLM Water Rights. *Id.* ¶ 4.

AMENDED ORDER PARTIALLY GRANTING PETITION; AMENDED ORDER TO  
SHOW CAUSE (BUTCHER BAR AND CHINA CREEK ALLOTMENTS) – 1

Petitioner maintains that it has, for at least the last five years, held a valid BLM grazing lease for livestock grazing on the Allotments. *Id.* ¶ 5; *see Petition* Ex. B. Petitioner asserts that its livestock have grazed on the Allotments “each year of the lease term.” *Petition* ¶ 6. Petitioner claims that its employees, officers, and family of its officers and employees have “regularly visited the Allotments, which borders Petitioner’s private property, each grazing season of use and at other times outside the season of use each year for more than the past five years.” *Id.* ¶ 7. Petitioner alleges that “[a]t no time over the past five years has Petitioner, its officers, employees, their families, or agents, witnessed or heard of the existence of livestock owned or controlled by the BLM on either Allotment. . . .” *Id.* ¶ 8, at 2. Petitioner alleges that at no time since it has had use of the area “has Petitioner ever witnessed or heard of the BLM applying the [BLM] Water Rights to the beneficial use of watering livestock the BLM owns or controls on either Allotment.” *Id.* ¶ 10. Petitioner asserts that no agency relationship exists between Petitioner and the BLM “for the purpose of acquiring water rights for the BLM on either Allotment.” *Id.* ¶ 11. The Petition is verified by Marty I. Gill, manager of Gill Family Ranches, LLC. *Id.* at 3.

To comply with the statutory service requirements of Idaho Code § 42-224(4),<sup>1</sup> the Department submitted a Freedom of Information Act (“FOIA”) request to the BLM on October 15, 2021, for a copy of all active grazing permits or leases on the Butcher Block and China Creek Allotments. On October 29, 2021, in response to the Department’s FOIA request, the BLM sent a copy of one grazing lease. The lease sent by the BLM matches Lease No. 1105152, authorized September 30, 2015, that Petitioner filed as Exhibit B.

### APPLICABLE LAW

Idaho Code § 42-224 states in pertinent part:

(1) Within thirty (30) days of receipt by the director of the department of water resources of a petition or other information that a stockwater right has not been put to beneficial use for a term of five (5) years, the director must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture pursuant to section 42-222(2), Idaho Code. If the director determines the petition or other information, or both, is insufficient, he shall notify the petitioner of his determination, which shall include a reasoned statement in support of the determination, and otherwise disregard for the purposes of this subsection the other, insufficient, information.

(2) If the director determines the petition or other information, or both, contains prima facie evidence of forfeiture due to nonuse, the director must within thirty (30) days issue an order to the stockwater right owner to show cause before the director

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<sup>1</sup> Idaho Code § 42-224(4) was amended during the Second Regular Session of the Sixty-sixth Idaho Legislature, effective March 24, 2022. Both prior to and after the 2022 amendment, the service requirements outlined within Idaho Code § 42-224(4) are substantially the same regarding the persons who must be served a copy of an order to show cause issued by the Department.



why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code. Any order to show cause must contain the director's findings of fact and a reasoned statement in support of the determination.

....

(14) This section applies to all stockwater rights except those stock water rights decreed to the United States based on federal law.

I.C. § 42-224(1)–(2), (14) (current version as amended in 2022). Therefore, to issue an order to show cause as Petitioner has requested, the Director must conclude that the Petition makes a “prima facie showing” that the BLM has not put its BLM Water Rights, decreed based on state law, to beneficial use for at least five years. “Prima facie” is defined by *Black’s Law Dictionary* as: “Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue <a prima facie showing>.” *Prima facie*, *Black’s Law Dictionary* (11th ed. 2019).

### FINDINGS OF FACT

After careful review of the Petition and the Department’s associated research memorandum,<sup>2</sup> the Director issues the following findings:

1. Petitioner requested the Department issue an order to the BLM to show cause why the BLM’s Water Rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2). *See Petition* at 1. The following is a list of the water rights at issue: 79-11259, 79-11261, 79-11372, 79-11373, 79-11374, 79-11376, 79-11756, and 79-11784. *See Petition* Ex. A; *Memorandum*.
2. The Director has reviewed the partial decrees for the BLM Water Rights. The basis for water right 79-11784 is federal law. In accordance with Idaho Code § 42-224(14), further consideration of water right 79-11784 is unwarranted in this matter. The remaining water rights at issue are based on state law and subject to further consideration by the Director.
3. Using the Department’s water rights database, the Department reviewed the places of use for the BLM Water Rights. *Memorandum* at 1.
4. Petitioner’s allegations only relate to the BLM’s lack of beneficial use of water within the boundaries of the Allotments. Petitioner does not make allegations relating to the BLM’s use of water outside of the boundaries of the Allotments. *See Petition* at 1–2.

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<sup>2</sup> For the Director to give a reasoned statement supporting a determination in favor of or opposing forfeiture pursuant to Idaho Code § 42-222(2), Department staff utilized the Department’s water right files and database to thoroughly review, analyze, and document the locations of the places of use for the water rights listed in Exhibit A of the Petition. *See* Mem. from Glen Gardiner & Craig Saxton, Water Allocations Analyst and Adjudication Section Manager, Idaho Dep’t of Water Res., to Shelley Keen, Water Allocation Bureau Chief, Idaho Dep’t of Water Res. 1 (Oct. 27, 2021) (attached to this Order as Attachment A) [hereinafter *Memorandum*].



5. Based on the Memorandum, the Director finds that the places of use for the following water rights, are entirely within the Allotments: 79-11372, 79-11373, 79-11374, 79-11376, and 79-11756. *See Memorandum.*

6. Marty I. Gill is an officer of Gill Family Ranches, LLC. *Petition* at 3. The allegations in the *Petition* attribute observations of nonuse of water in the Allotments to the officers of Gill Family Ranches, LLC. *Id.* at 1–2. Accordingly, the Director finds that Marty I. Gill’s statements are based on personal knowledge.

7. Based on the Memorandum, the Director finds that some of the water rights at issue have a place of use that extends beyond the Allotments. The water rights with a place of use that extends beyond the boundaries of the Allotment are: 79-11259 and 79-11261. *Memorandum* at 2.

8. The Director has not received written evidence that a principal/agent relationship existed, during the five-year period calculated pursuant to Idaho Code § 42-224(1), between the BLM and any Butcher Bar Allotment or China Creek Allotment livestock grazing permit or lease holders for the purpose of maintaining the BLM Water Rights.

### ANALYSIS

Forfeiture is disfavored in Idaho law. *Application of Boyer*, 73 Idaho 152, 159, 248 P.2d 540, 544 (1952) (“Forfeitures are abhorrent and all intendments are to be indulged against a forfeiture.”). To make a prima facie showing that the BLM has not beneficially used water authorized by its water rights for five years, for each water right at issue here, Petitioner must present sufficient evidence establishing forfeiture over the entire place of use—not just those portions of the place of use within the Allotments. The Department’s Memorandum, which includes an analysis of its associated due diligence investigation, clarifies that some of the places of use of the BLM Water Rights extend beyond the boundaries of the Allotments. *See Memorandum.* As noted in finding 4 above, Petitioner does not offer evidence of BLM’s non-use of water beyond the boundaries of the Allotments. Therefore, the *Petition* does not include sufficient evidence for the Director to issue an order to show cause to the extent that Petitioner has requested.

The Department must limit the scope of an order to show cause issued in this matter to only those BLM Water Rights based on state law and with a place of use that is located entirely within the property boundaries for which the Department has received supporting statements alleging non-use of water. Accordingly, for those BLM Water Rights that have a place of use that is located either entirely or partially outside of the Allotments (see finding 7 above), Petitioner has failed to make a “prima facie showing” in accordance with Idaho Code § 42-224 that the BLM has not beneficially used water authorized by its water rights for five years. However, Petitioner’s statements based on personal knowledge (see findings 6 above), when combined with the analysis within the Department’s Memorandum, amount to a “prima facie showing” in accordance with Idaho Code § 42-224 that the BLM has not beneficially used water authorized by its water rights that have a place of use entirely within the Allotments within the last five years.

## CONCLUSION OF LAW

The Director concludes that the “prima facie showing” burden of proof, set forth in Idaho Code § 42-224, has been satisfied to the extent that he should partially grant Petitioner’s request and issue an order to the BLM to show cause before the Director why those BLM Water Rights based on state law and that have a place of use entirely within the Allotments have not been lost through forfeiture pursuant to Idaho Code § 42-222(2).

## ORDER

Based on the foregoing, the following are HEREBY ORDERED:

1. The *Verified Petition for Order to Show Cause* at issue is GRANTED for ONLY the following water rights: 79-11372, 79-11373, 79-11374, 79-11376, and 79-11756.
2. The *Verified Petition for Order to Show Cause* at issue is DENIED for the following water rights: 79-11259, 79-11261, and 79-11784.
3. In accordance with Idaho Code § 42-224(2), the United States of America acting through the Department of Interior, Bureau of Land Management must show cause before the Director of the Idaho Department of Water Resources why the following stockwater rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2): 79-11372, 79-11373, 79-11374, 79-11376, and 79-11756.
4. In accordance with Idaho Code § 42-224(6), the United States of America acting through the Department of Interior, Bureau of Land Management has 21 days from completion of service of this order to request in writing a hearing pursuant to Idaho Code § 42-1701A(1)–(2). If the United States requests such a hearing, it must also serve a copy of the request upon the petitioner listed on the included certificate of service.
5. In accordance with Idaho Code § 42-224(7), if the United States fails to respond to the above order to show cause within 21 days, the stockwater rights for which the *Verified Petition for Order to Show Cause* has been partially granted shall be considered forfeited, and the Director shall issue an order within 14 days stating the stockwater rights have been forfeited pursuant to Idaho Code § 42-222(2).
6. In accordance with Idaho Code §§ 42-224(1) and 42-224(4), Gill Family Ranches, LLC will be served a copy of this order.

DATED this 13th day of May 2022.

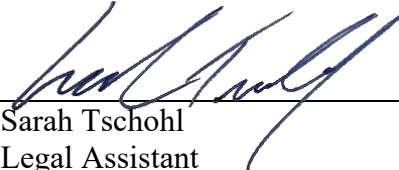


MAT WEAVER for GARY SPACKMAN  
Acting Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of May 2022, I caused to be served a true and correct copy of the foregoing *Amended Order Partially Granting Petition; Amended Order to Show Cause (Butcher Bar and China Creek Allotments)*, by the method indicated below, upon the following:

Gill Family Ranches, LLC 188 Gill Ranch Rd. P.O. Box 386 Lucile, ID 83542  <i>Petitioner</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
USDI BLM Idaho State Office 1387 S. Vinnell Way Boise, ID 83709  <i>Stockwater Right Owner</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<i>Courtesy Copy:</i>	
David Negri United States Department of Justice Environment and Natural Resources Division 550 W. Fort St., MSC 033 Boise, ID 83724 <a href="mailto:david.negri@usdoj.gov">david.negri@usdoj.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
William G. Myers III HOLLAND & HART LLP P.O. Box 2527 Boise, ID 83701 <a href="mailto:wmyers@hollandhart.com">wmyers@hollandhart.com</a>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

  
\_\_\_\_\_  
Sarah Tschohl  
Legal Assistant

## Memorandum

**To:** Shelley Keen

**Prepared by:** Glen Gardiner & Craig Saxton

**Date:** October 27, 2021

**Re:** Review of Federal water rights within the Butcher Bar Allotment (#36138) and China Creek Allotment (#36191) which were identified in Exhibit A of Gill Family Ranches, LLC Verified Petition for Order to Show Cause.

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### Comparison of Partial Decrees to IDWR Database Records and Shapefiles

On October 15, 2021, Gill Family Ranches, LLC ("Gill") petitioned the Director of the Idaho Department of Water Resources ("IDWR") to issue a show cause order pursuant to Idaho Code § 42-224(1) for a list of water rights "located on a federal grazing allotment known as the Butcher Bar Allotment (#36138) and China Creek Allotment (#36191)." Gill's petition refers to the list of water rights in Exhibit A. For each of the water rights in Exhibit A, we compared information on SRBA partial decrees to information in IDWR's water rights database. Fields compared included Name and Address, Source, Quantity, Priority Date, Point of Diversion, Purpose and Period of Use, and Place of Use. We found no discrepancies, although the Names on the partial decrees list USDI BLM, IDAHO STATE OFFICE, whereas IDWR's database refers to the Names as UNITED STATES OF AMERICA ACTING THROUGH USDI BUREAU OF LAND MANAGEMENT, IDAHO STATE OFFICE.

IDWR stores digitized water right places of use ("POU") in its geographic information system ("GIS"). We verified the digitized POU for each of the water rights listed in Exhibit A matches the POU described in the water rights database. No discrepancies were found. To complete our analysis, we then used GIS to overlay the digitized POU for each water right in Exhibit A onto the digital boundaries of the Butcher Bar Allotment, China Creek Allotment and neighboring grazing allotments (Wet Gulch Allotment)<sup>1</sup>.

### Butcher Bar Allotment Analysis

Based on digital overlay, the POU for the following water right exists completely within the Butcher Bar Allotment:

79-11756.

### China Creek Allotment Analysis

Based on digital overlay, the POUs for the following water rights exist completely within the China Creek Allotment:

79-11374 & 79-11376.

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<sup>1</sup> The digital shapes of the allotment boundaries were created by U.S. Department of the Interior, Bureau of Land Management with a publication date of 06-30-2017. The digital allotment boundaries can be downloaded from the website [https://gis.blm.gov/arcgis/rest/services/range/BLM\\_Natl\\_Grazing\\_Allotment/MapServer](https://gis.blm.gov/arcgis/rest/services/range/BLM_Natl_Grazing_Allotment/MapServer)



### **Analysis of Rights Within Both Subject Allotments**

POUs for the following water rights exist partially within the Butcher Bar Allotment and partially within the China Creek Allotment.

#### **79-11372:**

Water right 79-11372 is an instream stockwater right on the Salmon River. The POU is T26N, R1E, Sec 34, (L1)NESE, (L2)SESE. China Creek flows through the POU described as T26N, R1E, Sec 34, (L1)NESE. Land north of China Creek is in the Butcher Bar Allotment. Land south of China Creek is in the China Creek Allotment. It appears this POU can be accessed from either the China Creek or Butcher Bar allotments. The entire POU is managed by Bureau of Land Management, United States of America.

#### **79-11373:**

Water right 79-11373 is an instream stockwater right on China Creek, tributary to the Salmon River. The POU is T26N, R1E, Sec 34, SENE, (L1)NESE. China Creek flows through the POU described as T26N, R1E, Sec 34, (L1)NESE. Land north of China Creek is in the Butcher Bar Allotment. Land south of China Creek is in the China Creek Allotment. It appears this POU can be accessed from either the China Creek or Butcher Bar allotments. The entire POU is managed by Bureau of Land Management, United States of America.

#### **79-11784:**

Water right 79-11374 is a spring, tributary to China Creek. The POU is T26N, R1E, Sec 34, (L1)NESE. China Creek flows through the POU. Land north of China Creek is in the Butcher Bar Allotment. Land south of China Creek is in the China Creek Allotment. It appears this POU can be accessed from either the China Creek or Butcher Bar allotments. The entire POU is managed by Bureau of Land Management, United States of America.

### **Analysis of Rights Outside the Subject Allotments**

POUs for the following water rights exist entirely outside both the Butcher Bar Allotment and the China Creek Allotment.

#### **79-11259:**

Water right 79-11259 is an instream stockwater right on unnamed stream, tributary to the Salmon River. The POU is T26N, R1E, Sec 23, (L8)SWSW. This POU is entirely within the Wet Gulch Allotment. The POU is managed by Bureau of Land Management, United States of America.

#### **79-11261:**

Water right 79-11259 is an instream stockwater right on Wet Gulch, tributary to the Salmon River. The POU is T26N, R1E, Sec 26, (L1)NWNW. This POU is entirely within the Wet Gulch Allotment. The POU is managed by Bureau of Land Management, United States of America.

-end-

# EXHIBIT 2

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF CERTAIN BASIN 75  
WATER RIGHTS, IN THE NAME OF THE  
UNITED STATES

Docket No. P-OSC-2022-001

**ORDER PARTIALLY GRANTING  
PETITION; ORDER TO SHOW  
CAUSE**

**(FOURTH OF JULY CREEK  
ALLOTMENT)**

**BACKGROUND**

On May 23, 2022, Jaycob J. and Sheyenne A. Smith (collectively, “Petitioners”) filed with the Idaho Department of Water Resources (“Department”) a *Verified Petition for Order to Show Cause* (“Petition”). Petitioners ask the Department to issue an order pursuant to Idaho Code § 42-224(1) “to show cause why the Water Rights”(see Petition Exhibit A) on the federal grazing allotment known as the Fourth of July Creek Allotment (“Allotment”) “have not been lost through forfeiture pursuant to Idaho Code Sec. 42-222(2).” *Petition* at 1.

Petitioners assert that the water rights listed in Exhibit A (“U.S. Water Rights”) are owned by the United States of America acting through the Department of Agriculture, Forest Service (“Forest Service”) and the Department of Interior, Bureau of Land Management (“BLM”) (collectively, “U.S.”). *Id.* ¶ 1; see *Petition* Ex. A. Additionally, Petitioners assert that each of the U.S. Water Rights solely have a stockwater beneficial use for less than 13,000 gallons a day and the points of diversion and places of use are located partially or entirely on the Allotment. *Petition* ¶ 2–3. Petitioners claim that no other water rights share “the same place of use, source, and point of diversion” as the U.S. Water Rights. *Id.* ¶ 4.

Petitioners maintain that they have, for at least the last five years, held a valid Forest Service grazing permit for cattle grazing on the Allotment. *Id.* ¶ 5; see *Petition* Ex. B. Petitioners assert that they have grazed on the Allotment “each year of the permit term.” *Petition* ¶ 6. Petitioners claim that their employees, officers, and families have “regularly visited the Allotment, which borders Petitioners’ leased property, each grazing season of use and at other times outside the season of use each year for more than the past five years.” *Id.* ¶ 7. Petitioners allege that “[a]t no time over the past five years have Petitioners, their officers, employees, their families, or agents witnessed or heard of the existence of livestock owned or controlled by the [U.S.]” on the Allotment to use water under the U.S. Water Rights. *Id.* ¶ 8. Petitioners allege that at no time since their family has been authorized to use the Allotment “have Petitioners ever witnessed or heard of the Federal government applying the Water Rights to the beneficial use of watering livestock the Federal government owns or controls on either [sic] Allotment.” *Id.* ¶ 10. Petitioners assert that no agency relationship exists between Petitioners and the U.S. “for the purpose of acquiring water rights for the Federal government on the Allotment.” *Id.* ¶ 11. The Petition is verified by both Jaycob J. and Sheyenne A. Smith. *Id.* at 3–4.

In an effort to comply with the statutory service requirements of Idaho Code § 42-224(4), the Department submitted Freedom of Information Act (“FOIA”) requests to the BLM and to the Forest Service on May 25, 2022, for a copy of all active grazing permits or leases on the Fourth of July Allotment. On May 27, 2022, in response to the Department’s FOIA request, the BLM sent a letter informing the Department that they have no responsive records. To date, the Forest Service has confirmed receipt of the Department’s FOIA request, but has not responded regarding the contents of the request.

### APPLICABLE LAW

Idaho Code § 42-224 states in pertinent part:

(1) Within thirty (30) days of receipt by the director of the department of water resources of a petition or other information that a stockwater right has not been put to beneficial use for a term of five (5) years, the director must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture pursuant to section 42-222(2), Idaho Code. If the director determines the petition or other information, or both, is insufficient, he shall notify the petitioner of his determination, which shall include a reasoned statement in support of the determination, and otherwise disregard for the purposes of this subsection the other, insufficient, information.

(2) If the director determines the petition or other information, or both, contains prima facie evidence of forfeiture due to nonuse, the director must within thirty (30) days issue an order to the stockwater right owner to show cause before the director why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code. Any order to show cause must contain the director's findings of fact and a reasoned statement in support of the determination.

....

(14) This section applies to all stockwater rights except those stock water rights decreed to the United States based on federal law.

I.C. § 42-224(1)–(2), (14), *as amended by* H.B. 608 (2022). Therefore, to issue an order to show cause as Petitioners have requested, the Director must conclude that the Petition makes a “prima facie showing” that the U.S. has not put its U.S. Water Rights, decreed based on state law, to beneficial use for at least five years. “Prima facie” is defined by *Black’s Law Dictionary* as: “Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue <a prima facie showing>.” *Prima facie*, *Black’s Law Dictionary* (11th ed. 2019).



## FINDINGS OF FACT

After careful review of the Petition and the Department's associated research memorandum,<sup>1</sup> the Director issues the following findings:

1. Petitioners requested the Department issue an order to the U.S. to show cause why the U.S.'s Water Rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2). *See Petition* at 1. The following is a list of the water rights at issue: 75-2225, 75-4236, 75-4241,<sup>2</sup> 75-7279, 75-7288, 75-7335, 75-7672, 75-11102, 75-13804, 75-13808, 75-13813, 75-13822, 75-13825, 75-13826, 75-13899, 75-13912. *See Petition* Ex. A; *Memorandum* at 2.
2. The Director has not received written evidence that a principal/agent relationship existed, during the five-year period calculated pursuant to Idaho Code § 42-224(1), between the BLM or the Forest Service and any Fourth of July Creek Allotment livestock grazing permit or lease holder(s) for the purpose of maintaining the U.S. Water Rights.
3. Based on the Memorandum, the Director finds that none of the 16 U.S. Water Rights at issue are based on federal law, and all of the water rights at issue are stockwater rights pursuant to Idaho Code § 42-1401A(11). *Memorandum* at 1, 3.
4. Using the Department's water rights database, the Department reviewed the places of use for the Water Rights. *Memorandum* at 1.
5. Petitioners' allegations in the Petition are specific to non-use within the Allotment and do not extend to use beyond the Allotment. *See Petition* at 1–2.
6. Based on the Memorandum, the Director finds that the places of use for the following water rights are entirely within the Allotment: 75-4241, 75-7279, 75-7288, 75-7335, 75-11102, 75-13808, 75-13813, 75-13822, 75-13826, 75-13899, and 75-13912. *See Memorandum* at 2.
7. The allegations in the Petition attribute observations of nonuse of water in the Allotment to Petitioners and their employees, officers, agents, and family members. *Id.* at 1–2. Accordingly, the Director finds that Petitioners' statements are based on personal knowledge.
8. The Director finds that all the BLM's and some of the Forest Service's water rights at issue have a place of use that extends beyond the Allotment. The water rights having all or

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<sup>1</sup> For the Director to give a reasoned statement supporting a determination in favor of or opposing forfeiture pursuant to Idaho Code § 42-222(2), Department staff utilized the Department's water right files and database to thoroughly review, analyze, and document the basis of each water right and the locations of the places of use for the U.S. Water Rights listed in Exhibit A of the Petition. *See* Mem. from Craig Saxton & Shelley Keen, Adjudication Section Manager and Water Allocation Bureau Chief, Idaho Dep't of Water Res., to Gary Spackman, Director, Idaho Dep't of Water Res. 1 (June 21, 2022) (attached to this Order as Attachment A) [hereinafter *Memorandum*].

<sup>2</sup> Water rights 75-4241 and 75-4236 are statutory claims not made in or decreed by the Snake River Basin Adjudication ("SRBA"). Since both water rights are solely for stockwater use in an amount less than 13,000 gallons per day, they qualify for the SRBA *de minimis* stockwater claims deferral option.

portions of their place of use located beyond the boundaries of the Allotment are: 75-2225, 75-4236, 75-7672, 75-13804, and 75-13825. *See Memorandum* at 2–3.

### ANALYSIS

Forfeiture is disfavored in Idaho law. *Application of Boyer*, 73 Idaho 152, 159, 248 P.2d 540, 544 (1952) (“Forfeitures are abhorrent and all intendments are to be indulged against a forfeiture.”). To make a prima facie showing that the U.S. has not beneficially used water authorized by its water rights for five years, for each water right at issue here, Petitioners must present sufficient evidence establishing forfeiture over the entire place of use—not just those portions of the place of use within the Allotment. The Department’s Memorandum, which includes an analysis of its associated due diligence investigation, clarifies that some of the places of use of the U.S. Water Rights extend beyond the boundaries of the Allotment. *See Memorandum* at 2–3. As noted in finding 5 above, Petitioners do not offer evidence of the U.S.’s non-use of water beyond the boundaries of the Allotment. Therefore, the Petition does not include sufficient evidence for the Director to issue an order to show cause to the extent that Petitioners have requested.

The Department must limit the scope of an order to show cause issued in this matter to only those U.S. Water Rights based on state law and with a place of use that is located entirely within the property boundaries for which the Department has received supporting statements alleging non-use of water. Accordingly, for those U.S. Water Rights that have a place of use that is located either entirely or partially outside of the Allotment (see finding 8 above), Petitioners have failed to make a “prima facie showing” in accordance with Idaho Code § 42-224 that the U.S. has not beneficially used water authorized by its water rights for five years. However, Petitioners’ statements based on personal knowledge (see finding 7 above), when combined with the analysis within the Department’s Memorandum, amount to a “prima facie showing” in accordance with Idaho Code § 42-224 that the U.S. has not beneficially used water authorized by its water rights that have a place of use entirely within the Allotment within the last five years.

### CONCLUSION OF LAW

The Director concludes that the “prima facie showing” burden of proof, set forth in Idaho Code § 42-224, has been satisfied to the extent that he should partially grant Petitioners’ request and issue an order to the U.S. to show cause before the Director why those U.S. Water Rights based on state law and that have a place of use entirely within the Allotment have not been lost through forfeiture pursuant to Idaho Code § 42-222(2).

### ORDER

Based on the foregoing, the following are HEREBY ORDERED:

1. The *Verified Petition for Order to Show Cause* at issue is GRANTED for ONLY the following water rights: 75-4241, 75-7279, 75-7288, 75-7335, 75-11102, 75-13808, 75-13813, 75-13822, 75-13826, 75-13899, and 75-13912. All these water rights are held by the United States of America acting through the Department of Agriculture, Forest Service.

2. The *Verified Petition for Order to Show Cause* at issue is DENIED for the following water rights: 75-2225, 75-4236, 75-7672, 75-13804, and 75-13825.

3. In accordance with Idaho Code § 42-224(2), the United States of America acting through the Department of Agriculture, Forest Service must show cause before the Director of the Idaho Department of Water Resources why the following stockwater rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2): 75-4241, 75-7279, 75-7288, 75-7335, 75-11102, 75-13808, 75-13813, 75-13822, 75-13826, 75-13899, and 75-13912.

4. In accordance with Idaho Code § 42-224(6), the United States of America acting through the Department of Agriculture, Forest Service has 21 days from completion of service of this order to request in writing a hearing pursuant to Idaho Code § 42-1701A(1)–(2). If the United States requests such a hearing, it must also serve a copy of the request upon the petitioners and all current Fourth of July Allotment livestock grazing permit or lease holders known to the United States.

5. In accordance with Idaho Code § 42-224(7), if the United States fails to respond to the above order to show cause within 21 days, the stockwater rights for which the *Verified Petition for Order to Show Cause* has been partially granted shall be considered forfeited, and the Director shall issue an order within 14 days stating the stockwater rights have been forfeited pursuant to Idaho Code § 42-222(2).

6. In accordance with Idaho Code §§ 42-224(1) and 42-224(4), Jaycob J. and Sheyenne A. Smith will be served a copy of this order.

DATED this 22<sup>nd</sup> day of June 2022.

  
GARY SPACKMAN  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22nd day of June 2022, I caused to be served a true and correct copy of the foregoing *Order Partially Granting Petition; Order to Show Cause (Fourth of July Creek Allotment)*, by the method indicated below, upon the following:

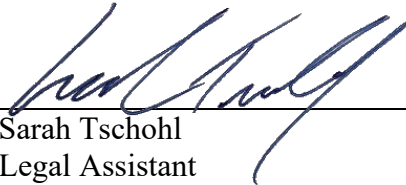
Alison C. Hunter William G. Meyers III HOLLAND & HART LLP P.O. Box 2527 Boise, ID 83701 <a href="mailto:achunter@hollandhart.com">achunter@hollandhart.com</a> <a href="mailto:wmyers@hollandhart.com">wmyers@hollandhart.com</a>  <i>Attorneys for Petitioners and Grazing Permit          Holders Jaycob J. and Sheyenne A. Smith</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
USDA Forest Service 550 W Fort St., MSC 033 Boise, ID 83724  <i>Stockwater Right Owner</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
USDI BLM Idaho State Office 1387 S. Vinnell Way Boise, ID 83709  <i>Stockwater Right Owner</i>	<input checked="" type="checkbox"/> Certified U.S. Mail with return receipt <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email

***COURTESY COPIES TO:***

John Murdock U.S. Department of the Interior Office of the Solicitor Boise Field Office 960 South Broadway A venue, Suite 400 Boise, Idaho 83706-6240 <a href="mailto:john.murdock@sol.doi.gov">john.murdock@sol.doi.gov</a>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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David Negri  
United States Department of Justice  
Environment and Natural Resources  
Division  
550 W. Fort St., MSC 033  
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- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email

  
Sarah Tschohl  
Legal Assistant



## Memorandum

**To:** Gary Spackman

**Prepared by:** Craig Saxton and Shelley Keen

CS

SK

**Date:** June 21, 2022

**Re:** Review of Federal water rights within the Fourth of July Creek Allotment (#70213) which were identified in Exhibit A of Jacob J. Smith and Cheyenne A. Smith's *Verified Petition for Order to Show Cause*

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### Comparison of Partial Decrees to IDWR Database Records and Shapefiles

On May 23, 2022, Jacob J. Smith and Cheyenne A. Smith ("Smiths") submitted a *Verified Petition for Order to Show Cause* ("Petition") asking the Director of the Idaho Department of Water Resources ("IDWR") to issue a show cause order pursuant to Idaho Code § 42-224(1) for a list of water rights "located on a federal grazing allotment known as the Fourth of July Creek Allotment (#70213)." Smiths' petition refers to the list of water rights as Exhibit A.

Of the 16 water rights listed in Exhibit A, none are decreed based on federal law, ten are decreed in the Snake River Basin Adjudication ("SRBA") based on state law, four are water right licenses issued by IDWR pursuant to Idaho Code § 42-219, and two are "statutory claims" filed pursuant to Idaho Code § 42-243. Statutory claims have not been confirmed as valid water rights by a court of law or by IDWR. For convenience, they may be referred to as "water rights" in this memorandum.

For each of the water rights in Exhibit A, we compared information on the SRBA partial decree, original license document, or the original statutory claim document to the information in IDWR's water rights database. Data fields compared included Name and Address, Source, Quantity, Priority Date, Point of Diversion, Purpose and Period of Use, and Place of Use. We found no discrepancies in the decreed water rights, although the Names on the partial decrees are abbreviated to USDI BLM, IDAHO STATE OFFICE, whereas IDWR's database refers to the Names as UNITED STATES OF AMERICA ACTING THROUGH USDI BUREAU OF LAND MANAGEMENT, IDAHO STATE OFFICE. IDWR's database shows a different address for USFS rights based on statutory claim or license than what is listed on the original documents scanned into IDWR's document management system. The original documents list an address in Ogden, Utah, while IDWR's database shows the addresses have been updated to show a Boise, Idaho address.

IDWR stores digitized water right places of use ("POU") in its geographic information system ("GIS"). We verified the digitized POU for each of the water rights listed in Exhibit A matches the POU described in the water rights database. We found no discrepancies.

### Water Right Ownership Review

The Petition asserts that the water rights listed in Exhibit A "are currently owned by the United States of America acting through the U.S. Department of Agriculture, Forest Service, or the U.S. Bureau of Land

Management.” IDWR records show each of the rights listed in Exhibit A as being owned by the United States.

### **Water Right Place of Use Analysis**

The Petition asserts that the water rights listed in Exhibit A have “places of use . . . partially or completely on a federal grazing allotment known as the Fourth of July Creek #70213 Allotment (“Allotment”) and managed by the Salmon-Cobalt Ranger District of the Salmon-Challis National Forest headquartered in Salmon, Idaho (“Forest Service”).” To evaluate whether the water rights listed in Exhibit A are used on the Fourth of July Creek Allotment as asserted, we used GIS to overlay the digitized POU for each water right in Exhibit A onto the digital boundaries of the Fourth of July Creek Allotment, neighboring grazing allotments, and parcels in private ownership.<sup>1</sup>

Based on the digital data, the POUs for the following water rights are completely within the Fourth of July Creek Allotment:

75-4241	75-7335	75-13813	75-13899
75-7279	75-11102	75-13822	75-13912
75-7288	75-13808	75-13826	

POUs for the following five water rights from Exhibit A have all or portions of their authorized POUs outside the Fourth of July Creek Allotment boundary:

75-2225	75-7672	75-13825
75-4236	75-13804	

The analysis below describes water rights in Exhibit A having all or portions of the authorized POUs outside the Fourth of July Creek Allotment boundary:

#### **75-2225**

Water right 75-2225 is for stockwater use from a spring tributary to Kriley Creek. The POU is located in T24N, R22E, Section 32, NWSE, which is outside the boundary of the Fourth of July Creek Allotment. The POU is on BLM land, the majority being within the BLM’s Tower Creek Allotment.

#### **75-4236**

Water right 75-4236 is a statutory claim for stockwater use and is diverted from Brown Spring tributary to sinks. The POU is located in T24N, R22E, Section 30, SWSE. The south ½ of the SWSE of Section 30 is within the boundary of the Fourth of July Creek Allotment. The north ½ of the SWSE of Section 30 is not within an allotment boundary. The north ½ of the SWSE of Section 30 includes privately owned land parcels in the name of Clark Jennison and Tef’s Family Revocable Trust.

#### **75-7672**

Water right 75-7672 is for stockwater and wildlife use and is diverted from a spring that sinks. Part of the POU is located in T23N, R22E, Section 10, SESE, which is entirely in the Fourth of July Creek

<sup>1</sup> The digital shapes of the allotment boundaries were created by U.S. Department of the Interior, Bureau of Land Management with a publication date of 06-30-2017. The digital allotment boundaries can be downloaded from the website [https://gis.blm.gov/arcgis/rest/services/range/BLM\\_Natl\\_Grazing\\_Allotment/MapServer](https://gis.blm.gov/arcgis/rest/services/range/BLM_Natl_Grazing_Allotment/MapServer).



Allotment and, according to BLM data, also partly within the BLM's Badger Springs Allotment. The rest of the POU is in T23N, R22E, Section 15, NENW and NWNW, which is in BLM's Badger Springs Allotment.

#### **75-13804**

Water right 75-13804 is for stockwater use from East Kriley Spring tributary to sinks. The POU is located in T24N, R22E, Sec 32, SWNE, which is partly within the Fourth of July Creek Allotment, partly within the BLM's Tower Creek Allotment, and partly (less than one acre) within the Salmon-Challis National Forest but not within a grazing allotment.

#### **75-13825**

Water right 75-13825 is for stockwater use from Magpie Spring, which sinks. The POU is located in T24N, R22E, Section 31, SENE. Three-fourths (3/4) of the SENE of Section 31 is in the Fourth of July Creek Allotment. One-fourth (1/4) of the SENE of Section 31 is outside of the Fourth of July Creek Allotment and is split between the USFS Salmon-Challis National Forest and the Cheryl A. Hart Revocable Trust.

### **Idaho Code § 42-1401A(11) Analysis**

The Petition also asserts that the water rights listed in Exhibit A "meet the requirements of Idaho Code Sec. 42-1401A(11) because the beneficial use is solely for stockwater in a quantity not to exceed 13,000 gallons per day."

The following ten water right from Exhibit A are decreed solely for stockwater use and have a condition stating that the use shall not exceed 13,000 gallons per day:

75-11102	75-13808	75-13813	75-13822
75-13826	75-13899	75-13912	75-2225
75-13804	75-13825		

Water rights 75-7279, 75-7288, and 75-7335 from Exhibit A are licenses solely for stockwater use. The authorized diversion rate on each of the licenses is 0.02 cfs, which would be less than 13,000 gallons per day if diverted continuously. They were not claimed or decreed in the SRBA. Stockwater rights that do not exceed 13,000 gallons per day qualify for the claim deferral option in the SRBA.

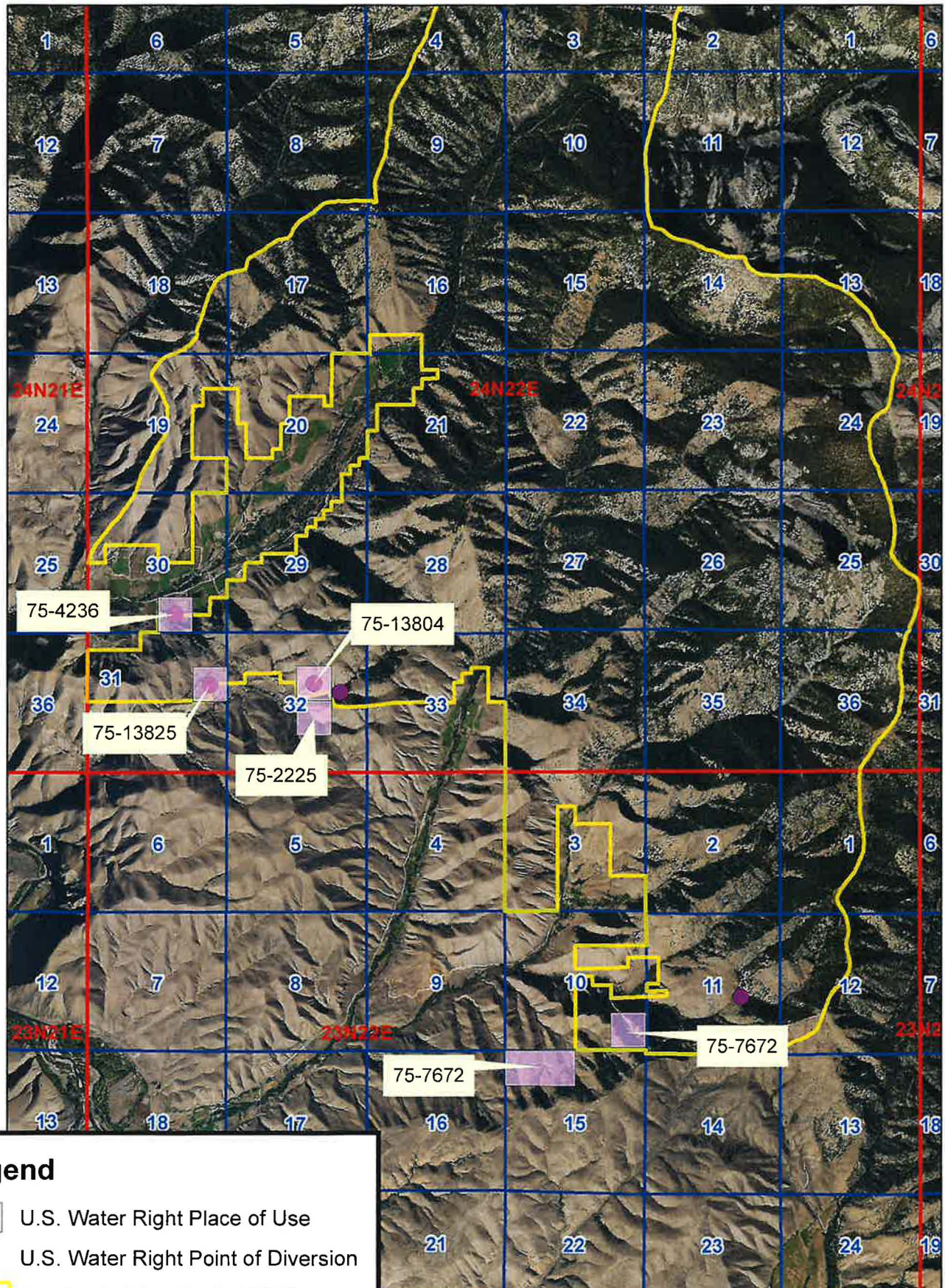
Licensed water right 75-7672 from Exhibit A lists two beneficial uses, stockwater and wildlife. Idaho Code § 42-1401A(11) defines stock watering use to include "water solely for livestock *or wildlife*" (italics added). The authorized diversion rate on the license is 0.02 cfs, which would be less than 13,000 gallons per day if diverted continuously. Because the permit for water right 75-7672 was issued in 2000, thirteen years after the commencement date of the SRBA, the license was not required to be claimed in the SRBA.

Water rights 75-4241 and 75-4236 from Exhibit A are statutory claims solely for stockwater use. The claimed diversion rate on each of the statutory claims is 0.02 cfs, which would be less than 13,000 gallons per day if diverted continuously. They were not claimed in the SRBA. Stockwater rights that do not exceed 13,000 gallons per day qualify for the claim deferral option in the SRBA.



# Fourth of July Creek Allotment

Federal Water Rights NOT Entirely within the Fourth of July Creek Allotment



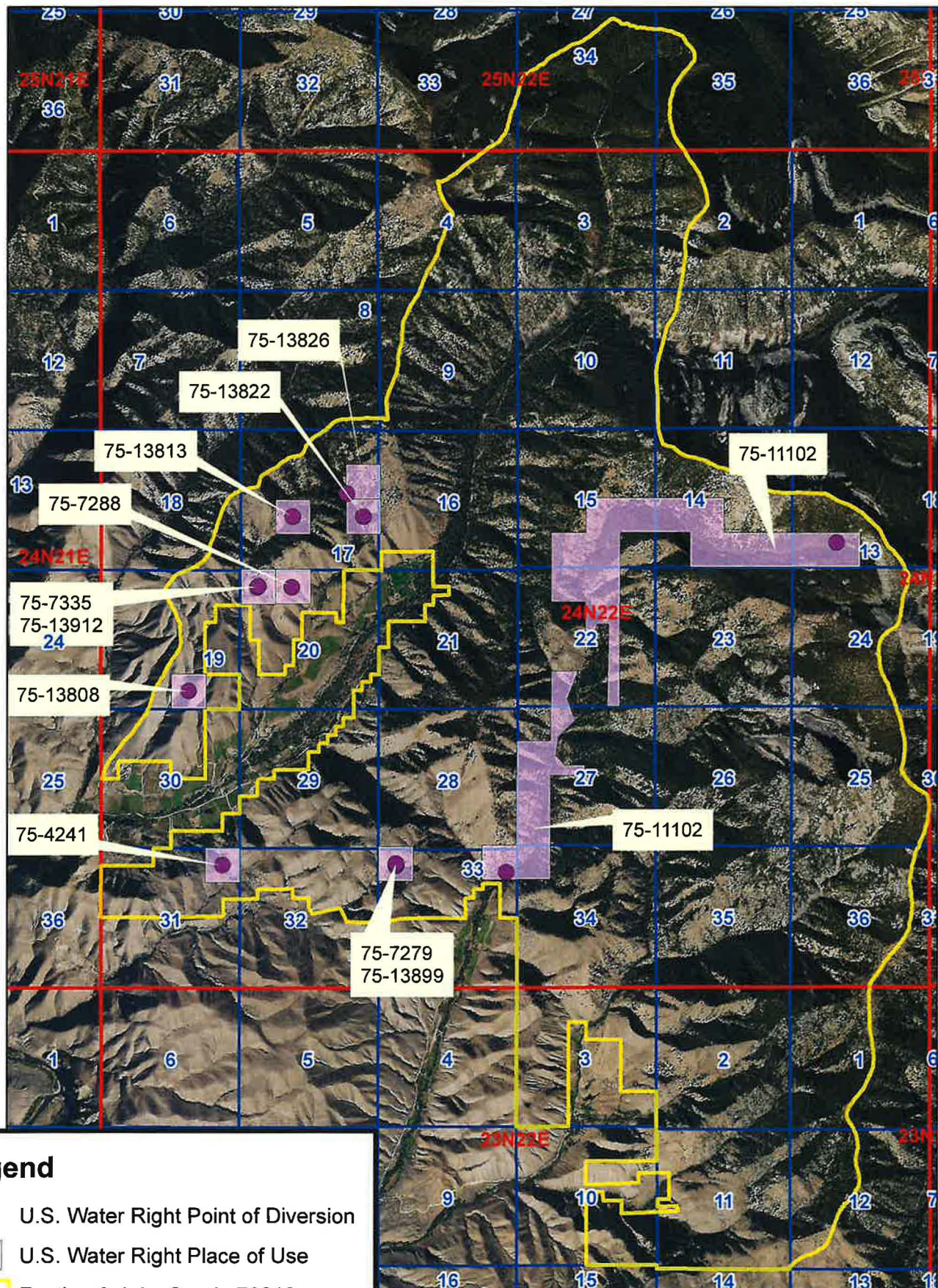
## Legend

- U.S. Water Right Place of Use
- U.S. Water Right Point of Diversion
- Fourth\_of\_July\_Creek\_70213
- Township/Range



# Fourth of July Creek Allotment

Federal Water Rights Entirely within the Fourth of July Creek Allotment



## Legend

- U.S. Water Right Point of Diversion
- U.S. Water Right Place of Use
- Fourth\_of\_July\_Creek\_70213
- Township/Range



# EXHIBIT 3

**Names of Parties Serving Document:**

UNITED STATES OF AMERICA

SEE ATTACHMENT #1

**Attorneys' Names and Addresses:**

THOMAS L. SANSONETTI  
United States Department of Justice  
Assistant Attorney General  
Environment and Natural Resources Division

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ISB # 4761 (NMS)  
ISB # 6168 (TLT)

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Numbers: See Exhibit A, B, C,
	)	and E
	)	
Case No. 39576	)	<b>STIPULATION AND JOINT MOTION</b>
	)	<b>FOR ORDER APPROVING</b>
	)	<b>STIPULATION</b>

**DESCRIPTIVE SUMMARY**

This document is the Stipulation and Joint Motion for Order Approving Stipulation, filed by the United States of America ("United States") and the private parties listed on Attachment #1 ("Private Parties").

## STIPULATION

The United States and the Private Parties (collectively “Parties”), by and through their respective undersigned counsel, hereby stipulate and agree as follows as to the water right numbers listed on Exhibits A, B, C, D, E, and F, and the water right claims to be filed in the grazing allotments listed on Exhibit G (individually, “Water Right” or, collectively, “Water Rights”):

### 1. WITHDRAWAL OF OBJECTIONS AND RESPONSES BY PRIVATE PARTIES.

The Private Parties agree to dismiss with prejudice their objections and responses to the Water Rights listed on Exhibit A. The Parties agree and stipulate that the elements of each Water Right listed on Exhibit A should be decreed as described in Section 5, below.

The Private Parties agree to dismiss with prejudice their objections and responses to the Water Rights listed on Exhibit B, and to withdraw any motions or court filings which attempt to set aside partial decrees for stockwater rights held by the United States, as listed in Exhibit C. The Private Parties further agree that they will not challenge any other partial decree issued to the United States in the SRBA for stockwater purposes.

2. WITHDRAWAL OF OBJECTIONS BY UNITED STATES. The United States agrees to dismiss with prejudice its objections to the Water Rights listed on Exhibit E. The Parties agree and stipulate that the elements of each Water Right listed on Exhibit E should be decreed as described in Section 5, below.

3. CLAIMS NOT YET REPORTED. The Parties have a number of pending stockwater claims that have not yet been reported by IDWR (“unreported claims”). Such unreported claims

are listed on Exhibits D and F. The Parties agree and stipulate that the elements of the unreported claims should be decreed as described in Section 5, below. The Parties agree that they will not file objections or responses to the entry of partial decrees for the claims listed on Exhibit D and F if the elements of such claims conform to the provisions described in this Stipulation.

4. CLAIMS NOT YET FILED. The Private Parties have a number of stockwater claims that have not yet been filed with IDWR ("unfiled claims"). The name of the claimant and the grazing allotments in which these unfiled claims are located are listed on Exhibit G. Notwithstanding the provisions of Section 8 below, the Parties agree that they will not oppose the filing of the claims so long as they are made by the claimants and within the allotments identified in Exhibit G. Moreover, although the United States retains the right to file objections to individual elements of the claimed water right in order to ensure compliance with this Stipulation and to ensure consistency with the overlapping or competing claims of the United States, it will not object to the claims on the basis that they contain points of diversion or places of use on federal lands and it will not object to the priority date or the purpose of use so long as those elements conform to the provisions described in this Stipulation. In addition, the Parties agree that such claims shall be filed no later than December 31, 2002, and that in no event shall any stockwater claims be filed in the SRBA on the federal lands underlying the grazing allotments listed on Exhibit G after such date except by agreement between the United States and any affected Private Parties.



5. WATER RIGHT DESCRIPTIONS. The Parties agree and stipulate that the water right claims listed on Exhibits A, D, E, and F, and the water right claims to be filed pursuant to Section 4 above, shall be decreed consistent with the following:

A. Priority Dates.

- i. Claims for which the United States has not yet received a partial decree. If the United States has not yet received a partial decree for a water right claim, the following shall apply. For claims on lands administered by the Bureau of Land Management, the United States shall receive a water right with a priority date which is the later of a) the claimed priority date or b) June 28, 1934. For claims on lands administered by the Forest Service, the United States shall receive a water right with a priority date which is the later of a) the claimed priority date or b) the date of the federal reservation of such lands. On Forest Service lands, the federal reservation date for claims on what is presently the Sawtooth National Forest is June 12, 1905, and the federal reservation date for claims on what is presently the Nez Perce National Forest is May 10, 1906. The overlapping or competing claims of the Private Parties shall have a priority date that is one-day senior to the United States' priority date, unless the Private Parties can provide a patent or deed for their "base property," as such term is defined in 36 C.F.R. § 222.1 and 43 C.F.R. § 4100.0-5, that precedes this date, in which case the Private Parties shall receive a priority date that is this more senior date.
- ii. Claims for which the United States has received a partial decree for an undeveloped source. If the United States has received a partial decree for a water

right claim and the source is undeveloped (*i.e.*, instream or an undeveloped spring), the Private Parties' water rights shall be decreed as described in the last sentence of section 5A(i) above.

iii. Claims for which the United States has received a partial decree for a developed source. If the United States has received a partial decree for a water right claim and the source is developed, the overlapping or competing claims of the Private Parties shall have a priority date that is one-day junior to that of the United States' priority date as described in the decree. However, if the Private Parties can provide 1) evidence of stockwatering use of the water source preceding the priority date of the United States' decree, and 2) a patent or deed for their "base property," as such term is defined in 36 C.F.R. § 222.1 and 43 C.F.R. § 4100.0-5, that is at least as senior as the water use date, the Private Parties' priority date shall be the water use date. Moreover, if the priority date of the United States' decree is based on beneficial use and such date significantly predates the date of the development, the overlapping or competing claims of the Private Parties shall have a priority date that is one-day senior to that of the United States' priority date.

iv. Claims for which the United States has a Public Water Reserve 107 reservation. If the United States has a claim or a decree for a spring under Public Water Reserve 107 ("PWR 107"), the overlapping or competing claims of the Private Parties shall have a priority date that is one-day junior to that of the United States' priority date, unless the Private Parties can provide 1) evidence of

stockwatering use of the water source preceding the United States' priority date, and 2) complete chain-of- title documentation for their "base property," as such term is defined in 36 C.F.R. § 222.1 and 43 C.F.R. § 4100.0-5, that is at least as senior as the water use date, in which case the Private Parties' priority date shall be the water use date.

- B. Purpose and Place of Use of Water Rights. The Parties agree that the purpose of use of the Water Rights listed on Exhibit E and Exhibit F, and the water right claims to be filed pursuant to Section 4 above, is only for the watering of livestock lawfully within a permitted federal grazing allotment and that the number of livestock within the allotment shall not exceed the amount authorized by a federal grazing permit. The Parties agree that the purpose of use of the state-law based Water Rights listed on Exhibits A, C and D is only for the watering of livestock lawfully within a permitted federal grazing allotment. The Parties further agree that the place of use of the state-law based Water Rights listed on Exhibits A, C, D, E and F, and the water right claims to be filed pursuant to Section 4 above, shall remain *in situ*.

6. CONFORMING DOCUMENTS. The Parties agree that they will execute and file any necessary documents with the SRBA Court and IDWR to conform the elements of the claims listed on Exhibits A, D, E, and F, and the water right claims to be filed pursuant to Section 4 above, to the provisions described in this Stipulation.

7. GRAZING PERMITS AND MANAGEMENT OF FEDERAL LANDS. The Parties agree that the Water Rights listed on Exhibits A, C, D, E and F, and the water right claims to be



filed pursuant to Section 4 above, shall not alter the rights of a permittee under a valid grazing permit nor impede the authority of the United States to manage federal lands.

8. NO FURTHER CLAIMS. The Private Parties agree that they will not file additional claims in the SRBA for water rights where the place of use or point of diversion is located on federal lands and the United States agrees that it will not file additional claims in the SRBA for water rights where the place of use or point of diversion is located on federal lands underlying the federal Grazing Allotments on which any of the Private Parties are grazing permittees, except by agreement between the United States and any affected Private Parties. This paragraph shall not affect or apply to any claims already filed in the SRBA by any Party as of the effective date of this Stipulation, nor shall it apply to the claims to be filed pursuant to Section 4 above.

9. APPROVAL OF STIPULATION AND ISSUANCE OF PARTIAL AND FINAL DECREES BY COURT. The Parties agree to support the Joint Motion for Order Approving Stipulation set forth below. If for any reason the Court does not approve the Stipulation and issue partial and final decrees for any of the Water Rights on the attached Exhibits pursuant to the terms of this Stipulation, this Stipulation is null and void and shall have no effect, and the Parties shall proceed with a determination of their water rights and/or objections under applicable law.

10. STIPULATION NOT TO BE USED AGAINST THE PARTIES. The Parties agree that this Stipulation has been entered into based upon good faith negotiations for the purpose of resolving legal disputes, including pending litigation, by compromise and settlement and that nothing in this Stipulation, or any offers or compromises made in the course of negotiating this Stipulation, shall be construed as admissions against interest or tendered or used as evidence to

show the validity or invalidity of any water right claims made by the Parties, or as an admission or concession of wrongdoing or liability, or shall be used in any manner by any party in the SRBA in any future proceedings in the SRBA, in any appellate proceedings concerning the SRBA, or in any other proceeding, other than those seeking approval of this Stipulation by the SRBA Court, for interpretation or enforcement of this Stipulation, or for a purpose contemplated by Idaho Rule of Evidence 408.

11. RESERVATIONS. The Parties agree that this Stipulation has been entered into based upon good faith negotiations for the purpose of resolving legal disputes, including pending litigation, by compromise and settlement and that nothing herein shall be construed as precedent in any other proceeding or context. Nothing in this Stipulation shall be construed to deprive any federal official of authority to revise, amend, or promulgate regulations. Nothing in this Stipulation shall be construed to commit any federal official to expend funds not appropriated by Congress.

12. VOLUNTARY EXECUTION. This Stipulation was entered into and executed voluntarily by the Parties in good faith, and without any fraud, misunderstanding, overreaching, misrepresentation, duress, or undue influence.

13. BINDING EFFECT. This Stipulation shall be binding on any and all successors, assigns, heirs, executors, and administrators of each of the Parties.

14. COSTS AND ATTORNEY FEES. Each Party shall bear their own costs and attorney fees.

15. EFFECTIVE DATE. This Stipulation shall become effective upon execution by all of the Parties.

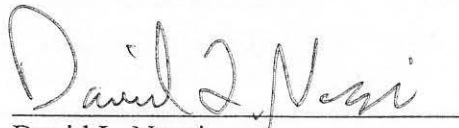
### JOINT MOTION FOR ORDER APPROVING STIPULATION

The United States and the Private Parties request the Court to approve the foregoing Stipulation. The Order sought by this motion is fully in accordance with Idaho law. Such an Order would serve not only to facilitate the settlement between the United States and the Private Parties, thus streamlining the process, but would very likely have the effect of encouraging future settlements in the SRBA. The provisions of Idaho Rule of Evidence 408, as well as the policy underlying that rule and the policy of the SRBA Court, are directed at furthering the strong public policy favoring out-of-court settlement of disputes over litigation.

Wherefore, the United States and the Private Parties respectfully request that this Court grant this motion in all respects. The United States and the Private Parties further request oral argument and expedited consideration of this matter.

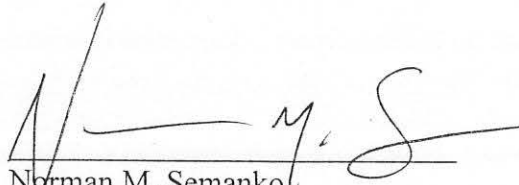


DATED this 28<sup>th</sup> day of August, 2002.



David L. Negri  
Larry A. Brown  
United States Department of Justice

Attorneys for the United States of America



Norman M. Semanko  
Travis L. Thompson  
Barker, Rosholt & Simpson LLP

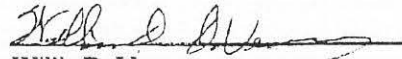
Attorneys for the following Parties:

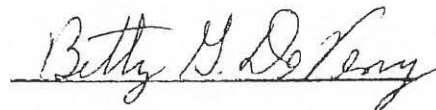
Western Stockgrowers Association et al.  
Broken Diamond Ranch  
Brown, Birchie  
Brown, Wallace  
Butler, Raymond  
Crockett, David  
Kinsey Family LLP  
Kunkel, Tom  
Mathers Ranch  
Tugaw Ranches  
Williams, Inc.  
Williams Properties LLC  
William J & Thomas Williams

A.L. Cattle, Inc.  
Bedke Family Limited Partnership  
Bedke, Scott  
Bedke, Karl U.  
Bedke, Ray C.  
Bowen, Todd  
Branch, Weldon  
Crater Butte Cattle Association  
Diamond A Livestock, Inc.  
DeVeny, Willis  
DeVeny, Betty  
Eckhardt Family Limited Partnership  
Eckhardt, James  
Eckhardt, Nellie  
Faulkner Land & Livestock Company  
Flying Triangle Inc.



Gardner, Luther  
Lawrence Ranch Inc.  
Lawrence, Ron  
Layton, Eugene  
Mathews, Bill J.  
Mathews, Eugene  
Pickett Ranch and Sheep Company  
Poulton, Michael  
Poulton, Gary  
Richfield Cattle Association  
Shingle Creek LLC  
Shoulder Three Ranches Inc.  
Tugaw, Joe  
Warr, Keith  
Whiteley, Winslow  
Winecup, Inc.

  
Willis DeVeney

  
Betty DeVeney

State of Idaho           )  
                                  ) ss.  
County of Ada           )

DAVID L. NEGRI, duly sworn, upon oath, deposes and says:

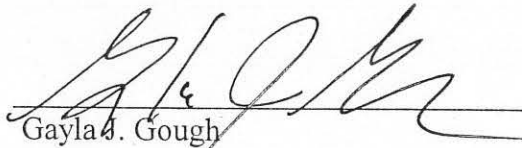
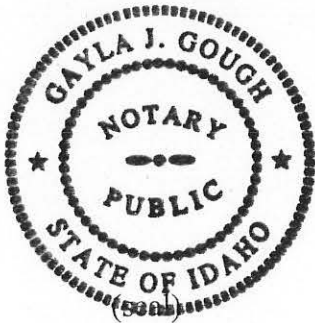
That I am the party filing this Stipulation, and/or that I am the attorney for the party, and that I have read this Stipulation, know its contents and believe that the statements are true to the best of my knowledge.



David L. Negri  
United States Department of Justice  
Environment and Natural Resources Division  
General Litigation Section  
550 West Fort Street, MSC 033  
Boise, Idaho 83724  
(208) 331-5943

Counsel for the United States of America

Subscribed and sworn before me on: Aug 28, 2002



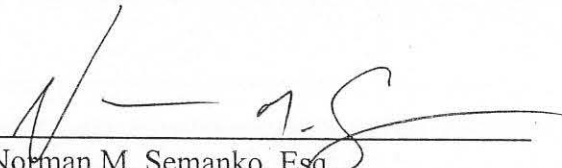
Notary Public for: Idaho  
Residing at: Kuna, Idaho  
Commission expires: 11-17-2004

State of Idaho                 )  
  ) ss.  
County of Ada                 )

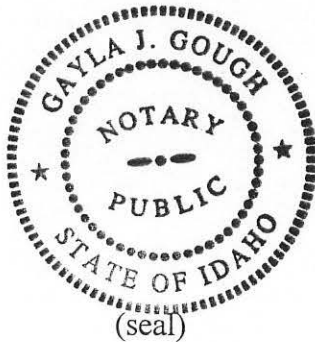
NORMAN M. SEMANKO, duly sworn, upon oath, deposes and says:

That I am the party filing this Stipulation, and/or that I am the attorney for the party, and that I have read this Stipulation, know its contents and believe that the statements are true to the best of my knowledge.

Dated 8/28/02

  
Norman M. Semanko, Esq.  
Barker Rosholt & Simpson LLP  
205 N. 10<sup>th</sup> Street, Suite 520  
P.O. Box 2139  
Boise, Idaho 83701-2139  
Counsel for the Private Parties

Subscribed and sworn before me on: Aug 28, 2002



GAYLA J. GOUGH  
(name of notary)  
Notary Public for: Idaho  
Residing at: KUNA IDAHO  
Commission expires: 11-17-2004

State of Idaho )  
 ) ss.  
 County of Idaho )

WILLIS DEVENY and BETTY DEVENY, duly sworn, upon oath, deposes and says:

That we are the parties filing this Stipulation, and that we have read this Stipulation, know its contents and believe that the statements are true to the best of our knowledge.

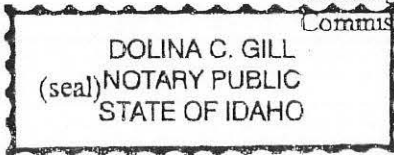
Dated Aug 27 2002

Willis E. DeVeney  
 Willis DeVeney  
 P.O. Box 1160  
 Riggins, Idaho 83549

Subscribed and sworn before me on: Aug 27 2002

Dolina C. Gill  
 (name of notary)

Notary Public for: Idaho  
 Residing at: Riggins  
 Commission expires: 1-18-2006

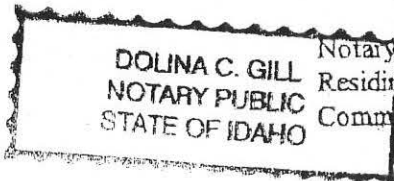


Betty E. DeVeney  
 Betty DeVeney  
 P.O. Box 1160  
 Riggins, Idaho 83549

Subscribed and sworn before me on: Aug 27, 2002

Dolina C. Gill  
 (name of notary)

Notary Public for: Idaho  
 Residing at: Riggins  
 Commission expires: 1-18-2006



(seal)



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28<sup>th</sup> day of August, 2002, I served a true and correct copy of the foregoing **STIPULATION AND JOINT MOTION FOR ORDER APPROVING STIPULATION**, by depositing a copy thereof in the U.S. mail, postage prepaid, or by other service where indicated, upon the following:

Original to:

BY OVERNIGHT DELIVERY:

Clerk of the Court  
Snake River Basin Adjudication  
P.O. Box 2707  
Twin Falls, ID 83303-2707

Copies to:

U.S. Department of Justice  
General Litigation Section  
Environment and Natural Resource Division  
550 West Fort Street, MSC 033  
Boise, ID 83724

IDWR Document Depository  
P.O. Box 83720  
Boise, ID 83720-0098

BY HAND DELIVERY:  
Norman M. Semanko, Esq.  
Travis L. Thompson  
Barker Rosholt & Simpson LLP  
205 N. 10<sup>th</sup> Street, Suite 520  
P.O. Box 2139  
Boise, Idaho 83701-2139

Chief, Natural Resources Division  
Office of the Attorney General  
State of Idaho  
P.O. Box 44449  
Boise, ID 83711-4449

David J. Barber, Deputy Attorney General  
Office of the Attorney General  
State of Idaho  
P.O. Box 44449  
Boise, ID 83711-4449

Willis & Betty DeVeney  
P.O. Box 1160  
Riggins, Idaho 83549

  
\_\_\_\_\_  
David Negri

Attachment 1  
Claimants/Objectors/Respondents

Western Stockgrowers Association et al.  
Broken Diamond Ranch  
Brown, Birchie  
Brown, Wallace  
Butler, Raymond  
Crockett, David  
Kinsey Family LLP  
Kunkel, Tom  
Mathers Ranch  
Tugaw Ranches  
Williams, Inc.  
Williams Properties LLC  
William J & Thomas Williams

Richfield Cattle Association  
Shingle Creek LLC  
Shoulder Three Ranches Inc.  
Tugaw, Joe  
Warr, Keith  
Whiteley, Winslow  
Winecup, Inc.

A.L. Cattle, Inc.  
Bedke Family Limited Partnership  
Bedke, Scott  
Bedke, Karl U.  
Bedke, Ray C.  
Bowen, Todd  
Branch, Weldon  
Crater Butte Cattle Association  
DeVeny, Willis  
DeVeny, Betty  
Diamond A Livestock, Inc.  
Eckhardt Family Limited Partnership  
Eckhardt, James  
Eckhardt, Nellie  
Faulkner Land & Livestock Company  
Flying Triangle Inc.  
Gardner, Luther  
Lawrence Ranch Inc.  
Lawrence, Ron  
Layton, Eugene  
Mathews, Bill J.  
Mathews, Eugene  
Pickett Ranch and Sheep Company  
Poulton, Michael  
Poulton, Gary



# EXHIBIT 4

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF CERTAIN BASIN 79  
WATER RIGHTS, IN THE NAME OF THE  
UNITED STATES OF AMERICA ACTING  
THROUGH THE UNITED STATES  
DEPARTMENT OF AGRICULTURE, FOREST  
SERVICE

Docket No. P-OSC-2021-003

**ORDER PARTIALLY GRANTING  
PETITION; ORDER TO SHOW  
CAUSE**

(COW CREEK ALLOTMENT)

**BACKGROUND**

On September 24, 2021, Gill Family Ranches, LLC (“Petitioner”) filed with the Idaho Department of Water Resources (“Department”) a *Verified Petition for Order to Show Cause* (“Petition”) related to certain Basin 79 water rights. Petitioner asked the Department to issue an order pursuant to Idaho Code § 42-224(1) “to show cause why the Water Rights [(see Exhibit A)] have not been lost through forfeiture pursuant to Idaho Code [§] 42-222(2).” *Petition* at 1.

Petitioner asserts that the water rights listed in Exhibit A (“Forest Service Water Rights”) are owned by the United States of America acting through the Department of Agriculture, Forest Service (“Forest Service”). *Id.* ¶ 1; and *see also* Exhibit A. Additionally, Petitioner asserts that the “points of diversion or places of use” for the Forest Service Water Rights are on a federal grazing allotment identified by the Forest Service as the Cow Creek Allotment (“Allotment”). *Id.* ¶ 3. Petitioner claims that no other water rights share “the same place of use, source, and point of diversion” as the Forest Service Water Rights. *Id.* ¶ 4.

Petitioner maintains that it has, for at least the last five years, held a valid Forest Service grazing permit for livestock grazing on the Allotment. *Id.* ¶ 5; and *see also* Exhibit B. Petitioner asserts that its livestock has grazed on the Allotment “each year of the permit term.” *Id.* ¶ 6. Petitioner claims that its employees, officers, and family of its officers and employees have “regularly visited the Allotment, which borders Petitioner’s private property, each grazing season of use and at other times outside the season of use each year for more than the past five years.” *Id.* ¶ 7. Petitioner alleges that “[a]t no time over the past five years has Petitioner, its officers, employees, their families, or agents, witnessed or heard of the existence of livestock owned or controlled by the Forest Service on the Allotment either to graze or to use water under the [Forest Service] Water Rights.” *Id.* ¶ 8, at 2. Petitioner alleges that at no time since it has had use of the area “has Petitioner ever witnessed or heard of the Forest Service applying the [Forest Service] Water Rights to the beneficial use of watering livestock the Forest Service owns or controls on the Allotment.” *Id.* ¶ 10. Petitioner asserts that no agency relationship exists between Petitioner and the Forest Service “for the purpose of acquiring water rights for the Forest Service on the Allotment.” *Id.* ¶ 11. The Petition is verified by Marty I. Gill, manager of Gill Family Ranches, LLC. *Id.* at 3.

To comply with the statutory service requirements of Idaho Code § 42-224(4), the Department submitted a Freedom of Information Act (“FOIA”) request to the Forest Service on September 27, 2021, for a copy of all active grazing permits on the Cow Creek Allotment. On September 29, 2021, in response to the Department’s FOIA request, the Forest Service sent a copy of two redacted grazing permits. One permit sent by the Forest Service matches Permit No. 01045, issued April 29, 2015, that Petitioner filed as Exhibit B. The second permit, sent by the Forest Service, is held in the name of Rex Baker.<sup>1</sup>

### APPLICABLE LAW

Idaho Code § 42-224(1) states:

Whenever the director of the department of water resources receives a petition making prima facie showing, or finds, on his own initiative based on available information, that a stockwater right has not been put to beneficial use for a term of five (5) years, the director shall expeditiously issue an order to the stockwater right owner to show cause before the director why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code.

Therefore, to issue an order to show cause as Petitioner has requested, the Director must conclude that the Petition makes a “prima facie showing” that the Forest Service has not put its Forest Service Water Rights to beneficial use for at least five years. “Prima facie” is defined by *Black’s Law Dictionary* as: “Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue <a prima facie showing>.” *Prima facie*, *Black’s Law Dictionary* (11th ed. 2019).

### FINDINGS AND PRELIMINARY CONCLUSIONS

After careful review of the Petition and the Department’s water right files and database, the Director issues the following findings and preliminary conclusions:

1. Petitioner asked the Department to issue an order to the Forest Service to show cause why the Forest Service’s Water Rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2). *See Petition* at 1. The following is a list of the water rights at issue: 79-4134, 79-4138, 79-4139, 79-4149, 79-4165, 79-4212, 79-4234, 79-4235, 79-4236, 79-4237, 79-4238, 79-4239, 79-4240, 79-4324, 79-4325, 79-4327, 79-4328, 79-4329, 79-4330, 79-4333, 79-4334, 79-4335, 79-4336, 79-4337, 79-4338, 79-4339, 79-4340, 79-4341, 79-4342, 79-4343, 79-10505, 79-10506, 79-10507, 79-10508, 79-10509, 79-10510, 79-10511, 79-10512, 79-10513, 79-10514, 79-10515, 79-10519, 79-10559, 79-10568, 79-10572, 79-10573, 79-10611, 79-10612, 79-10720, 79-10722, 79-13647, 79-13658, 79-13664, and 79-13679. *See Exhibit A*; and *see also* Memorandum from Glen

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<sup>1</sup> The Forest Service redacted the address for Rex Baker on the grazing permit they produced. The Department obtained an address, updated on June 3, 2021, for Rex Baker through the online Idaho County Parcel Viewer.

Gardiner & Craig Saxton, Water Allocations Analyst and Adjudication Section Manager, Idaho Dep't of Water Res., to Shelley Keen, Water Allocation Bureau Chief, Idaho Dep't of Water Res. 1–2 (Oct. 21, 2021) (attached to this Order as Attachment A) [hereinafter Memorandum].

2. Petitioner's allegations only relate to the Forest Service's lack of beneficial use of water within the boundaries of the Allotment. Petitioner does not make allegations relating to the Forest Service's use of water outside of the boundaries of the Allotment. *See Petition* at 1–2.
3. Using the Department's water rights database, the Director reviewed the place of use for the Forest Service Water Rights. *See Memorandum* at 1.
4. Based on the Memorandum, the Director finds that some of the Forest Service Water Rights have a place of use that extends beyond the Allotment. Petitioner's allegations, however, are specific to non-use within the Allotment and do not extend to use beyond the allotment. *Petition* at 1-2. Forfeiture is disfavored in Idaho law. *Application of Boyer*, 73 Idaho 152, 159, 248 P.2d 540, 544 (1952) (“Forfeitures are abhorrent and all intendments are to be indulged against a forfeiture.”). To make a prima facie showing that the Forest Service has not put its water rights to beneficial use for at least five years, Petitioner must make allegations that would establish forfeiture over the entire place of use—not just those portions of the place of use within the Allotment. The Director concludes that because some of the Forest Service Water Rights have a place of use that extends beyond the Allotment and because Petitioner did not make allegations about the Forest Service's water use outside the Allotment, Petitioner has failed to make a “prima facie showing” that the Forest Service has not put those water rights to beneficial use for at least five years. The water rights at issue with a place of use that extends beyond the boundaries of the Allotment are: 79-4149, 79-4338, 79-10511, 79-10514, 79-10515, 79-10559, 79-10573, 79-10611, and 79-13658. *Memorandum* at 2.
5. Based on the Memorandum, the Director finds that the following water rights at issue have a place of use that is entirely within the Allotment: 79-4134, 79-4138, 79-4139, 79-4165, 79-4212, 79-4234, 79-4235, 79-4236, 79-4237, 79-4238, 79-4239, 79-4240, 79-4324, 79-4325, 79-4327, 79-4328, 79-4329, 79-4330, 79-4333, 79-4334, 79-4335, 79-4336, 79-4337, 79-4339, 79-4340, 79-4341, 79-4342, 79-4343, 79-10505, 79-10506, 79-10507, 79-10508, 79-10509, 79-10510, 79-10512, 79-10513, 79-10519, 79-10568, 79-10572, 79-10612, 79-10720, 79-10722, 79-13647, 79-13664, and 79-13679. *Id.* at 1.
6. Marty I. Gill is an officer of Gill Family Ranches, LLC. *Petition* at 3. The Petition makes specific allegations related to the Allotment attributable to the officers of Gill Family Ranches, LLC. *Id.* at 1–2. Accordingly, the Director concludes that Marty I. Gill's statements are based on personal knowledge and therefore establish a “prima facie showing” (in accordance with Idaho Code § 42-224) that the Forest Service has not put water rights that have a place of use entirely within the Allotment to beneficial use within the last five years.

7. The Director concludes that he should partially grant Petitioner's request and issue an order to the Forest Service to show cause before the Director why the Forest Service water rights that have a place of use entirely within the Allotment have not been lost through forfeiture pursuant to Idaho Code § 42-222(2).

### ORDER

Based on the foregoing, the following are HEREBY ORDERED:

1. The Petition for an order to show cause why the Forest Service's water rights at issue here have not been lost through forfeiture, pursuant to Idaho Code § 42-222(2), is GRANTED for ONLY the following water rights: 79-4134, 79-4138, 79-4139, 79-4165, 79-4212, 79-4234, 79-4235, 79-4236, 79-4237, 79-4238, 79-4239, 79-4240, 79-4324, 79-4325, 79-4327, 79-4328, 79-4329, 79-4330, 79-4333, 79-4334, 79-4335, 79-4336, 79-4337, 79-4339, 79-4340, 79-4341, 79-4342, 79-4343, 79-10505, 79-10506, 79-10507, 79-10508, 79-10509, 79-10510, 79-10512, 79-10513, 79-10519, 79-10568, 79-10572, 79-10612, 79-10720, 79-10722, 79-13647, 79-13664, and 79-13679.
2. The Petition for an order to show cause why the Forest Service's water rights at issue here have not been lost through forfeiture, pursuant to Idaho Code § 42-222(2), is DENIED for the following water rights: 79-4149, 79-4338, 79-10511, 79-10514, 79-10515, 79-10559, 79-10573, 79-10611, and 79-13658.
3. The United States of America acting through the Department of Agriculture, Forest Service shall have 21 days from completion of service to request in writing a hearing pursuant to Idaho Code § 42-1701A. If the United States fails to timely respond to the order to show cause, the stockwater rights for which this petition has been granted shall be considered forfeited, and the Director shall issue an order declaring the stockwater rights forfeited pursuant to Idaho Code § 42-222(2). If the Forest Service files a request for a hearing, it shall also serve the request upon the parties listed on the included certificate of service.
4. In accordance with Idaho Code § 42-224(4), all active Cow Creek Allotment livestock grazing permit or lease holders will be served a copy of this order.

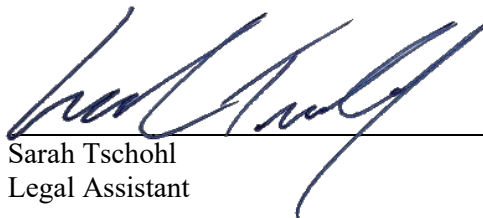
DATED this 27th day of October 2021.

  
GARY SPACKMAN  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27th day of October 2021, I caused to be served a true and correct copy of the foregoing *Order Partially Granting Petition; Order to Show Cause*, by the method indicated below, upon the following:

William G. Myers III HOLLAND & HART LLP P.O. Box 2527 Boise, ID 83701 <a href="mailto:wmyers@hollandhart.com">wmyers@hollandhart.com</a>  <i>For Petitioner</i>	<input checked="" type="checkbox"/> Certified U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Rex H. Baker P.O. Box 327 Lucile, ID 83542  <i>Livestock Grazing Permit Holder</i>	<input checked="" type="checkbox"/> Certified U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
USDA Forest Service 550 W Fort St., MSC 033 Boise, ID 83724  <i>Stockwater Right Owner</i>	<input checked="" type="checkbox"/> Certified U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<i>Courtesy Copy:</i> United States Department of Justice Environment and Natural Resources Division 550 W. Fort St., MSC 033 Boise, ID 83724	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email

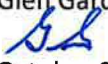



Sarah Tschohl  
Legal Assistant



## Memorandum

**To:** Shelley Keen

**Prepared by:** Glen Gardiner & Craig Saxton  
 

**Date:** October 21, 2021

**Re:** Review of Federal water rights within the Cow Creek Allotment (#104) which were identified in Exhibit A of Gill Family Ranches, LLC Verified Petition for Order to Show Cause.

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### Comparison of Partial Decrees to IDWR Database Records and Shapefiles

On September 24, 2021, Gill Family Ranches, LLC ("Gill") petitioned the Director of the Idaho Department of Water Resources ("IDWR") to issue a show cause order pursuant to Idaho Code § 42-224(1) for a list of water rights "located on a federal grazing allotment known as the Cow Creek Allotment (#104)." Gill's petition refers to the list of water rights in Exhibit A. For each of the water rights in Exhibit A, we compared information on SRBA partial decrees to information in IDWR's water rights database. Fields compared included Name and Address, Source, Quantity, Priority Date, Point of Diversion, Purpose and Period of Use, and Place of Use. We found no discrepancies, although the Names on the partial decrees list USDA FOREST SERVICE, whereas IDWR's database refers to the Names as UNITED STATES OF AMERICA ACTING THROUGH USDA FOREST SERVICE.

IDWR stores digitized water right places of use ("POU") in its geographic information system ("GIS"). We verified the digitized POU for each of the water rights listed on Exhibit A matches the POU described in the water rights database. No discrepancies were found. To complete our analysis, we then used GIS to overlay the digitized POU for each water right in Exhibit A onto the digital boundaries of the Cow Creek Allotment and neighboring grazing allotments.<sup>1</sup> (Sherwin Creek Allotment, Pittsburg Allotment, Sheep Creek Allotment, Papoose Allotment, and Race Creek Allotment).

### Cow Creek Allotment Analysis

Based on digital overlay, the POUs for the following water rights exist completely within the Cow Creek Allotment:

79-4134, 79-4138, 79-4139, 79-4165, 79-4212, 79-4234, 79-4235, 79-4236, 79-4237, 79-4238, 79-4239, 79-4240, 79-4324, 79-4325, 79-4327, 79-4328, 79-4329, 79-4330, 79-4333, 79-4334, 79-4335, 79-4336, 79-4337, 79-4339, 79-4340, 79-4341, 79-4342, 79-4343, 79-10505, 79-10506, 79-10507, 79-10508, 79-10509, 79-10510, 79-10512, 79-10513, 79-10519, 79-10568, 79-10572, 79-10612, 79-10720, 79-10722, 79-13647, 79-13664, and 79-13679.

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<sup>1</sup> The digital shapes of the allotment boundaries were created by U.S. Department of the Interior, Bureau of Land Management with a publication date of 06-30-2017 and downloaded from the website [https://gis.blm.gov/arcgis/rest/services/range/BLM\\_Natl\\_Grazing\\_Allotment/MapServer](https://gis.blm.gov/arcgis/rest/services/range/BLM_Natl_Grazing_Allotment/MapServer)

POUs for the following water rights exist partially within the Cow Creek Allotment and partially outside the Cow Creek Allotment:

79-4149, 79-4338, 79-10511, 79-10514, 79-10515, 79-10559, 79-10573, 79-10611, and 79-13658.

The analysis below describes water rights in Exhibit A with portions of their authorized POU's outside the Cow Creek Allotment. During the analysis of water right POU locations and Forest Service Allotments, a discrepancy was noted in the Forest Service Allotment boundaries. The boundaries of Cow Creek Allotment, Pittsburg Allotment and Sheep Creek do not align, causing the areas within the boundaries to overlap. In these areas, it is unknown if the water right POU's are intended for Cow Creek Allotment, Pittsburg Allotment, Sheep Creek Allotment or a combination of allotments. The Sherwin Creek Allotment, Papoose Allotment, and Race Creek Allotment boundaries align with the Cow Creek Allotment boundary.

**79-4149:**

Water right 79-4149 describes the source as a spring, tributary to sinks. The POU is T26N, R1E, Sec 18, SESW. The POU is within the Cow Creek Allotment, Sherwin Creek Allotment, and Pittsburg Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America.

**79-4338:**

Water right 79-4338 describes the source as Horner Springs, tributary to Little China Creek. The POU is T26N, R1E, Sec 17, SWSW. The POU is within Cow Creek Allotment and Sherwin Creek Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America.

**79-10511:**

Water right 79-10511 is an instream stockwater right on Kessler Creek, tributary to South Fork Race Creek. POU's T24N, R1W, Sec 1, NWNE; T25N, R1W, Sec 26, NESW, SESW, SWSE; T25N, R1W, Sec 35, NWNE, SWNE, SENE, NESE; T25N, R1W, Sec 36, NWSW, SWSW, SESW, SWSE are within the Cow Creek Allotment. POU T24N, R1W, Sec 1, NENE is within the Cow Creek Allotment, Race Creek Allotment, and an area with no allotment. It appears this POU's, and therefore this water right, can be accessed from multiple allotments. The POU's are managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America, except for part of T24N, R1W, Sec 1, NENE which is private land owned by Susan Lee O'Leary.

**79-10514:**

Water right 79-10514 is an instream stockwater right on West Fork Race Creek, tributary to Race Creek. POU's are T25N, R1E, Sec 30, SWNW; T25N, R1W, Sec 23, NWNE, SWNE, SENE; T25N, R1W, Sec 24, SWNW, NWSW, SWSW, SESW; T25N, R1W, Sec 25, NENE, NWNE, SENE, NESW are within the Cow Creek Allotment. POU's T25N, R1E, Sec 30 SENW, NESW are thin the Cow Creek Allotment and Race Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America, except for part of T25N, R1E, Sec 30, SENW which is private land owned by Larry L Simonson.



**79-10515:**

Water right 79-10515 is an instream stockwater right on Bean Creek, tributary to West Fork Race Creek. POU's T25N, R1E, SEC 19, SENE; T25N R1E, Sec 20, SWNW, NWSW are in the Cow Creek Allotment. POU's T25N R1E, Sec 29, NWNE, SWNE, SENE, NESE, are in the Race Creek Allotment. POU's T20N, R1E, Sec 20, NESW, SESW are in both Cow Creek Allotment and Race Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America.

**79-10559:**

Water right 79-10559 is an instream stockwater right on Corral Creek, tributary to Snake River. The POU's T26N, R1W, Sec 9, SWNE, SENE, NESE, SESE; T26N, R1W, Sec 10, SWSW; T26N, R1W, Sec 14, NWSW, SWSW, SESW; T26N, R1W, Sec 15, SWNE, NESW, NWNW, SENW, NESE, NWSE; T26N, R1W, Sec 23, NENE, NWNE, SENE, NENW; T26N, R1W, Sec 24, SWNW, NESW, NWSW, SESW, SWSE are within the Cow Creek Allotment, Pittsburg Allotment, and Sheep Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU's are managed by US Forest Service, Wallowa-Whitman National Forest, United States of America, except for part of T26N, R1W, Sec 24, NWSW which is owned by Crooks Corral Mines, LLC.

**79-10573:**

Water right 79-10573 is an instream stockwater right on Lost Valley Creek, tributary to Kirkwood Creek. POU's T25N, R1W, Sec 3, SWNW, NESW, NWSW, NWSE, SWSE; T25N, R1W, Sec 10, NWNE, SWNE, SENE, NESE, SWSE, SESE; T25N, R1W, Sec 15, NWNE, SWNE, SENW, NESW, are within the Cow Creek Allotment. POU's T25N, R1W, Sec 3, SWNW, NWSW<sup>2</sup> are within both Cow Creek Allotment and Sheep Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Wallowa-Whitman National Forest, United States of America.

**79-10611:**

Water right 79-10611 is an instream stockwater right on Clarks Fork, tributary to Sheep Creek. POU's T25N, R1W, Sec 27, NWSW, SWSW, SESW; T25N, R1W, Sec 28, SWNW, NESW, NWSW, NESE, NWSE; T25N, R1W, Sec 29, SWNE, SENE, NESW, NWSE are within the Cow Creek Allotment. T25N, R1W, Sec 29, SWNW, SENW<sup>3</sup> are within both Cow Creek Allotment and Sheep Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Wallowa-Whitman National Forest, United States of America.

**79-13658:**

Water right 79-13658 is an instream stockwater right on South Fork Race Creek, tributary to Race Creek. POU's T24N, R1W, Sec 3, SWSW, SESW, SWSE; T24N, R1W, Sec 10, NENE, NWNE; T24N, R1W, SEC 11, NENE, NWNE, NENW, NWNW; T24N, R1W, Sec 12, NENW, NWNW, SWNE, SENW are within both Cow Creek Allotment and Papoose Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest United States of America. T24N, R1W, Sec 12, NENW, NWNE are partially within the Cow Creek Allotment, Papoose Allotment and partially on private land owned by JB Scott.

-end-

<sup>2</sup> In these two sections, the Cow Creek Allotment and Sheep Creek Allotment overlap.

<sup>3</sup> In these two sections, the Cow Creek Allotment and Sheep Creek Allotment overlap.

# EXHIBIT 5

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF CERTAIN BASIN 79  
WATER RIGHTS, IN THE NAME OF THE  
UNITED STATES OF AMERICA ACTING  
THROUGH THE UNITED STATES  
DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE

Docket No. P-OSC-2021-003

**ORDER WITHDRAWING ORDER TO  
SHOW CAUSE; ORDER DISMISSING  
PETITION**

**(COW CREEK ALLOTMENT)**

**BACKGROUND**

On September 24, 2021, Gill Family Ranches, LLC (“Petitioner”) filed with the Idaho Department of Water Resources (“Department”) a *Verified Petition for Order to Show Cause* (“Petition”) related to certain Basin 79 water rights. Petitioner asked the Department to issue an order pursuant to Idaho Code § 42-224(1) “to show cause why the Water Rights [(see Exhibit A)] have not been lost through forfeiture pursuant to Idaho Code [§] 42-222(2).” *Petition* at 1.

On October 27, 2021, the Director of the Department issued an *Order Partially Granting Petition; Order to Show Cause* (“Order to Show Cause”), ordering the United States of America acting through the Department of Agriculture, Forest Service (“Forest Service”) “to show cause before the Director why the Forest Service water rights that have a place of use entirely within the [Cow Creek] Allotment have not been lost through forfeiture pursuant to Idaho Code § 42-222(2).” *Order to Show Cause* ¶ 7, at 4. The Order to Show Cause gave the Forest Service, “21 days from completion of service to request in writing a hearing pursuant to Idaho Code § 42-1701A.” *Id.* ¶ 3, at 4. If the Forest Service does not timely respond, the Order to Show Cause dictates that the following Forest Service stockwater rights, entirely within the Cow Creek Allotment, shall be considered forfeited pursuant to Idaho Code § 42-222(2): 79-4134, 79-4138, 79-4139, 79-4165, 79-4212, 79-4234, 79-4235, 79-4236, 79-4237, 79-4238, 79-4239, 79-4240, 79-4324, 79-4325, 79-4327, 79-4328, 79-4329, 79-4330, 79-4333, 79-4334, 79-4335, 79-4336, 79-4337, 79-4339, 79-4340, 79-4341, 79-4342, 79-4343, 79-10505, 79-10506, 79-10507, 79-10508, 79-10509, 79-10510, 79-10512, 79-10513, 79-10519, 79-10568, 79-10572, 79-10612, 79-10720, 79-10722, 79-13647, 79-13664, and 79-13679 (“Forest Service Water Rights”). *See Id.* ¶¶ 7, 1, 3, at 4.

To comply with Idaho Code § 42-224(3), the Department served the Order to Show Cause via certified mail. The Forest Service signed for its certified mail copy of the Order to Show Cause on October 29, 2021. To comply with Idaho Code § 42-224(3)–(4), the Order to Show Cause was also sent via certified mail to Rex Baker, holder of an active Forest Service grazing permit on the Cow Creek Allotment. *See Id.* at 2, ¶ 4, at 4. Rex Baker signed for his certified mail copy of the Order to Show Cause on November 1, 2021.

ORDER WITHDRAWING ORDER TO SHOW CAUSE; ORDER DISMISSING PETITION  
(COW CREEK ALLOTMENT) - 1

On November 8, 2021, the Department received a copy of a *Limited Agency Agreement for the Purposes of Establishing and Maintaining Stockwater Rights on National Forest Grazing Allotments in Accordance with the Laws of the State of Idaho* (“Agreement”) between Rex Baker and the Forest Service, authorized on November 8, 2021 (attached to this Order as Attachment A).

### **APPLICABLE LAW**

Idaho Code § 42-224 states:

(1) Whenever the director of the department of water resources receives a petition making prima facie showing, or finds, on his own initiative based on available information, that a stockwater right has not been put to beneficial use for a term of five (5) years, the director shall expeditiously issue an order to the stockwater right owner to show cause before the director why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code.

. . . .

(5) The stockwater right owner shall have twenty-one (21) days from completion of service to request in writing a hearing pursuant to section 42-1701A, Idaho Code. If the stockwater right owner fails to timely respond to the order to show cause, the stockwater right shall be considered forfeited, and the director shall issue an order declaring the stockwater right to be forfeited pursuant to section 42-222(2), Idaho Code.

However, Idaho Code § 42-224(10) limits the director of the Department from forfeiting certain stockwater rights:

The director shall not issue an order to show cause, and shall not proceed under the provisions of this section, where the holder or holders of any livestock grazing permit or lease on a federal grazing allotment asserts a principal/agent relationship with the federal agency managing the grazing allotment.

### **FINDINGS OF FACT**

1. Rex Baker holds a valid and current Forest Service grazing permit for the Cow Creek Allotment. *See Order to Show Cause* at 2; *Agreement* at 1, ¶ 3, at 2.

2. The Agreement was entered into by Rex Baker and the Forest Service “for the purposes of establishing and maintaining stockwater rights to use water diverted from sources that are within grazing allotments located on NFS [(National Forest System)] lands . . . .” *Agreement* at 1.<sup>1</sup>

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<sup>1</sup> While captioned as a “limited” agency agreement, it is “limited” only because it is for the narrow purpose of establishing and maintaining stockwater rights.



3. The Agreement states that when Rex Baker's cattle are drinking water on the Cow Creek Allotment, Rex Baker is "acting as a limited agent for the United States for the purposes of establishing and maintaining stockwater rights for the United States within grazing allotments located on NFS lands, . . . ." *Id.* ¶ 2, at 1.

### CONCLUSIONS OF LAW

1. Idaho Code § 42-224(10) states, in relevant part, "The director ... shall not proceed under the provisions of this section, where the holder or holders of any livestock grazing permit or lease on a federal grazing allotment asserts a principal/agent relationship with the federal agency managing the grazing allotment." <sup>2</sup>

2. The Director concludes that Rex Baker, a Cow Creek Allotment livestock grazer and permit holder, established a principal/agent relationship with the Forest Service, the federal agency that manages the Cow Creek Allotment.

3. Because this principal/agent relationship was established, Idaho Code § 42-224(10) mandates that the Director not proceed under the provisions of Idaho Code § 42-224.

4. Having reviewed the Agreement, the Director concludes he should withdraw the Order to Show Cause and dismiss the Petition.

### ORDER

IT IS HEREBY ORDERED that the *Order Partially Granting Petition; Order to Show Cause* is WITHDRAWN.

IT IS FURTHER ORDERED that the *Verified Petition for Order to Show Cause* is DISMISSED.

DATED this 12th day of November 2021.

  
GARY SPACKMAN  
Director

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<sup>2</sup> The Agreement was executed after the Order to Show Cause was issued by the Director. See *Order to Show Cause* at 4; Agreement at 2. At the time it was issued, the Order to Show Cause was in accordance with Idaho Code § 42-224.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12th day of November 2021, I served a true and correct copy of the foregoing, *Order Withdrawing Order to Show Cause; Order Dismissing Petition (Cow Creek Allotment)*, by the method indicated below, upon the following:

William G. Myers III HOLLAND & HART LLP P.O. Box 2527 Boise, ID 83701 <a href="mailto:wmyers@hollandhart.com">wmyers@hollandhart.com</a>  <i>For Petitioner</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Rex H. Baker P.O. Box 327 Lucile, ID 83542  <i>Livestock Grazing Permit Holder</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
USDA Forest Service 550 W Fort St., MSC 033 Boise, ID 83724  <i>Stockwater Right Owner</i>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<i>Courtesy Copy:</i> United States Department of Justice Environment and Natural Resources Division 550 W. Fort St., MSC 033 Boise, ID 83724 <a href="mailto:david.negri@usdoj.gov">david.negri@usdoj.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email



Sarah Tschohl  
Legal Assistant

**LIMITED AGENCY AGREEMENT FOR THE PURPOSES OF ESTABLISHING AND  
MAINTAINING STOCKWATER RIGHTS ON NATIONAL FOREST GRAZING  
ALLOTMENTS IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO**

The U.S Forest Service, Department of Agriculture, ("Forest Service") and  
Rex Baker ("Permittee," and together  
with the Forest Service the "Parties"), in consideration of the mutual acknowledgments and agreements  
below, and for the benefit of the Parties and the National Forest System ("NFS"), enter into this Limited  
Agency Agreement for the purposes of establishing and maintaining stockwater rights to use water  
diverted from sources that are within grazing allotments located on NFS lands in accordance with the  
Laws of the State of Idaho ("Agreement").

**ACKNOWLEDGEMENTS**

The Parties acknowledge the following:

1. The significant role of the livestock industry in the settlement, history, and culture of the State of Idaho;
2. The importance of stockwater rights to the livestock industry in the State of Idaho, to the Forest Service grazing program, to the Permittee's livestock operation, and to the association of water with NFS lands;
3. On March 24, 2020, Idaho Governor Brad Little signed into law Idaho House Bill 592 ("HB 592") with an effective date of July 1, 2020;
4. HB 592 amended state law to remove limitations on the Forest Service and permittees entering into agency agreements to exercise Forest Service stockwater rights on National Forest grazing allotments; and
5. Current or future grazing authorization is not impacted or restricted in any way by this Agreement.

**AGREEMENTS**

The Forest Service and the Permittee agree as follows:

1. The Parties wish to continue utilizing state-based stockwater rights obtained by the United States located on the grazing allotments listed in Exhibit A so that the use of water authorized under those rights for livestock watering, and of any subsequent stockwater rights obtained in accordance with State law, can be used by livestock owned by the Permittee for the term of the current federal grazing permit and any subsequent renewal or reissuance thereof by the Forest Service; and
2. The Parties agree that the availability of water on the listed grazing allotments is critical for the grazing management of the allotments, and when domestic livestock owned by the Permittee and located on the listed grazing allotments make use of water by drinking from places, or sources located on NFS lands, that such use will be deemed beneficial under Idaho state law, and is made by the Permittee acting as a limited agent of the United States for the purposes of establishing and maintaining stockwater rights for the United States within grazing allotments located on NFS lands, and for no other purposes.

### GENERAL TERMS

1. This Agreement does not convey any right, title, or interest in any lands or resources owned by the United States. Nothing in this Agreement shall prevent the Forest Service from administering the use and occupancy of NFS land for livestock grazing, construction and maintenance of range improvements in accordance with applicable laws and regulations, nor does it extend the statutory and regulatory authority of the Forest Service beyond regulations of the use and occupancy of NFS land.

2. The Parties expressly agree that the mutual acknowledgements and agreements contained in this Agreement are supported by good and adequate consideration including, but not limited to, past and continuing use of water in accordance with the stockwater rights, held by the Forest Service, together with the construction and maintenance of associated range improvements.

3. This Agreement shall remain in effect throughout the term of the existing grazing authorization, new authorizations, and any renewals of grazing authorizations. This Agreement terminates only upon: (a) the expiration, termination, or revocation of the current grazing permit(s) held by the Permittee that is not renewed; or (b) upon 90-day written notice by either Party to the other of a desire to terminate the Agreement.

4. The terms of this Agreement may not be modified without the written consent of the Parties. If any paragraph or portion of this Agreement is deemed unenforceable, the remainder of this Agreement shall remain in full force and effect.

5. Subject to the termination clause above, the Parties agree to act in good faith and with fair dealings to fulfill, and not impede, the intent of this Agreement.

6. This Agreement shall become effective on the date of the last signature of the Parties thereafter.

7. The signators to this Agreement acknowledge that they (a) have read this entire document; (b) fully understand and agree with all the terms of this Agreement; (c) have knowingly, voluntarily, and in good faith entered into this Agreement; and (d) have the explicit authorization to execute and bind their respective entities or selves by this Agreement.

**For the Permittee and/or Lessee (Agent):**

Ray G. Becker

11/5/21  
Date

**For the Forest Service:**

[Signature]  
(Title of Authorized Officer)

11/8/21  
Date

District Ranger (Office)

Salmon River Ranger District

**Exhibit A**

The following Forest Service Allotments on the Nez Perce - Clearwater National Forest are permitted to Rex Baker.

Cow Creek Allotment