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

UNITED STATES OF AMERICA, )  
 ) Case No. 1:22-cv-00236-DCN  
 )  
 )  
 )  
 Plaintiff, )  
 )  
 )  
 v. ) **DECLARATION OF KATHRYN J.**  
 ) **CONANT IN SUPPORT OF UNITED**  
 ) **STATES' MOTION FOR SUMMARY**  
 STATE OF IDAHO; IDAHO DEPARTMENT ) **JUDGMENT**  
 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, )  
 )

v. )

IDAHO HOUSE OF REPRESENTATIVES; )  
MIKE MOYLE, in his official capacity as )  
Majority Leader of the House; IDAHO )  
SENATE; and CHUCK WINDER, in his official )  
capacity as President Pro Tempore of the )  
Senate, )

Intervenor-Defendants. )  
\_\_\_\_\_ )

I, Kathryn J. Conant, in accordance with the requirements of 28 U.S.C. § 1746 declare:

1. My name is Kathryn Jeanne Conant, I am an employee of the United States Department of Agriculture (“USDA”), Forest Service (“Forest Service”). The following statements are based upon my personal knowledge.
2. My present position is that of Lands and Minerals Director, for the USDA Forest Service Intermountain Region. I have served in this position since June 2012.
3. In this capacity, my current responsibilities include overseeing all water right issues for the Forest Service in Central/Southern Idaho, Nevada, Utah, western Wyoming, a portion of California, and a portion of Colorado. This includes exercising delegated authority for most water rights actions, as well as overseeing the Forest Service’s participation in general water right adjudications in Idaho, which have included the Snake River Basin Adjudication (“SRBA”) and Bear River Basin Adjudication.
4. Signatory authority for most water rights actions has been delegated to the Lands and Minerals Director as defined in the Regional Manual Supplement (*see* FSM 2500-2007-1). Also delegated to the Director is the responsibility to retain and maintain original permanent water rights files for the Intermountain Region.
5. I provide direction, oversight, and decisions as these pertain to our management of water resources with emphasis on federally owned water rights held for the benefit of the Forest Service and water uses of others on National Forest System (“NFS”) lands. My position also directs and helps evaluate the regional water rights program, and develops and disseminates applicable policy, procedures, and protocols for the program. I ensure coordination of program components with other staff groups, external organizations, other Federal, State and local

agencies, and the USDA Office of the General Counsel. I am also responsible for the study of new or modified legislative or regulatory requirements and agency objectives and for formulating policies and approaches for managing water rights in the Intermountain Region.

6. I work closely with representatives from Federal, State, and municipal organizations, non-government organizations, and private industries to develop long term management solutions for water rights within the Intermountain Region. I have developed and revised national procedures, technical standards, and guidelines for water rights and water uses. I review proposed and revised national policy directives, provide constructive input, and ensure consistency with regional programs and objectives. I also serve as a regional consultant and I work closely with our USDA Office of the General Counsel, Forest Supervisors, and program specialists in providing advice and interpretation on complex problems relating to the resolution and negotiation of water rights and instream flow issues for National Forests, NFS lands, and adjacent State and private forest lands. I oversee programs to secure Forest Service water rights and to prevent inappropriate water uses or claims by others that could have adverse impacts on water resources on the National Forests. In addition, I provide direction and guidance in the development and implementation of a water rights management strategy. Components of such a strategy may include legal, regulatory, legislative, and programmatic approaches.

7. I have been employed by the Federal government since 1995, and with the Forest Service since 2003. My federal career includes service in the following positions:

- a. Almost five years as a biologist for the U.S. Army Corps of Engineers, out of the Baltimore District. During my tenure, I worked on water resource management projects within the Potomac and Susquehanna River Basins.

- b. Almost four years as a biologist working for National Marine Fisheries Service within the National Oceanic and Atmospheric Administration primarily focused on the Federal Energy Regulatory Commission's hydropower licensing program.
- c. Nine years with the U.S. Forest Service, managing the national Forest Legacy Program within State and Private Forestry.
- d. Ten years in my current role as Lands and Minerals Regional Director for the Forest Service, Intermountain Region.

8. The United States holds approximately 9,000 decreed stockwater rights on NFS lands in the State of Idaho; the Forest Service administers such rights located on grazing allotments on NFS lands in order to benefit the grazing program and for use by grazing permittees, and in some instances to benefit wildlife. Forest Service administration of these stockwater rights has the important benefit of allowing efficient use of water resources by multiple or successive grazing permittees on the same allotment. Particularly in circumstances where multiple permittees share an allotment, which is common in Idaho, or in the event of resource shortages, the availability of stockwater under federally-held rights is essential to allow effective land management, for the protection of sensitive areas, to spread livestock across allotments as needed for forage, and to allow for management of livestock that may congregate at particular water sources. It also prevents one permittee from excluding one or multiple other permittees' use on the same allotment, and from transferring a water right away from an allotment onto other land, hindering water use on an allotment by multiple and successive permittees and by wildlife.

9. Federal land grazing permits, and the grazing program in general, contribute to the socio-economic stability of local communities. In the arid western U.S., the provision of

grazing use through grazing permits for western livestock producers is a vital component of their ranch operations in that the holder of a Forest Service grazing permit is not only provided the benefit of summer season grazing use to support western livestock beef/lamb production for Fall/Spring market sales, but the opportunity for summer grazing also provides ranches the opportunity to build winter hay feed supplies and sell surplus hay production as a secondary income source to sustain western family ranch operations. Agency permitted grazing use contributes to the sustainability of local communities and working circles dependent on agriculture production while also contributing to the maintenance of open space in rural communities of the west.

10. In my capacity as Intermountain Region Lands and Minerals Director, I participated in and observed the later phases of the SRBA. The SRBA was commenced in 1987; the Court issued a Final Unified Decree in 2014. The SRBA encompassed 87% of the State of Idaho. Four smaller adjudications are currently active in the remainder of the State for the Coeur d'Alene-Spokane River, the Palouse River, the Bear River, and the Clark Fork-Pend Oreille River systems.

11. The Forest Service established a team known as the Boise Adjudication Team in 1993, extending across multiple offices and programs, to defend existing licensed and statutory water rights obtained under state law, and to prepare constitutional claims for all water use occurring on NFS lands, including stockwater. "Constitutional rights" were created by putting water to beneficial use without obtaining a prior permit or license from the Idaho Department of Water Resources ("IDWR"). The Boise Adjudication Team served both the Intermountain Region and the Northern Region of the Forest Service through 2014.

12. After commencement of the SRBA, the SRBA Court issued an order establishing procedures for the adjudication of small domestic and stockwater claims.

- a. The Forest Service filed thousands of stockwater claims for the benefit of the grazing program and for use by grazing permittees.
- b. This action was communicated to grazing permit holders, many of whom communicated thanks that the Forest Service was working to secure stockwater rights for use on allotments.
- c. Most permittees chose not to file their own stockwater claims in situations where the Forest Service had filed claims for use on those allotments.
- d. Of approximately 1,020 grazing permit holders on NFS lands within the SRBA, only 20 filed competing claims. Those contested cases were resolved in 2002 in a stipulated settlement where both the Forest Service and the permittees received decrees for the stockwater use.

13. In 2014, the SRBA court issued the SRBA Final Unified Decree, which included nearly 9,000 stockwater rights decreed to the USDA Forest Service. Over half of the water sources for those decreed rights have been developed by the Forest Service, with significant investments in troughs, pipes, tanks, wells, and other infrastructure, often funded by federal appropriations. The Forest Service likely would not have made such investments without being able to rely on the certainty afforded by holding these decreed water rights.

14. The certainty and finality of the SRBA Final Unified Decree allowed the Forest Service to manage its Range Management Program on NFS lands, providing access to stockwater resources for the benefit of NFS grazing permittees.

15. Beginning in 2017, the Idaho Legislature made a series of changes to Idaho water

statutes related to forfeiture of federally held water rights that put at risk the Forest Service's decreed and other stockwater rights and that threaten significant impacts on the Forest Service's ability to manage the federal grazing program on NFS lands. The changes are codified at Idaho Code sections 42-113(2)(b), 42-224, 42-501, 42-502, and 42-504.

16. Pursuant to these new Idaho laws, on October 27, 2021, the Director of IDWR issued an order to the Forest Service to show cause ("Order to Show Cause") why forty-five stockwater rights decreed by the SRBA Court to the United States on behalf of the Forest Service should not be forfeited. This Order to Show Cause further provided that if the United States did not respond within twenty-one days, the stockwater rights would be forfeited.

- a. The Order to Show Cause was based on a petition filed by Gill Family Ranches, one of two grazing permit holders on the Cow Creek Allotment on the Nez Perce-Clearwater National Forest. The petition sought to forfeit all water rights held by the United States located on that allotment. A second grazing permit holder on the Cow Creek allotment, Mr. Rex Baker, was not a party to the action. A true and accurate copy of the Order to Show Cause is attached as Conant Exhibit #1.
- b. Following issuance of IDWR's Order to Show Cause, Mr. Baker executed a limited agency 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.



A true and accurate copy of the agreement is attached as Conant Exhibit #

2.

- c. After receiving a copy of this agreement, on November 12, 2021, the Director of IDWR issued an Order withdrawing the Order to Show Cause, on the grounds that the agency agreement executed between the Forest Service and the permittee satisfied the agency-relationship defense codified under H.B. 592, and dismissing the petition filed by Gill Family Ranches. A true and accurate copy of the Order is attached as Conant Exhibit # 3.

17. Also pursuant to these new Idaho laws, on June 22, 2022, the Director of IDWR issued an order to the Forest Service to show cause (“Order to Show Cause”) why 11 stockwater rights held by the United States on behalf of the Forest Service should not be forfeited.

- a. The Order to Show Cause was based on a petition filed by Jaycob J. and Sheyenne A. Smith, the sole grazing permit holder on the Fourth of July Creek No. 70213 Allotment on the Salmon-Challis National Forest. The petition sought to forfeit water rights held by the United States located on that allotment.
- b. Of the 11 stockwater rights subject to the Order to Show Cause, seven were decreed by the SRBA Court to the United States on behalf of the Forest Service (75-11102, 75-13808, 75-13813, 75-13822, 75-13826, 75-13899, and 75-13912), three were licensed to the United States pursuant to Idaho law by IDWR (75-7279, 75-7288, and 75-7335), and one was the subject of a statutory claim qualifying for the SRBA *de minimis* stockwater claims deferral option (75-4241).

A true and accurate copy of the Order to Show Cause is attached as Conant Exhibit # 4.

18. Recent changes to Idaho water law have also affected day to day administrative actions related to water right applications.

- a. For example, an Application for Permit (Application) to develop stockwater was filed by the Forest Service on August 4, 2014. The Application described the proposed use of water as stockwatering and the diverting works to include a well with pump to 10,000-gallon storage tank piped to 4 stock troughs with floats.
- b. Idaho Code § 42-204 requires the department to examine the Application as follows: “On receipt of the application...it shall be the duty of that department...to examine said application and ascertain if it sets forth all the facts necessary to show the location, nature and amount of the proposed use. *If upon such examination the application is found defective, it shall be the duty of the department of water resources to return the same for correction or to correspond with the applicant to obtain the needed information or amendments.*” (emphasis added)
- c. On August 21 and 28, 2014, the Application was published in the Post Register. No protests were filed against the Application.
- d. On September 16, 2014, IDWR issued a Permit to Appropriate Water (Permit) to the Forest Service without any request for additional information. At that time the Forest Service began to develop the water source consistent with the terms of the Permit, which state in part: “Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion....”

- e. The Forest Service relied upon issuance of the Permit to install a 6-inch diameter well and pump that flows to a 10,000-gallon storage tank, then distributes water to 4 troughs through a pipeline system. The cost of this improvement was \$67,800 and included substantial staff time. This development was installed in compliance with Idaho state law and pursuant to the terms of the Permit issued by the State.
- f. On July 30, 2021, IDWR sent a letter to the Forest Service that included a Notice to Federal Agencies Regarding Proof of Beneficial Use for Permits Authorizing Stockwater Use. That Notice, based on recent changes to Idaho water law codified at I.C. § 42-502, requires the Forest Service to show the agency's ownership of the livestock when submitting the Proof Statement. Absent that showing the permit may be voided. A true and accurate copy of the letter is attached as Conant Exhibit # 5.
- g. In sum, IDWR provided a Permit to the Forest Service to develop the well and delivery system for stockwater. The Forest Service relied upon that Permit and invested money and time in compliance with Idaho state law to develop the improvement. It is in place and ready to be used by the current grazing permit holders in accordance with both state and federal law.
- h. The beneficial use of water under this Permit will allow for full utilization of a National Forest grazing allotment by 10 grazing permit holders that share the allotment. In order to ensure water is available to all 10 grazing permittees, the license should be issued to the Forest Service, but it is currently at risk of denial by IDWR.

19. The Forest Service strives to ensure the long-term viability of grazing on NFS lands. Stockwater rights are fundamental to grazing management. The potential loss of existing stockwater rights, or the loss of Forest Service management of stockwater rights may have irreparable and still unclear repercussions. This uncertainty in itself is harmful to the functioning of the Forest Service's Range Management Program.

- a. For example, many grazing allotments have more than one grazing permittee. If stockwater rights are held by the permittee, it is likely or possible that one permittee would hold some or all of the stockwater right(s) to the exclusion of other permittees. In such a situation, it is likely or at least foreseeable that one permittee would manage the stockwater, creating uncertainty as to water availability for other permittees. Also in such a situation, the cessation of grazing activity by the permittee who has obtained ownership of the stockwater right(s), and to whose base property the right(s) have become appurtenant could result in the deprivation on that allotment of any legal right to use water.
- b. It is likely that one grazing permit holder could attempt to prevent another grazing permit holder from using water if only one holds the right, or one grazing permit holder could initiate a forfeiture action by petition against stockwater rights held by the Forest Service when there are other permittees using the water on the same allotment, as occurred with the Cow Creek Allotment Order to Show Cause described above.
- c. The Forest Service currently does not finance new stockwater developments for water rights held by private parties on Forest Service allotments. The new forfeiture procedure under HB 592 and HB 608 deprives the Range Management

Program, and the permittees who benefit from that program, of a reliable path forward for determining who will pay for and maintain such developments. If the forfeiture process established by HB 592 and HB 608 is implemented on a widespread basis as apparently intended, thousands of decreed stockwater rights would be threatened with forfeiture and, under such extremely unreliable conditions of water availability, the financing of stockwater developments by the Forest Service would likely grind to a near halt.

- d. The Forest Service currently may temporarily move permitted grazing for purposes of resting an allotment to provide for plant health and vigor or addressing wildland fire impacts. The new provision added by SB 1305 to Section 42-113(2)(b) for stockwater rights to become appurtenant to a permittee's base property would prevent or hinder these actions to the detriment of the Program and grazing permittees if the stockwater right is no longer tied to Forest Service allotments.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: December 16, 2022

A handwritten signature in blue ink that reads "Kathryn Jeanne Conant". The signature is written in a cursive style with a horizontal line underlining the name.

Kathryn Jeanne Conant  
Land and Minerals Director  
U.S. Forest Service  
Intermountain Region

# CONANT EXHIBIT 1

**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.

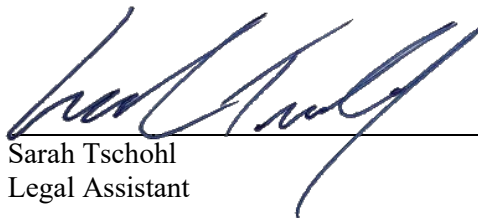
DATED this 27th day of October 2021.

  
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>	<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
<i>For Petitioner</i>	
Rex H. Baker P.O. Box 327 Lucile, ID 83542	<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>Livestock Grazing Permit Holder</i>	
USDA Forest Service 550 W Fort St., MSC 033 Boise, ID 83724	<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>Stockwater Right Owner</i>	
<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




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Sarah Tschohl  
 Legal Assistant

## Memorandum

**To:** Shelley Keen

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

**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 POUs 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 POUs 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-

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<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.

# CONANT EXHIBIT 2



**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. Baker

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

# CONANT EXHIBIT 3

**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.

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

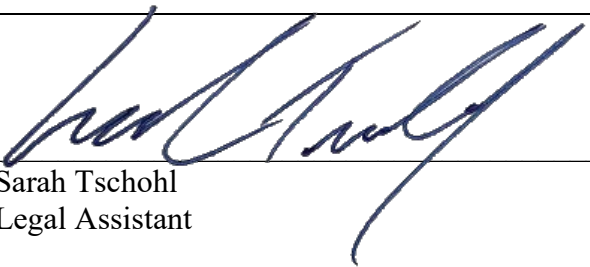
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<sup>2</sup> The Agreement was executed after the Order to Show Cause was issued by the Director. See *Order to Show Cause* at 4; Agreement at 2. At the time it was issued, the Order to Show Cause was in accordance with Idaho Code § 42-224.

**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:

<p>William G. Myers III  HOLLAND &amp; HART LLP  P.O. Box 2527  Boise, ID 83701  <a href="mailto:wmyers@hollandhart.com">wmyers@hollandhart.com</a></p> <p><i>For Petitioner</i></p>	<p><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</p>
<p>Rex H. Baker  P.O. Box 327  Lucile, ID 83542</p> <p><i>Livestock Grazing Permit Holder</i></p>	<p><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</p>
<p>USDA Forest Service  550 W Fort St., MSC 033  Boise, ID 83724</p> <p><i>Stockwater Right Owner</i></p>	<p><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</p>
<p><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></p>	<p><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</p>




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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 H. Baker

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

# CONANT EXHIBIT 4

**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:

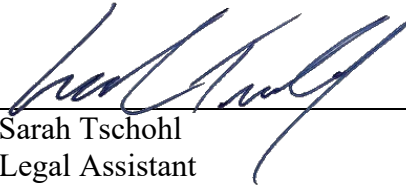
Alison C. Hunter William G. Meyers III HOLLAND & HART LLP P.O. Box 2527 Boise, ID 83701 <a href="mailto:achunter@hollandhart.com">achunter@hollandhart.com</a> <a href="mailto:wmyers@hollandhart.com">wmyers@hollandhart.com</a>  <i>Attorneys for Petitioners and Grazing Permit Holders Jaycob J. and Sheyenne 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  
Boise, ID 83724  
[david.negri@usdoj.gov](mailto:david.negri@usdoj.gov)

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email



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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

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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).

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		

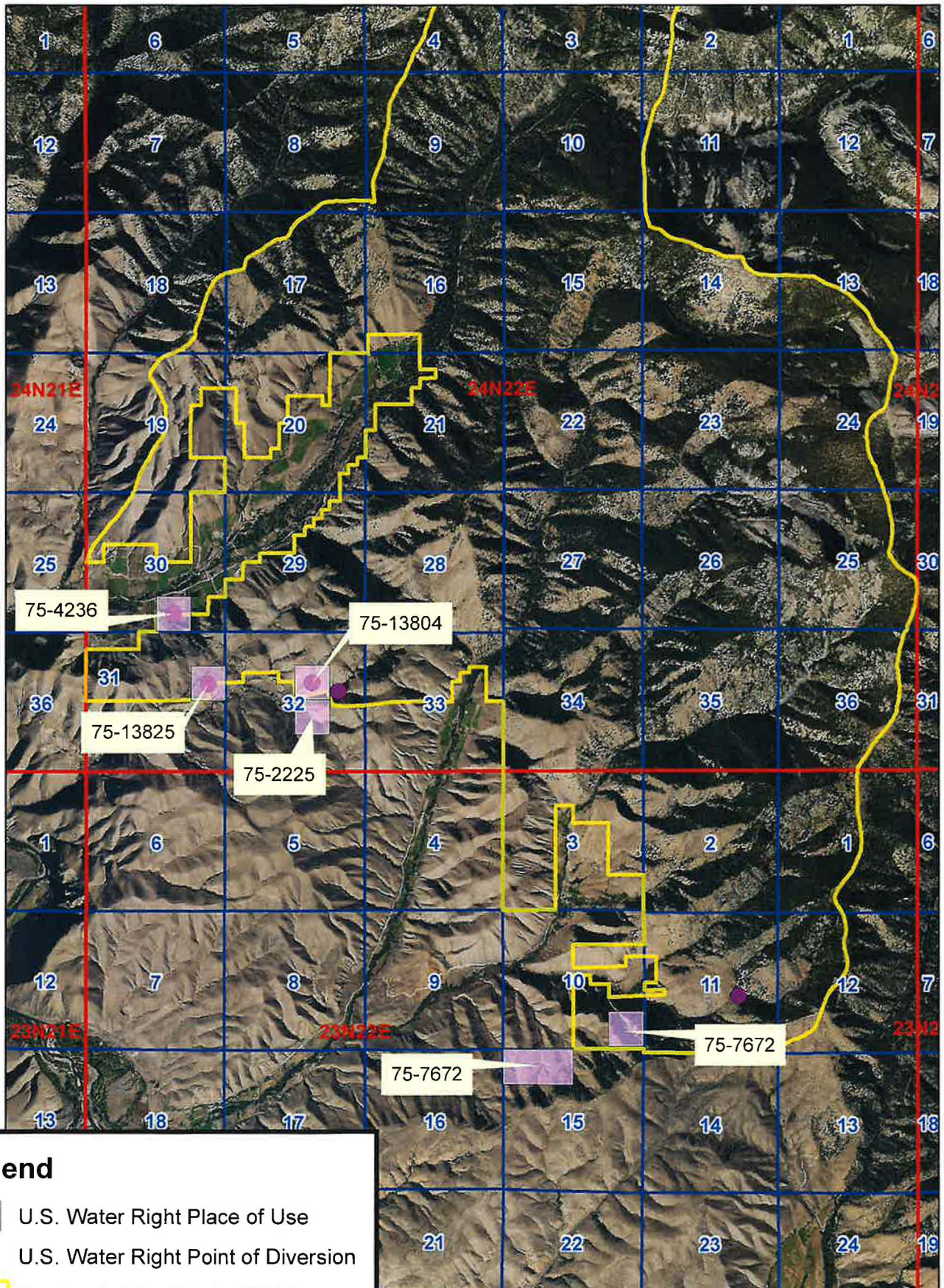
Water rights 75-7279, 75-7288, and 75-7335 from Exhibit A are licenses solely for stockwater use. The authorized diversion rate on each of the licenses is 0.02 cfs, which would be less than 13,000 gallons per day if diverted continuously. They were not claimed or decreed in the SRBA. Stockwater rights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

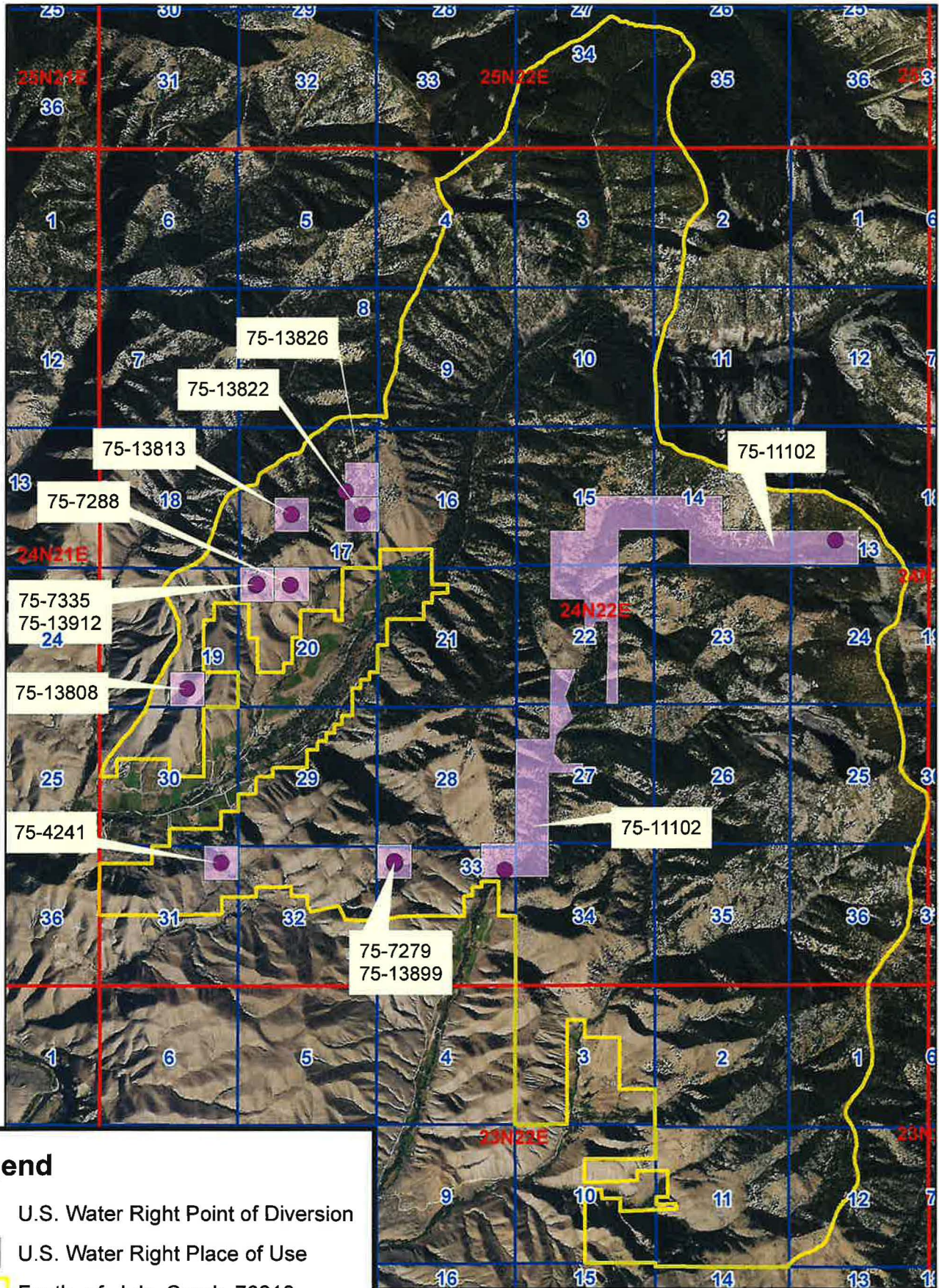


**Legend**

-  U.S. Water Right Place of Use
-  U.S. Water Right Point of Diversion
-  Fouth\_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



# CONANT EXHIBIT 5



State of Idaho  
DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098  
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

BRAD LITTLE  
Governor

GARY SPACKMAN  
Director

July 30, 2021

US DEPT OF AGRICULTURE FOREST SERVICE  
CARIBOU TARGHEE NATIONAL FOREST  
1405 HOLLIPARK DR  
IDAHO FALLS ID 83401

**NOTICE: STATEMENT OF COMPLETION DUE**

RE: Permit No. 31-12339

**IMPORTANT: A response from you is required to maintain the active status of the referenced water right permit. If no response is received from you, the permit will lapse and your authorization to develop and/or use this water right will be cancelled.**

Dear Permit Holder(s):

One of the conditions of approval of the above referenced water permit was that proof of the extent of your beneficial use must be submitted to this office on or before **October 01, 2021**. Please complete and return the enclosed Statement of Completion for Submitting Proof of Beneficial Use (proof) if you have completed the water project authorized by your permit. The proof statement must be accompanied by either the appropriate license examination fee or a field examination report prepared by a certified water right examiner.

If you have not fully completed your project, and you or a previous owner of this permit have not received a prior extension of time, you may request an extension of time if the delay is for reasonable cause as provided in Section 42-204, Idaho Code. If you have been delayed by a government agency or by litigation that brings title to the water in question, an extension of time may be granted if appropriate documentation is provided at the time of filing. An extension request must be accompanied by a \$50.00 filing fee and signed by the appropriate authorized permit holder(s) or authorized representative with a power of attorney.

Either an acceptable proof or an acceptable extension request must be received by this department on or before the above proof due date. If neither is received, the department will send you a lapse notice and the permit will no longer be of any force or effect.

Sincerely,

Debbi Judd  
Technical Records Specialist

Enclosure(s)



SCANNED  
AUG 02 2021

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES  
**NOTICE TO FEDERAL AGENCIES REGARDING PROOF OF BENEFICIAL USE**  
FOR PERMITS AUTHORIZING STOCKWATER USE

In accordance with Idaho Code §§ 42-217 and 42-502, federal government agencies submitting a *Statement of Completion for Submitting Proof of Beneficial Use* ("Proof Statement") for a permit authorizing stockwater use are required to show the agency's ownership of the livestock putting the water to beneficial use. Please attach the required evidence of ownership of the livestock when submitting the Proof Statement. If the required evidence of ownership is not submitted, IDWR may exclude the stockwater use from the water right license issued in connection with the permit, or it may void the permit if stockwater is the only permitted water use. See Idaho Code § 42-219(8). The federal agency may also choose to relinquish the permit by completing and returning the enclosed form.