


## Adjudication Memorandum #60

TO: Adjudication Staff

FROM: Meghan Carter, Deputy Attorney General 

SUBJECT: I.C. § 42-223(11) – mining exception to forfeiture

DATE: March 2, 2015

---

This memo is to provide guidance on evaluating the mining exception to forfeiture in I.C. § 42-223(11) when making recommendations. The memo will break down the statute into factors and provide information on how to evaluate the factors and other relevant law.

### A. Threshold Questions

There are two questions that need to be answered prior to analyzing whether an exception to forfeiture applies. The first, has the claimant submitted sufficient evidence showing that a water right was established? Second, has there been at least 5 consecutive years of non-use? If both answers are yes then you may proceed to evaluate if the mining exception to forfeiture applies.

### B. Does the claim qualify for the exception?

Idaho Code § 42-223(11) provides an exception to forfeiture if:

- 1) The beneficial use is related to mining, mineral processing or milling,
- 2) Nonuse of the water was due to mineral prices,
- 3) The mining property has a valuable mineral –and–
- 4) The water right owner has maintained the property & mineral rights for potential future mineral production.

Each factor must be established in order to recommend the right. Below is a discussion of each factor and the type of evidence needed to establish it.

#### The beneficial use is related to mining, mineral processing or milling.

If during your analysis of the water right claim you determine the beneficial use is mining, mineral processing or milling (“mining practices”) no further investigation for this factor must be done. However if the beneficial use is for something other than mining practices the claimant must show a link to the claimed beneficial use and mining practices.

For example a claim for stockwater would likely not be related to mining practices. However, a claim for power generation could be related to mining practices if the claimant can show the power was to run some aspect of the mining operation.

The mining property has a valuable mineral.

The claimant must establish that the property has a valuable mineral as defined in I.C. § 47-1205. That statute states a valuable mineral shall “include not only gold, silver, copper, lead, zinc, coal, phosphate and limestone, but also any other substance not gaseous or liquid in its natural state, which makes real property more valuable by reason of its presence . . . provided, however, that sand and gravel are not included in this definition.”

Nonuse of the water was due to mineral prices.

Once the presence of a valuable mineral has been settled, nonuse due to mineral prices must be established. In *Lemhi Gold*<sup>1</sup>, the claimant presented a mining history and evidence of historical gold prices to establish the nonuse of water was due to mineral prices.

The water right owner has maintained the property & mineral rights for potential future mineral production.

The most difficult factor presented in this exception is whether the property and mineral rights were maintained for potential future mineral production. There are two sources that lend some insight but they are by no means comprehensive. It is best to look at all of the evidence as a whole to make a determination.

The first source is the the legislative committee minutes from the hearing on the bill adding the mining exception to I.C. § 42-223.<sup>2</sup> The committee minutes mention the following activities that could lend to finding the property had been maintained for future mineral production:

- the property has not been put to some use incompatible with mining;
- maintenance of lease rights;
- payment of claim maintenance fees;
- assuring that any surface use of the property is free of encumbrances that would preclude mining practices;
- maintenance of shafts and adits (even if blocked for public safety);
- maintenance of access to the property for future development.

The *Lemhi Gold* case also offers guidance on this issue. Language from the court states: “Over the years, assorted mining companies spent millions of dollars confirming the property contains valuable minerals worth extracting as the price of gold rose. Their continuing efforts show the current water right owner and its predecessors in interest ‘maintained the property and mineral rights for potential future mineral production.’” The practices that led to the court’s conclusion are:

- As the price of gold began to rise various mining activities were conducted on the property throughout the years.
  - 1973, hauled ore by hand;

---

<sup>1</sup> *Memorandum Decision and Order on Challenge, Final Order Disallowing Water Right Claim, Subcase No. 75-10117(Lemhi Gold Trust LLC)* (Nov. 12, 2014).

<sup>2</sup> Senate Resources & Environment Committee Minutes, SB 1348 (February 15, 2008).

- 1984-1991, geophysical surveys and drilled test holes;
- 1991-1996, more test hole and feasibility studies;
- 2001, commenced an exploration and drilling program, water and environmental monitoring in preparation of an EIS and permitting.
- Claimant and its predecessors spent \$3 million on drilling and exploration.

### **C. Is there an intervening water use?**

Once it has been established that the mining exception to forfeiture applies there is one more analysis that must be done prior to recommending the claim. Per *Lemhi Gold*, if the following are true, application of the exemption would be unconstitutional:

- A five year period of non-use occurs prior to March 25, 2008;
- Prior to March 25, 2008, a water right was established during or after five years of non-use;
- The new water right would be injured if the exempted water right resumed.

Given the complicated nature of this analysis once you have determined that there has been an intervening right established during or after the period of non-use prior to March 25, 2008, you should consult legal to aid in your determination of injury. If it is determined that an intervening water right would be injured if the exempted water right resumed, the claim must be disallowed.

### **D. Condition Codes.**

Once you have determined whether or not the claim will be recommended you will need to use a condition code. Condition K11 should be used if the claim is being recommended. K11 states: "Water was used under this right for \_\_\_\_\_ at the \_\_\_\_\_ mine <and mill site>. This right is recommended pursuant to Section 42-223(11), Idaho Code." The appropriate case specific information will need to be added.

Condition P38 should be used if the claim is being disallowed. P38 states: "Right cannot be recommended due to injury to other rights. See *Memorandum Decision and Order on Challenge, Final Order Disallowing Water Right Claim, SRBA Subcase No. 75-10117(Lemhi Gold Trust LLC)* (Nov. 12, 2014)."