

**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,¹ 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, 75-4241,² 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

¹ 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].

² 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 22nd 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:

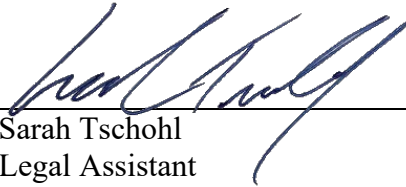
Alison C. Hunter William G. Meyers III HOLLAND & HART LLP P.O. Box 2527 Boise, ID 83701 achunter@hollandhart.com wmyers@hollandhart.com <i>Attorneys for Petitioners and Grazing Permit Holders Jaycob J. and Sheyenne A. Smith</i>	☒ Certified U.S. Mail with return receipt ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
USDA Forest Service 550 W Fort St., MSC 033 Boise, ID 83724 <i>Stockwater Right Owner</i>	☒ Certified U.S. Mail with return receipt ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email
USDI BLM Idaho State Office 1387 S. Vinnell Way Boise, ID 83709 <i>Stockwater Right Owner</i>	☒ Certified U.S. Mail with return receipt ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ 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 john.murdock@sol.doi.gov	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
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- ☐ Hand Delivery
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ Email



Sarah Tschohl
Legal Assistant

Memorandum

To: Gary Spackman

Prepared by: Craig Saxton and Shelley Keen
CSK SWK

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*

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.¹

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

¹ 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.

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		

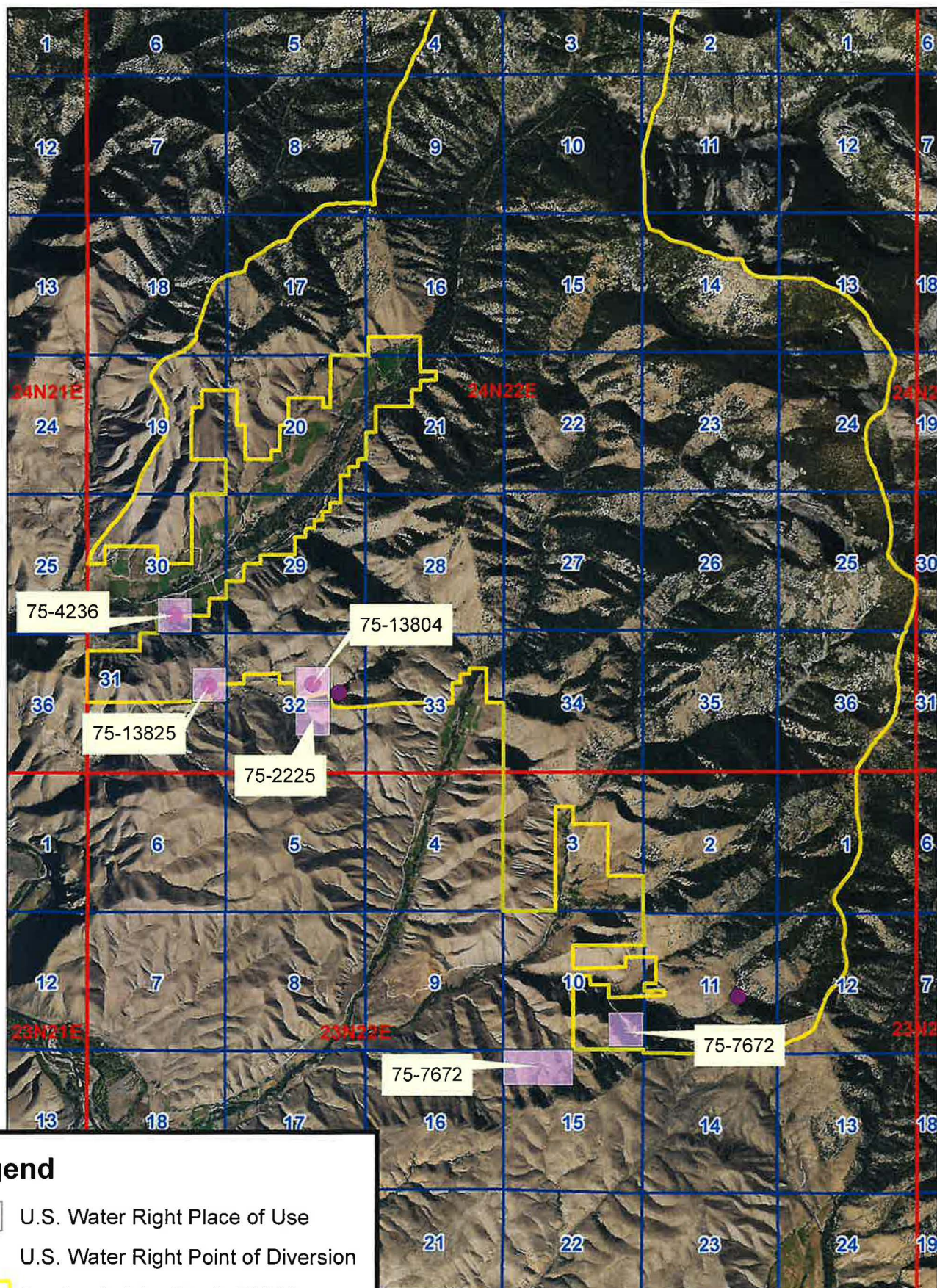
Water rights 75-7279, 75-7288, and 75-7335 from Exhibit A are licenses solely for stockwater use. The authorized diversion rate on each of the licenses is 0.02 cfs, which would be less than 13,000 gallons per day if diverted continuously. They were not claimed or decreed in the SRBA. Stockwater rights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



Fourth of July Creek Allotment

Federal Water Rights Entirely within the Fourth of July Creek Allotment

