BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF CERTAIN BASIN 79 WATER RIGHTS, IN THE NAME OF THE UNITED STATES OF AMERICA ACTING THROUGH THE DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT	Docket No. P-OSC-2021-004 **ORDER PARTIALLY GRANTING PETITION; ORDER TO SHOW CAUSE** **(BUTCHER BAR AND CHINA CREEK ALLOTMENTS)**

BACKGROUND

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

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

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

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

APPLICABLE LAW

Idaho Code § 42-224 states in pertinent part:

> (1) Within thirty (30) days of receipt by the director of the department of water resources of a petition or other information that a stockwater right has not been put to beneficial use for a term of five (5) years, the director must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture pursuant to section 42-222(2), Idaho Code.[2] 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.
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> (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.[3] Any order to show cause must contain the director's findings of fact and a reasoned statement in support of the determination.

I.C. § 42-224(1)–(2) (current version as amended in 2022). Therefore, to issue an order to show cause as Petitioner has requested, the Director must conclude that the Petition makes a "prima facie showing" that the BLM has not put its BLM Water Rights 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).

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

[2] Prior to the 2022 amendment of Idaho Code 42-224(1), the Director was not required by law to determine, within a period of 30 days, whether a stockwater right has been put to beneficial use for a term of five years. In this matter, the Department considers the start of the newly codified 30-day requirement to be March 24, 2022, the day the statutory amendment went into effect.

[3] Prior to the 2022 amendment of Idaho Code 42-224(2), the Director was not required by law to issue an order to show cause within 30 days of his determination. *See generally supra* note 2.

FINDINGS OF FACT

After careful review of the Petition and the Department's associated research memorandum,[4] the Director issues the following findings:

1. Petitioner requested the Department issue an order to the BLM to show cause why the BLM's Water Rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2). *See Petition* at 1. The following is a list of the water rights at issue: 79-11259, 79-11261, 79-11372, 79-11373, 79-11374, 79-11376, 79-11756, and 79-11784. *See Petition* Ex. A; *Memorandum*.

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

3. Petitioner's allegations only relate to the BLM's lack of beneficial use of water within the boundaries of the Allotments. Petitioner does not make allegations relating to the BLM's use of water outside of the boundaries of the Allotments. *See Petition* at 1–2.

4. Based on the Memorandum, the Director finds that the places of use for the following water rights, are entirely within the Allotments: 79-11372, 79-11373, 79-11374, 79-11376, 79-11756, and 79-11784. *See Memorandum*.

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

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

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

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

ANALYSIS

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

The Department must limit the scope of an order to show cause issued in this matter to those BLM Water Rights with a place of use that is located entirely within the property boundaries for which the Department has received supporting statements alleging non-use of water. Accordingly, for those BLM Water Rights that have a place of use that is located either entirely or partially outside of the Allotments (see finding 6 above), Petitioner has failed to make a "prima facie showing" in accordance with Idaho Code § 42-224 that the BLM has not beneficially used water authorized by its water rights for five years. However, Petitioner's statements based on personal knowledge (see findings 5 above), when combined with the analysis within the Department's Memorandum, amount to a "prima facie showing" in accordance with Idaho Code § 42-224 that the BLM has not beneficially used water authorized by its water rights that have a place of use entirely within the Allotments within the last five years.

CONCLUSION OF LAW

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

ORDER

Based on the foregoing, the following are HEREBY ORDERED:

1. The *Verified Petition for Order to Show Cause* at issue is GRANTED for ONLY the following water rights: 79-11372, 79-11373, 79-11374, 79-11376, 79-11756, and 79-11784.

2. The *Verified Petition for Order to Show Cause* at issue is DENIED for the following water rights: 79-11259 and 79-11261.

3. In accordance with Idaho Code § 42-224(2), the United States of America acting through the Department of Interior, Bureau of Land Management must show cause before the Director of the Idaho Department of Water Resources why the following stockwater rights have not been lost through forfeiture pursuant to Idaho Code § 42-222(2): 79-11372, 79-11373, 79-11374, 79-11376, 79-11756, and 79-11784.

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

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

6. In accordance with Idaho Code §§ 42-224(1) and 42-224(4), Gill Family Ranches, LLC will be served a copy of this order.

DATED this 25th day of April 2022.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April 2022, I caused to be served a true and correct copy of the foregoing *Order Partially Granting Petition; Order to Show Cause (Butcher Bar and China Creek Allotments),* by the method indicated below, upon the following:

Gill Family Ranches, LLC 188 Gill Ranch Rd. P.O. Box 386 Lucile, ID 83542 *Petitioner*	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email
USDI BLM Idaho State Office 1387 S. Vinnell Way Boise, ID 83709 *Stockwater Right Owner*	☒ Certified U.S. Mail with return receipt ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email
Courtesy Copy: United States Department of Justice Environment and Natural Resources Division 550 W. Fort St., MSC 033 Boise, ID 83724	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email
William G. Myers III HOLLAND & HART LLP P.O. Box 2527 Boise, ID 83701 wmyers@hollandhart.com	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

Sarah Tschohl
Legal Assistant

Memorandum

To: Shelley Keen

Prepared by: Glen Gardiner & Craig Saxton

Date: October 27, 2021

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

Comparison of Partial Decrees to IDWR Database Records and Shapefiles

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

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

Butcher Bar Allotment Analysis

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

79-11756.

China Creek Allotment Analysis

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

79-11374 & 79-11376.

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[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

Analysis of Rights Within Both Subject Allotments

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

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

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

79-11784:
Water right 79-11374 is a spring, tributary to China Creek. The POU is T26N, R1E, Sec 34, (L1)NESE. China Creek flows through the POU. Land north of China Creek is in the Butcher Bar Allotment. Land south of China Creek is in the China Creek Allotment. It appears this POU can be accessed from either the China Creek or Bucher Bar allotments. The entire POU is managed by Bureau of Land Management, United States of America.

Analysis of Rights Outside the Subject Allotments

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

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

79-11261:
Water right 79-11259 is an instream stockwater right on Wet Gulch, tributary to the Salmon River. The POU is T26N, R1E, Sec 26, (L1)NWNW. This POU is entirely within the Wet Gulch Allotment. The POU is managed by Bureau of Land Management, United States of America.

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