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December 30, 2021

Rec'd 12.30.2021
@ Eastern

Via Email Only to James.Cefalo@idwr.idaho.gov

Idaho Department of Water Resources
James Cefalo, Hearing Officer
900 N Skyline Drive
Idaho Falls, ID 83402

RE: Application for Transfer 84902 (Silver Sage)

Dear Mr. James Cefalo:

I. INTRODUCTION

Applicant applied to transfer water right 37-8409 on April 21, 2021. The Idaho Department of Water Resources ("Department") accepted and published the application for transfer. The Idaho Water Resource Board ("Board") filed a notice of protest on June 7, 2021. The Board's protest stated that the transfer "will potentially increase impact to this minimum stream flow reach, causing injury to water right 37-7919." At no time has the Department raised the concern of forfeiture.

The Applicant and Board attended a hearing in front of the Department's hearing officer, James Cefalo, on November 11, 2021. At that time, the Board raised several issues with the transfer of water right 37-8409, including issues not stated in their protest. At the conclusion of the hearing, Mr. Cefalo requested the parties to conduct a technical analysis of the impacts on the Board's minimum stream flow right if POD were changed to the proposed location. Mr. Cefalo also requested a statement of position on the issue of forfeiture to answer the following question, which is the subject of this document:

Has water right 37-8409 been forfeited through non-use?

II. APPLICABLE LAW

Idaho Code § 42-222 generally governs the forfeiture of water rights. Subsection 2 states the general rule that water rights are forfeited after five (5) years of nonuse. *Id.* However, the calculation of the five (5) year term is somewhat ambiguous and many exceptions to the general rule exist, both in code and common law. As a result, the Department issued a memorandum on March 5, 2012 clarifying Department policy on calculating the statutory five (5) term of non-use, as well as how it would deal with a variety of exceptions. *See* Attachment 1.

Idaho Code § 42-222(2) places the burden of proving forfeiture by clear and convincing evidence on the entity claiming forfeiture, which is the Board in this instance. *McCray v. Rosenkrance (in Re Srba Case No. 39576)*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001). At this time, the Board has presented no evidence supporting the conclusion that water right 37-8409 has been forfeited, and it was also not part of their formal protest.

The majority of the Applicant's analysis utilizes a memorandum from the Idaho Department of Water Resources addressing timing questions in the context of applications for transfer of a water right. Idaho Code § 42-222(2) provides that all rights to the use of water shall be lost and forfeited by failing to apply said water to the beneficial use which it was appropriated for a term of five years. *Idaho Department of Water Resources, Multiple Programs Memo No. 2: Forfeiture Review Period* (Mar. 5, 2012) (hereafter referred to as "Mar. 5, 2012 Dept. Memo."). Beneficial use of a water right during a portion of a calendar year or any defense or protection from forfeiture applicable during a portion of a calendar year will apply to the entire calendar year. *Id.* at p.2. The Department presumes that resumption of beneficial use under a water right for a portion of a calendar year applies to the entire calendar year. *Id.* The Department also presumes that resumption of beneficial use or any defense or protection, including filing an extension of time to avoid forfeiture, initiated before the end of the *sixth* calendar year will prevent a finding of forfeiture by the Department. *Id.*

In general, the Department disfavors forfeiture. Strict application of Idaho Code § 42-222(4) would require an application for an extension of time to avoid forfeiture be submitted *prior* to the end of the fifth year of non-use. As a result, "the Department will presume that resumption of beneficial use or any defense or protection, including filing an extension of time to avoid forfeiture, initiated before the end of the sixth calendar year will prevent a finding of forfeiture by the Department." *Id.*

Several defenses and protections to forfeiture exist. However, it should be noted that filing an application for transfer does not toll the statutory period for forfeiture of a water right due to non-use. *Mar. 5, 2012 Dept. Memo*, p. 2, footnote 1. Idaho Code § 42-223 describes eleven exceptions or defenses to forfeiture. Relevant to this matter:

- a. Idaho Code § 42-223(5) protects water rights from forfeiture when they are placed in the water supply bank.
- b. Idaho Code § 42-223(6) states that “[n]o portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.”

The Department also has a separate policy memorandum for processing transfer applications. Idaho Department of Water Resources, Transfer Processing No. 24, Administrator’s Memorandum RE: TRANSFER PROCESSING POLICIES & PROCEDURES, (Dec. 21, 2009) (hereafter referred to as “Dec. 21, 2009 Memo”). The Dec. 21, 2009 Memo explains that the department conducts an initial application review, and, as part of that review, must determine the validity of a water right, including whether the application owns the right or otherwise has authority to apply for the transfer. *Id.* at 1. “For any application for transfer, the department must determine that a right... proposed to be transferred is valid and has not been lost by forfeiture[.]” *Id.* at 22. The Department presumes that a water right has not been forfeited absent evidence in the Department’s records to the contrary. *Id.* To date, the Department has accepted, processed, and approved the subject application without any notice that forfeiture of water right 37-8409 is an issue.

III. ANALYSIS

Water right 37-8409 was not used during the 2016, 2017, 2018, 2019, 2020, and part of 2021. Water right 37-8409 is currently in its sixth calendar year of non-use, but it is not yet at the end of the sixth calendar year. Based primarily on the Department’s guidance in the Mar. 12, 2012 Dept. Memo., Water Right 37-8409 has not been forfeited because it is still within the allowed five year term of non-use. The allowed term of non-use ends December 31, 2021.

This conclusion is consistent with the Department’s general dislike for forfeiture. Furthermore, the Applicant’s attempt to transfer this water right is an explicit and direct attempt to utilize this water right and avoid forfeiture. Had the Board not protested this application, the

water right would have been used this irrigation season because the initial application was filed early in the irrigation season.

Water right 37-8409 was not used in the most recent irrigation season due to factors outside of its control. The Board protested the Applicant's transfer of water right 37-8409 on June 7, 2021. Had the Board not protested the transfer application, the application would have been approved and water right 37-8409 would have been put to beneficial use by the Applicant, thereby restarting the non-use period. It was the Board's independent decision, which the Applicant had no control over, that prevented the Applicant from applying water beneficially in the 2021 irrigation season. Idaho Code § 42-223(6) protects water rights from forfeiture when potential forfeiture is the result of circumstances beyond the Applicant's control. Combined with the Department's general dislike for forfeiture, this section of Idaho Code further protects water right 37-8409 from forfeiture.

There is a strong presumption of validity since the Department has already made an initial determination that water right 37-8409 is valid by accepting, processing, and preliminarily approving the Applicant's application for transfer. The Board has the burden of proving by clear and convincing evidence that water right 37-8409 has been abandoned. The Board's assertion that this water right has been abandoned is insufficient to prove as much, and it is not the Applicant's burden to prove non-forfeiture.

Lastly, in an effort to strictly comply with statutory requirements, common law, and IDWR policy, the Applicant has timely filed an Application for Extension of Time to Avoid Forfeiture of a Water Right on IDWR Form 42-222(4) Rev. 06/12. *See* Attachment 2. This application for extension of time was filed on December 29, 2021, and is within the allowed time to file for an extension of time. Since the filing of an application for transfer does not automatically toll the statutory period for forfeiture of a water right, this action was necessary to ensure that water right 37-8409 is not inadvertently forfeited during these contested transfer proceedings. While the Applicant believes such a forfeiture would be prohibited under Idaho Code § 42-223(6), filing an extension of time removes any issues regarding what may or may not be the result of circumstances beyond the control of the Applicant.

IV. CONCLUSION

The Applicant has been actively attempting to apply water right 37-8409 to beneficial use through the transfer of this water right since April, 2021. Had this transfer application not been protested, water would have been used at the new POD in the 2021 irrigation season. The protest of the transfer by the Board and factors beyond either the Applicant's or the Department's

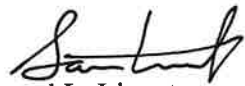
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control have caused a significant delay in resolving this matter and resuming beneficial use of the subject water rights. The Department's Mar. 5, 2012 Dept. Memo clearly explains that water right 37-8409 has not yet been statutorily forfeited, and the pending Application for Extension of Time to Avoid Forfeiture of a Water Right will provide additional protection against forfeiture as this matter moves into the year 2022.

For the reasons stated above, including the relevant Idaho statutes, case law, and Department policy cited herein, the Applicant respectfully requests that the Department find water right 37-8409 not forfeited.

Sincerely,

ALTURAS LAW GROUP, PLLC


Samuel L. Linnet

Attachment 1 - Mar. 5, 2012 Dept. Memo.

Attachment 2 - December 29, 2021 Application for Extension of Time

cc: Zach Latham w/attachs., via email zach.latham@brockwayeng.com
Ann Vonde w/attachs., via email ann.vonde@ag.idaho.gov
Remington Buyer w/attachs., via email Remington.Buyer@idwr.idaho.gov

ADMINISTRATOR'S MEMORANDUM

Multiple Programs Memo No. 2

To: Regional Offices
Water Allocation Bureau

From: Gary Spackman 

Re: **FORFEITURE REVIEW PERIOD**

Date: March 5, 2012

Idaho Code § 42-222(2) provides that all rights to the use of water shall be lost and forfeited by a failure for the term of five years to apply it to the beneficial use for which it was appropriated. Idaho Code § 42-222(3&4) provides that the Department may grant an extension for an additional five years for good cause shown if an application for extension is made before the end of the five year period. Idaho Code § 42-223 provides for exceptions or defenses to forfeiture. Experience in the Snake River Basin Adjudication (SRBA) and other court cases have provided additional guidance on the subject of forfeiture. In general, forfeiture is not favored; however, the Department has a responsibility to review water rights to determine if forfeiture has occurred prior to approving (or denying) certain applications affecting existing water rights.

In 1999, the SRBA court issued a decision tolling the forfeiture period for a water right during the time period that a claim is pending in the adjudication. The Department has presumed that water rights are not forfeited for non-use during the five-year period following issuance of a partial decree. For many water rights decreed in the SRBA, the initial five-year period has ended or will end soon, and Department employees are increasingly faced with questions regarding a cut-off date to determine if forfeiture has occurred and when action must be taken to protect a water right from forfeiture. For example, if a partial decree is issued during the middle of the irrigation season, is it appropriate to assume that five full irrigation seasons of non-use (in addition to the first partial season) must pass before the right is considered to be forfeited? If so, would the right holder need to initiate some action to protect the right from forfeiture prior to the end of the five full seasons, or prior to the beginning of the sixth irrigation season, or some other time? In the past, the Department has presumed that resumption at the beginning of the sixth season would prevent forfeiture on the basis that junior irrigation rights would not have had opportunity to establish some reliance on the unused water during the non-irrigation season. What if the need for irrigation water is further delayed in the sixth season due to a wet spring?

The purpose of this memo is to address the timing questions that arise during forfeiture review by providing Department employees with a simple and uniform forfeiture review period. This memo applies to forfeiture review associated with applications to lease a water right to the Water Supply Bank, applications for extension of time to avoid forfeiture, and applications for transfer of a water right. This memo applies to both irrigation and non-irrigation water rights.

The Department will presume that beneficial use under a water right during a portion of a calendar year or any defense or protection from forfeiture applicable during a portion of a calendar year will apply to the entire calendar year. For example, if an irrigation right is used to establish a cover crop at the beginning of an irrigation season and is not used during the remainder of the irrigation season; the right will be considered protected from forfeiture through December 31 of that calendar year. Likewise, if an irrigation right is decreed at the beginning of a calendar year (prior to the beginning of the irrigation season) and is not used at any time during the irrigation season, the right will still be considered protected from forfeiture for that entire calendar year.

The Department will also presume that resumption of beneficial use under a water right for a portion of a calendar year or any defense or protection initiated during a calendar year will apply to the entire calendar year. For example, if an irrigation right is used to establish a fall crop at the end of an irrigation season, even if the right was not used earlier during the irrigation season, the right will be considered protected from forfeiture for that calendar year. Likewise, if an application for lease to the Water Supply Bank is submitted before the end of a calendar year and eventually approved and the right is not used at any time during that calendar year, the right will be considered protected from forfeiture for that calendar year.

Strict application of Idaho Code § 42-222(4) would require an application for extension of time to avoid forfeiture to be submitted prior to the end of the fifth unprotected year of non-use. However, the Department wishes to avoid questions and conflicts surrounding the timing of resumption during an irrigation season and to maintain simple and uniform guidance to Department employees. Therefore, the Department will presume that resumption of beneficial use or any defense or protection, including filing an extension of time to avoid forfeiture, initiated before the end of the sixth calendar year will prevent a finding of forfeiture by the Department.

As an example, if an irrigation right is decreed in the SRBA in January, 2004 and water is not used during 2004, 2005, 2006, 2007, 2008 and 2009, then resumption or action initiating a defense or protection from forfeiture must occur prior to the end of the calendar year in 2010. The 2004 calendar year is considered protected since the decree was issued during that year. The years 2005 through 2009 represent the five year period of non-use. The Department would not find forfeiture if use resumed before the end of calendar year 2010. An application to lease the water right to the Water Supply Bank or other action initiating a defense or protection from forfeiture would apply similarly¹.

As another example, if an extension of time to avoid forfeiture is granted for five years, the Department will presume that resumption of beneficial use or any defense or protection initiated before the end of the sixth calendar year will prevent a finding of forfeiture by the Department. Continuing with the example above, if an application for extension of time to avoid forfeiture was submitted in 2010 and the Department granted an extension for the years 2010, 2011, 2012, 2013 and 2014, then resumption or other action initiating a defense or protection from forfeiture must occur prior to the end of calendar year 2015. Note that, pursuant to Idaho Code § 42-222(4), the Department would still be required to provide notice at least 60 days prior to the end of 2014 that resumption and a report is due by December 31, 2014. However, the Department would not find forfeiture if resumption of beneficial use or

¹ Filing an application for transfer does not toll the statutory period for forfeiture of a water right due to non-use.

other action initiating a defense or protection from forfeiture occurred prior to the end of calendar year 2015.

This memo does not change Department policy on partial forfeiture. Forfeiture of a portion of a water right may occur if beneficial use is reduced for the statutory period as applied under the guidance of this memo. When discussing forfeiture issues, Department employees and water users should be mindful that any Department decision or action where forfeiture may be an issue can be contested and certain facts may lead to a different conclusion in an administrative hearing, or judicial review.

Form 42-222(4) Rev. 06/12
FEE \$100.00

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR EXTENSION OF TIME TO AVOID
FORFEITURE OF A WATER RIGHT

RECEIVED
DEC 29 2021
DEPT OF WATER RESOURCES
SOUTHERN REGION

Section 42-222(4), Idaho Code, provides that a water right holder may apply to protect a valid water right from forfeiture. Upon a showing of reasonable cause, the Director may grant one (1) extension of five (5) years in which to resume use.

- Water Right No. 37-8409 (one right per application)
☒ Attach a copy of the water right record, available at <http://www.idwr.idaho.gov>, Water Right Transfers, Step 1, or by contacting any Department office.
- Applicant Silver Sage Owners Assn Inc Phone 208-481-1786
- Are you the current water right holder of record? Yes ☒ No ☐
☐ If no, provide documentation of your authority to sign on behalf of the right holder -- OR -- attach a Notice of Change in Water Right Ownership form along with the required documentation and fee.
- Mailing address ☒ Same as water right record -- OR -- complete the following information:
Address _____ City _____
State _____ Zip code _____ Email _____
- Give the last date water was beneficially used 12/31/15
- Explain your reasons for non-use of the water right and your reasons for requesting an extension of time.
Attach additional documentation if needed.
Pending water right transfer protest to water right transfer no. 84902.

The information contained in this application is true to the best of my knowledge.

Signature of applicant or authorized agent

Print name (and title, if applicable)

Date

Signature of applicant or authorized agent

Print name (and title, if applicable)

Date

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined this application for extension of time within which to resume the use of a water right and I hereby said application, subject to the following conditions or reasons:

The right holder shall resume beneficial use of water on or before _____

Signed this _____ day of _____, 20____.

Title: _____

Stamped received ☐ Fee received by _____ Date _____ Receipt # _____

**IDAHO DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT
PART 2A**

Current Water Right No.: 37-8409

Current Owner: SILVER SAGE OWNERS ASSN INC

Priority Date: 11/30/1988

Origin: Water Right

Status: Active

Basis: License

Source

Tributary

GROUND WATER

<u>Beneficial Use</u>	<u>From To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	4/15 to 10/31	0.1 CFS	6 AF
	<u>Total Diversion</u>	0.1 CFS	6 AF

Location of Point(s) of Diversion

GROUND WATER

SE1/4SW1/4 Sec. 33, Twp 03N, Rge 18E B.M.

BLAINE County

Place of Use

IRRIGATION Within BLAINE County

T03N R18E S33	NWSW	0.80	T03N R18E S33	SWSW	9.60
T03N R18E S33	SESW	5.40			

Total Acres: 15.8

Conditions of Approval:

1. T07 The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
2. R67 This right when combined with all other rights shall provide no more than 0.03 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the lands above.
3. T08 Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
4. 046 Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
5. Right 37-08409 is limited to the irrigation of 1.7 acres in the place of use described above in a single irrigation season.
If the original well under Right 37-08409 is no longer used, it shall be abandoned in a manner which complies with Department well abandonment rules.
6. 01M After specific notification by the department, the right holder shall install a suitable measuring device or shall enter into an agreement with the department to determine the amount of water diverted from power records and shall annually report the information to the department.

Page _____ of _____

Licensed Date: 3/19/1998

Idaho Department of Water Resources Receipt

Receipt ID: S039005

Payment Amount	\$100.00	Date Received	12/29/2021	Region	SOUTHERN
Payment Type	Check	Check Number	16730		
Payer	BROCKWAY ENGINEERING, PLLC				
Comments	APPLICATION FOR EXTENSION OF TIME FOR: SILVER SAGE OWNERS ASSON INC. WR#37-8409.				

Fee Details

Amount	Description	PCA	Fund	Fund Detail	Subsidiary	Object
\$100.00	EXTENSIONS	64103	0229	21		1155



Signature Line (Department Representative)