

**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.

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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 1.¹

¹ 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."²

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

² 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:

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

For Petitioner

Rex H. Baker
P.O. Box 327
Lucile, ID 83542

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

Livestock Grazing Permit Holder

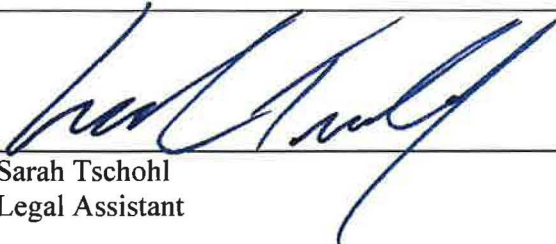
USDA Forest Service
550 W Fort St., MSC 033
Boise, ID 83724

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

Stockwater Right Owner

Courtesy Copy:
United States Department of Justice
Environment and Natural Resources Division
550 W. Fort St., MSC 033
Boise, ID 83724
david.negri@usdoj.gov

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



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):



11/5/21
Date

For the Forest Service:


(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