

**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 PARTIALLY GRANTING
PETITION; ORDER TO SHOW
CAUSE**

(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.

Petitioner asserts that the water rights listed in Exhibit A (“Forest Service Water Rights”) are owned by the United States of America acting through the Department of Agriculture, Forest Service (“Forest Service”). *Id.* ¶ 1; and *see also* Exhibit A. Additionally, Petitioner asserts that the “points of diversion or places of use” for the Forest Service Water Rights are on a federal grazing allotment identified by the Forest Service as the Cow Creek Allotment (“Allotment”). *Id.* ¶ 3. Petitioner claims that no other water rights share “the same place of use, source, and point of diversion” as the Forest Service Water Rights. *Id.* ¶ 4.

Petitioner maintains that it has, for at least the last five years, held a valid Forest Service grazing permit for livestock grazing on the Allotment. *Id.* ¶ 5; and *see also* Exhibit B. Petitioner asserts that its livestock has grazed on the Allotment “each year of the permit term.” *Id.* ¶ 6. Petitioner claims that its employees, officers, and family of its officers and employees have “regularly visited the Allotment, which borders 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 Forest Service on the Allotment either to graze or to use water under the [Forest Service] Water Rights.” *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 Forest Service applying the [Forest Service] Water Rights to the beneficial use of watering livestock the Forest Service owns or controls on the Allotment.” *Id.* ¶ 10. Petitioner asserts that no agency relationship exists between Petitioner and the Forest Service “for the purpose of acquiring water rights for the Forest Service on the 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), the Department submitted a Freedom of Information Act (“FOIA”) request to the Forest Service on September 27, 2021, for a copy of all active grazing permits on the Cow Creek Allotment. On September 29, 2021, in response to the Department’s FOIA request, the Forest Service sent a copy of two redacted grazing permits. One permit sent by the Forest Service matches Permit No. 01045, issued April 29, 2015, that Petitioner filed as Exhibit B. The second permit, sent by the Forest Service, is held in the name of Rex Baker.¹

APPLICABLE LAW

Idaho Code § 42-224(1) states:

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.

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 Forest Service has not put its Forest Service 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).

FINDINGS AND PRELIMINARY CONCLUSIONS

After careful review of the Petition and the Department’s water right files and database, the Director issues the following findings and preliminary conclusions:

1. Petitioner asked the Department to issue an order to the Forest Service to show cause why the Forest Service’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: 79-4134, 79-4138, 79-4139, 79-4149, 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, 79-4338, 79-4339, 79-4340, 79-4341, 79-4342, 79-4343, 79-10505, 79-10506, 79-10507, 79-10508, 79-10509, 79-10510, 79-10511, 79-10512, 79-10513, 79-10514, 79-10515, 79-10519, 79-10559, 79-10568, 79-10572, 79-10573, 79-10611, 79-10612, 79-10720, 79-10722, 79-13647, 79-13658, 79-13664, and 79-13679. *See Exhibit A*; and *see also* Memorandum from Glen

¹ The Forest Service redacted the address for Rex Baker on the grazing permit they produced. The Department obtained an address, updated on June 3, 2021, for Rex Baker through the online Idaho County Parcel Viewer.

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. 1–2 (Oct. 21, 2021) (attached to this Order as Attachment A) [hereinafter Memorandum].

2. Petitioner's allegations only relate to the Forest Service's lack of beneficial use of water within the boundaries of the Allotment. Petitioner does not make allegations relating to the Forest Service's use of water outside of the boundaries of the Allotment. *See Petition* at 1–2.
3. Using the Department's water rights database, the Director reviewed the place of use for the Forest Service Water Rights. *See Memorandum* at 1.
4. Based on the Memorandum, the Director finds that some of the Forest Service Water Rights have a place of use that extends beyond the Allotment. Petitioner's allegations, however, are specific to non-use within the Allotment and do not extend to use beyond the allotment. *Petition* at 1-2. 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 Forest Service has not put its water rights to beneficial use for at least five years, Petitioner must make allegations that would establish forfeiture over the entire place of use—not just those portions of the place of use within the Allotment. The Director concludes that because some of the Forest Service Water Rights have a place of use that extends beyond the Allotment and because Petitioner did not make allegations about the Forest Service's water use outside the Allotment, Petitioner has failed to make a "prima facie showing" that the Forest Service has not put those water rights to beneficial use for at least five years. The water rights at issue with a place of use that extends beyond the boundaries of the Allotment are: 79-4149, 79-4338, 79-10511, 79-10514, 79-10515, 79-10559, 79-10573, 79-10611, and 79-13658. *Memorandum* at 2.
5. Based on the Memorandum, the Director finds that the following water rights at issue have a place of use that is entirely within the Allotment: 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. *Id.* at 1.
6. Marty I. Gill is an officer of Gill Family Ranches, LLC. *Petition* at 3. The Petition makes specific allegations related to the Allotment attributable to the officers of Gill Family Ranches, LLC. *Id.* at 1–2. Accordingly, the Director concludes that Marty I. Gill's statements are based on personal knowledge and therefore establish a "prima facie showing" (in accordance with Idaho Code § 42-224) that the Forest Service has not put water rights that have a place of use entirely within the Allotment to beneficial use within the last five years.

7. The Director concludes that he should partially grant Petitioner's request and issue an order to the Forest Service to show cause before the Director why the Forest Service water rights 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 Petition for an order to show cause why the Forest Service's water rights at issue here have not been lost through forfeiture, pursuant to Idaho Code § 42-222(2), is GRANTED for ONLY the following water rights: 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.
2. The Petition for an order to show cause why the Forest Service's water rights at issue here have not been lost through forfeiture, pursuant to Idaho Code § 42-222(2), is DENIED for the following water rights: 79-4149, 79-4338, 79-10511, 79-10514, 79-10515, 79-10559, 79-10573, 79-10611, and 79-13658.
3. The United States of America acting through the Department of Agriculture, Forest Service shall have 21 days from completion of service to request in writing a hearing pursuant to Idaho Code § 42-1701A. If the United States fails to timely respond to the order to show cause, the stockwater rights for which this petition has been granted shall be considered forfeited, and the Director shall issue an order declaring the stockwater rights forfeited pursuant to Idaho Code § 42-222(2). If the Forest Service files a request for a hearing, it shall also serve the request upon the parties listed on the included certificate of service.
4. In accordance with Idaho Code § 42-224(4), all active Cow Creek Allotment livestock grazing permit or lease holders will be served a copy of this order.

DATED this 27th day of October 2021.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October 2021, I caused to be served a true and correct copy of the foregoing *Order Partially Granting Petition; Order to Show Cause*, 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

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

For Petitioner

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

Livestock Grazing Permit Holder

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

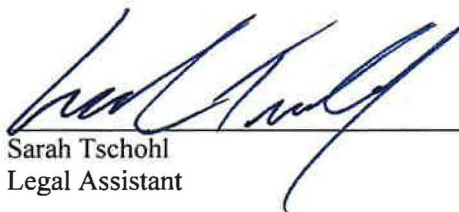
USDA Forest Service
550 W Fort St., MSC 033
Boise, ID 83724

- ☒ Certified 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

- ☒ 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
GG CS

Date: October 21, 2021

Re: Review of Federal water rights within the Cow Creek Allotment (#104) 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 September 24, 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 Cow Creek Allotment (#104)." 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 USDA FOREST SERVICE, whereas IDWR's database refers to the Names as UNITED STATES OF AMERICA ACTING THROUGH USDA FOREST SERVICE.

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 on 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 Cow Creek Allotment and neighboring grazing allotments.¹ (Sherwin Creek Allotment, Pittsburg Allotment, Sheep Creek Allotment, Papoose Allotment, and Race Creek Allotment).

Cow Creek Allotment Analysis

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

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.

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 and downloaded from the website https://gis.blm.gov/arcgis/rest/services/range/BLM_Natl_Grazing_Allotment/MapServer

POUs for the following water rights exist partially within the Cow Creek Allotment and partially outside the Cow Creek Allotment:

79-4149, 79-4338, 79-10511, 79-10514, 79-10515, 79-10559, 79-10573, 79-10611, and 79-13658.

The analysis below describes water rights in Exhibit A with portions of their authorized POUs outside the Cow Creek Allotment. During the analysis of water right POU locations and Forest Service Allotments, a discrepancy was noted in the Forest Service Allotment boundaries. The boundaries of Cow Creek Allotment, Pittsburg Allotment and Sheep Creek do not align, causing the areas within the boundaries to overlap. In these areas, it is unknown if the water right POUs are intended for Cow Creek Allotment, Pittsburg Allotment, Sheep Creek Allotment or a combination of allotments. The Sherwin Creek Allotment, Papoose Allotment, and Race Creek Allotment boundaries align with the Cow Creek Allotment boundary.

79-4149:

Water right 79-4149 describes the source as a spring, tributary to sinks. The POU is T26N, R1E, Sec 18, SESW. The POU is within the Cow Creek Allotment, Sherwin Creek Allotment, and Pittsburg Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America.

79-4338:

Water right 79-4338 describes the source as Horner Springs, tributary to Little China Creek. The POU is T26N, R1E, Sec 17, SWSW. The POU is within Cow Creek Allotment and Sherwin Creek Allotment. It appears this POU, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America.

79-10511:

Water right 79-10511 is an instream stockwater right on Kessler Creek, tributary to South Fork Race Creek. POU's T24N, R1W, Sec 1, NWNE; T25N, R1W, Sec 26, NESW, SESW, SWSE; T25N, R1W, Sec 35, NWNE, SWNE, SENE, NESE; T25N, R1W, Sec 36, NWSW, SWSW, SESW, SWSE are within the Cow Creek Allotment. POU T24N, R1W, Sec 1, NENE is within the Cow Creek Allotment, Race Creek Allotment, and an area with no allotment. It appears this POU's, and therefore this water right, can be accessed from multiple allotments. The POU's are managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America, except for part of T24N, R1W, Sec 1, NENE which is private land owned by Susan Lee O'Leary.

79-10514:

Water right 79-10514 is an instream stockwater right on West Fork Race Creek, tributary to Race Creek. POU's are T25N, R1E, Sec 30, SWNW; T25N, R1W, Sec 23, NWNE, SWNE, SENE; T25N, R1W, Sec 24, SWNW, NWSW, SWSW, SESW; T25N, R1W, Sec 25, NENE, NWNE, SENE, NESW are within the Cow Creek Allotment. POU's T25N, R1E, Sec 30 SENW, NESW are thin the Cow Creek Allotment and Race Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America, except for part of T25N, R1E, Sec 30, SENW which is private land owned by Larry L Simonson.

79-10515:

Water right 79-10515 is an instream stockwater right on Bean Creek, tributary to West Fork Race Creek. POU's T25N, R1E, SEC 19, SENE; T25N R1E, Sec 20, SWNW, NWSW are in the Cow Creek Allotment. POU's T25N R1E, Sec 29, NWNE, SWNE, SENE, NESE, are in the Race Creek Allotment. POU's T20N, R1E, Sec 20, NESW, SESW are in both Cow Creek Allotment and Race Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest, United States of America.

79-10559:

Water right 79-10559 is an instream stockwater right on Corral Creek, tributary to Snake River. The POU's T26N, R1W, Sec 9, SWNE, SENE, NESE, SESE; T26N, R1W, Sec 10, SWSW; T26N, R1W, Sec 14, NWSW, SWSW, SESW; T26N, R1W, Sec 15, SWNE, NESW, NWNW, SENW, NESE, NWSE; T26N, R1W, Sec 23, NENE, NWNE, SENE, NENW; T26N, R1W, Sec 24, SWNW, NESW, NWSW, SESW, SWSE are within the Cow Creek Allotment, Pittsburg Allotment, and Sheep Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU's are managed by US Forest Service, Wallowa-Whitman National Forest, United States of America, except for part of T26N, R1W, Sec 24, NWSW which is owned by Crooks Corral Mines, LLC.

79-10573:

Water right 79-10573 is an instream stockwater right on Lost Valley Creek, tributary to Kirkwood Creek. POU's T25N, R1W, Sec 3, SWNW, NESW, NWSW, NWSE, SWSE; T25N, R1W, Sec 10, NWNE, SWNE, SENE, NESE, SWSE, SESE; T25N, R1W, Sec 15, NWNE, SWNE, SENW, NESW, are within the Cow Creek Allotment. POU's T25N, R1W, Sec 3, SWNW, NWSW² are within both Cow Creek Allotment and Sheep Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Wallowa-Whitman National Forest, United States of America.

79-10611:

Water right 79-10611 is an instream stockwater right on Clarks Fork, tributary to Sheep Creek. POU's T25N, R1W, Sec 27, NWSW, SWSW, SESW, SWSE; T25N, R1W, Sec 28, SWNW, NESW, NWSW, NESE, NWSE; T25N, R1W, Sec 29, SWNE, SENE, NESW, NWSE are within the Cow Creek Allotment. T25N, R1W, Sec 29, SWNW, SENW³ are within both Cow Creek Allotment and Sheep Creek Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Wallowa-Whitman National Forest, United States of America.

79-13658:

Water right 79-13658 is an instream stockwater right on South Fork Race Creek, tributary to Race Creek. POU's T24N, R1W, Sec 3, SWSW, SESW, SWSE; T24N, R1W, Sec 10, NENE, NWNE; T24N, R1W, SEC 11, NENE, NWNE, NENW, NWNW; T24N, R1W, Sec 12, NENW, NWNW, SWNE, SENW are within both Cow Creek Allotment and Papoose Allotment. It appears these POU's, and therefore this water right, can be accessed from multiple allotments. The POU is managed by US Forest Service, Nez Perce-Clearwater National Forest United States of America. T24N, R1W, Sec 12, NENW, NWNE are partially within the Cow Creek Allotment, Papoose Allotment and partially on private land owned by JB Scott.

-end-

² In these two sections, the Cow Creek Allotment and Sheep Creek Allotment overlap.

³ In these two sections, the Cow Creek Allotment and Sheep Creek Allotment overlap.