



State of Idaho

DEPARTMENT OF WATER RESOURCES

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BRAD LITTLE
Governor

GARY SPACKMAN
Director

April 17, 2020

Travis Thompson
Barker Rosholt & Simpson LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83301

Re: Extension of Time to Avoid Forfeiture (Water Right Nos. 37-444 & 37-7636A)

Dear Travis:

On March 31, 2020, Idaho Department of Water Resources ("IDWR") received a letter from you on behalf of your client H. Philip Cash requesting a 29-month extension of time to avoid forfeiture for water rights nos. 37-444 and 37-7636A. For the reasons described below, IDWR is not able to grant the requested additional time on the existing extensions, nor can it grant an additional extension, but it can describe other factors for your client to consider when applying the requirement to resume use.

On September 25, 2015, Mr. Cash submitted an *Application for Extension of Time to Avoid Forfeiture of a Water Right* for water rights nos. 37-444 and 37-7636A. IDWR approved the extensions and granted Mr. Cash five additional years (until September 24, 2020) to put the water under these rights to beneficial use. Your recent letter requested a second extension of time to avoid forfeiture.

IDWR cannot grant a second extension of time to avoid forfeiture because IDWR does not have statutory authority to do so. The question of IDWR's authority to grant a second extension of time to avoid forfeiture of a water right must begin with the plain language of Idaho statutes. *A & B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho 500, 506 (2012). If the language in a statute is unambiguous, there need not be any additional interpretation of the statute. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893 (2011).

Idaho Code § 42-222(3) gives the Director the authority to "grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years." (Emphasis added.) Idaho Code § 42-222(4) makes it clear that the extension is limited to a single extension. Idaho Code § 42-222(4)(c) (The Director has the authority to "grant one (1) extension of five (5) years within which to resume such use."). Thus, Idaho Code § 42-222 authorizes the Director of IDWR to grant no more than one extension of up to five years to allow water to be put to beneficial use. Because IDWR previously granted a five-year extension of time to avoid forfeiture for water rights nos. 37-444 and 37-7636A, IDWR cannot now grant a second extension.

Although IDWR cannot grant Mr. Cash another extension of time to avoid forfeiture for water rights nos. 37-444 and 37-7636A, the following factors might be useful to consider when applying the requirement to resume beneficial use.

Idaho Code § 42-222(4)(d) requires resumption of use to occur "before the date set for resumption of use", or "such right shall revert to the state and again be subject to appropriation." In some cases, this statutory language has been difficult for IDWR to apply due to climate and weather factors affecting the timing of irrigation. When IDWR approves an extension of time to avoid forfeiture, strict application of Idaho Code § 42-222(4) would require resumption of use by the date set in the extension, which could, in some instances, be in the middle of a calendar year. Several factors could influence the water right owner's ability to resume use by the date set. For example, the date could precede the start of the irrigation season. Or, a wet spring could delay planting and the need for irrigation. To avoid such complexities, IDWR has implemented a simple and uniform forfeiture review period. IDWR 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 IDWR. For example, if an application for extension of time to avoid forfeiture was submitted in 2020 and the Department granted an extension for the years 2020, 2021, 2022, 2023 and 2024, then resumption or other action initiating a defense or protection from forfeiture must occur prior to the end of calendar year 2025. 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 resumption date set in the extension approval that resumption and a report are due. However, the Department would not find forfeiture if resumption of beneficial use or other action initiating a defense or protection from forfeiture occurred prior to the end of calendar year 2025. Applying this practice to the extension approved for water right nos. 37-444 and 37-7636A, IDWR would not find forfeiture if resumption of use or some other defense or protection occurs by the end of 2021.

Also, the Idaho Water Resource Board has been accepting water rights with extensions of time to avoid forfeiture into the Water Supply Bank ("WSB") without evidence of the required resumption of use. In such instances, the letter notifying the water right owner of the lease acceptance includes a statement similar to the following:

Our review of your water right revealed that you are required to resume use of your water right by [insert date] in connection with an approved *Extension of Time to Avoid Forfeiture* (extension). By approving the lease of your water right in lieu of resuming use, the Water Resource Board and IDWR are presuming the Idaho Code § 42-223(5) defense to forfeiture for water rights leased into the WSB extends the protection from forfeiture. However, this presumption has not been challenged in court as of the date of this letter and the validity of your water right could come into question since, according to Idaho Code §42-222(4)(d), a resumption appears to be a requirement in the process of filing an extension to avoid forfeiture.

If you have any questions, or need any further assistance, feel free to contact the Department at your convenience.

Sincerely,



Corey Skinner, PE
IDWR Southern Region Manager