



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER - Governor
Gary Spackman - IDWR Director

March 18, 2014

Jay Winfield
District Ranger
Salmon-Challis National Forest
311 McPherson Street
Salmon, ID 83467

RE: Request for Forfeiture of Water Rights 75-14072 and 75-14073

Dear Mr. Winfield:

Thank you for providing additional documentation of the lack of diversion and beneficial use under water rights 75-14072 and 75-14073. The information you provided has been scanned and added to the official public files for those two water rights. It appears that your request has initiated a dialogue between the Forest Service and the water right holders.

At this time, the Idaho Department of Water Resources is not going to initiate any formal action on the forfeiture concerns raised by the Forest Service. Although the documents you provided strongly suggest that there has been little or no use of water under the water rights since they were decreed in the Snake River Basin Adjudication in November 2008, it is unclear whether the non-use of water has resulted in a forfeiture of the rights.

There are two defenses to forfeiture set forth in the Idaho Code that may apply to this particular case: Section 42-223(6) relating to circumstances out of the control of the water user and Section 42-223(11) relating to mineral prices. In addition, there are non-statutory (or common law) defenses to forfeiture that may apply, such as a lack of sufficient water supply from the water right source.

Idaho courts do not favor forfeiture. The Idaho courts have held that, by asserting that the water rights are forfeited, the Department not only bears the burden of showing through clear and convincing evidence that the rights have not been used, but also bears the burden of disproving any applicable defenses to forfeiture raised by the water right holders. In this case, the evidence may be sufficient to establish non-use of the water rights. However, there are still significant unanswered questions relating to the defenses to forfeiture identified above.

The Department does not have sufficient information about mineral prices or how they relate to the mining activities described in the water rights, about the availability of water from the listed water source (Rabbit Creek), or about circumstances that may be out of the control of the water right holders (such as restricted access to the water right place of use).

Please be aware that Idaho Code § 42-222 creates a private right of action relating to forfeiture. In other words, the Forest Service could initiate a forfeiture proceeding in Idaho District Court, asking a judge to declare the water rights forfeited. In such a case, the Forest Service would bear the burden of proving non-use of the water rights and also disproving any defenses to forfeiture raised by the water right holders. As stated, the information you provided has been incorporated into the permanent records for water rights 75-14072 and 75-14073. Please feel free to contact me with any other questions.

Sincerely,

A handwritten signature in dark ink, appearing to read 'J. Cefalo', with a stylized, cursive script.

James Cefalo
Water Resources Program Manager
(208) 525-7161

Cc: Dick Wright, Ken Seymour, James Chadwick, Donnie Hudson, Steve Wackerli, Dave Gietzen (current owners listed on water rights 75-14072 and 75-14073)