

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF THE NOTICE OF)
DIVERSION AS AN ALTERNATIVE TO)
INSTREAM STOCKWATER USE NO.)
34-14955 IN THE NAME OF SHIFLETT) **ORDER DENYING PETITION**
FAMILY MANAGEMENT LLC)**

On September 3, 2024, Shiflett Family Management LLC (“SFM”) filed a Notice of Diversion as an Alternative to Instream Stockwater Use (“Notice”) with the Idaho Department of Water Resources (“Department”). SFM amended the Notice on September 17, 2024. The Notice, as amended, describes a proposed point of diversion in the SWNW of Section 25, T09N, R20E, on land held by the United States and managed by the U.S. Bureau of Land Management (“BLM”).

Consistent with Idaho Code § 42-113, the Department recorded the Notice in the Department’s water rights records. The Department identified the Notice as a statutory claim, filed pursuant to Idaho Code § 42-243, and assigned water right no. 34-14955 to the claim. On September 19, 2024, the Department sent a letter to SFM, acknowledging that the Department had received the Notice, listing the limitations on diversion set forth in Idaho Code § 42-113, and providing SFM a copy of the water right record created for the Notice.

On January 30, 2025, the Department notified BLM that the Department had recorded the Notice in its water rights records. On February 4, 2025, BLM filed a *Petition* asking the Department to deny the Notice.

Idaho Code § 42-113 governs in-stream stockwater use and the process used to divert water from a stream as an alternative to in-stream stockwater use. Because Section 42-113 is essential to the analysis of BLM’s *Petition*, it is included in this order in its entirety:

42-113. In-stream and other water use for livestock.

(1) A permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock. In the consideration of applications for permits to appropriate water for other purposes, the director of the department of water resources shall impose such reasonable conditions as are necessary to protect prior downstream water rights for in-stream livestock use, and in the administration of the water rights on any stream, the director, and the district court where applicable, shall recognize and protect water rights for in-stream livestock use, according to priority, as they do water rights for other purposes. As used in this section, the phrase "in-stream watering of livestock" means the drinking of water by livestock directly from a natural stream, without the use of any constructed physical diversion works.

(2) For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation:

(a) The priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land, subject to the provisions of section 42-222(2), Idaho Code; and

(b) The water right shall be an appurtenance to the base property. When a federal grazing permit is transferred or otherwise conveyed to a new owner, the associated stockwater rights may also be conveyed and, upon approval of an application for transfer, shall become appurtenant to the new owner's base property.

(3) This subsection is established to promote the watering of livestock away from streams and riparian areas, but not to require fencing of livestock away from streams and riparian areas.

(a) Any person having an established water right or appropriating water for in-stream watering of livestock pursuant to subsection (1) of this section may, in addition to the in-stream use, divert the water for livestock use away from the stream or riparian area. The diversion may occur only if the following conditions are met:

(i) The water is diverted from a surface water source to a trough or tank through an enclosed water delivery system;

(ii) The water delivery system is equipped with an automatic shutoff or flow control mechanism or includes a means for returning unused water to the surface water source through an enclosed delivery system, and the system is designed and constructed to allow the rate of diversion to be measured;

(iii) The diversion is from a surface water source to which the livestock would otherwise have access and the watering tank or trough is located on land from which the livestock would have access to the surface water source from which the diversion is made;

(iv) The diversion of water out of the stream in this manner does not injure other water rights;

(v) The use of the water diverted is for watering livestock; and

(vi) The bed and banks of the source shall not be altered as that term is defined in section 42-3802, Idaho Code, except that an inlet conduit may be placed into the source in a manner that does not require excavation or obstruction of the stream channel, unless additional work is approved by the director of the department of water resources.

(b) The amount of water diverted for watering of livestock in accordance with this subsection shall not exceed thirteen thousand (13,000) gallons per day per diversion.

(c) Before construction and use of a water diversion and delivery system as provided in this subsection, the person or other entity proposing to construct and use the system shall give notice to the director of the department of water resources. Separate notice for each diversion shall be provided on a form approved by the director and shall be accompanied by a twenty-five dollar (\$25.00) fee for each notice filed. Filing of the notice as herein provided shall serve as a substitute for filing a notice of claim to a water right pursuant to section 42-243, Idaho Code. The director may provide notice to holders of water rights and others as the director deems appropriate.

(d) Compliance with the provisions of this subsection is a substitute for the requirements for transfer proceedings in section 42-222, Idaho Code. In the administration of water diverted for livestock watering pursuant to this subsection, the director, and the district court where applicable, shall recognize and protect water rights for out-of-stream livestock watering use pursuant to this subsection as they would in-stream livestock watering use. The priority date for out-of-stream watering of livestock pursuant to this subsection shall be the first date that water historically was used for livestock watering and shall not be altered due to the diversion out-of-stream.

(e) Any water right holder who determines that diversion or use of water under the provisions of this subsection is depriving the water right holder of water to which the water right holder is entitled may petition the director of the department of water resources to curtail the diversion or use of water for livestock purposes. Upon such petition, the director shall cause an investigation to be made and may hold hearings or gather information in other ways. If the director finds that an interference is occurring, the director may order curtailment of diversion or use of the water or may require the water diversion and delivery system to be modified to prevent injury to other water rights. Any person feeling aggrieved by an order of the director in response to a petition filed as herein provided shall be entitled to review as provided in section 42-1701A, Idaho Code.

(4) No change in use of any water right used for watering of livestock, whether proposed under this section or section 42-222, Idaho Code, shall be made or allowed without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock.

ANALYSIS

BLM raises several arguments in its Petition asking the Department to deny the Notice. First, BLM states that a water right cannot be established through trespass. Although it may be possible to appropriate water through the notice process described in Idaho Code § 42-113(3)(c), the Notice filed by SFM indicates that SFM or its predecessor(s) in interest established an in-stream

stockwater right through beneficial use on March 1, 2002. Therefore, SFM is not seeking to appropriate water or to establish a new water right. BLM's arguments about establishing a water right in trespass do not apply to the facts set forth in the Notice.

Second, BLM asserts that SFM has not obtained a right-of-way or other authorization to construct a point of diversion on BLM ground, to construct a pipeline across BLM ground, or to convey water across BLM ground. Even though SFM holds a grazing permit for the subject ground, a grazing permit "does not authorize the construction of water developments on federal land." BLM Petition at 1. Idaho Code § 42-113(3) does not require a water user to demonstrate that they have the right-of-way needed to construct the proposed diversion system on federal land. Nor does it grant the Department jurisdiction over trespass. If the BLM believes the proposed stockwater system will be constructed in trespass or in violation of federal law, the BLM can seek a remedy in a tribunal with appropriate jurisdiction over trespass.

Third, BLM's Petition suggests that the Department has the authority to deny a notice filed pursuant to Idaho Code § 42-113(3). This reflects a misunderstanding of the Department's role and authority under Idaho Code § 42-113. When a notice is filed under Section 42-113(3)(c), the Department does not approve or deny the notice. Instead, the Department simply creates a record of the notice and assigns it a water right number. Pursuant to Section 42-113(3)(c), filing a notice "shall serve as a substitute for filing a notice of claim to a water right pursuant to section 42-243, Idaho Code." That section is titled "Filing of claims of rights established by diversion and use – Form and content of claim" and was created to provide a means for water users to record claims for water rights established through beneficial use. Claims recorded through the process described in Idaho Code § 42-243 are often referred to as "beneficial use claims" or "statutory claims." Pursuant to Idaho Code § 42-244, the Department does not approve or deny statutory claims but simply creates a record of the claim. Similarly, the Department does not approve or deny notices filed pursuant to Idaho Code § 42-113 but simply creates a record of the notice.

Fourth, BLM argues that the Final Unified Decree in the Snake River Basin Adjudication ("SRBA") requires a water user to claim a water right in the SRBA "prior to seeking authorization from the Director to change the point of diversion, place of use, purpose of use, or period of use of the claimed right." BLM Petition at 2 (quoting an *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* (June 28, 2012)(emphasis added)). This argument reflects a misunderstanding of the Department's role and authority under Idaho Code § 42-113. A water user who files a notice pursuant to Section 42-113(3)(c) is not seeking authorization from the Department. As stated above, the Department does not have the authority to approve or deny notices filed pursuant to Section 42-113(3). In fact, Section 42-113(3)(d) states that the notice process "is a substitute for the requirements for transfer proceedings in section 42-222, Idaho Code." In other words, a water user who files a notice pursuant to Section 42-113(3) does not have to seek authorization from the Department through the transfer process. Therefore, the language from the SRBA quoted by the BLM does not apply to the SFM Notice.

Finally, BLM argues that SFM has not obtained consent to make the change from the other permittees in the federal grazing allotment where SFM proposes to divert water from the stream. BLM Petition at 3. Idaho Code § 42-113(4) states: "No change in use of any water right used for watering of livestock, whether proposed under this section or section 42-222, shall be made or

allowed without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock.” BLM confirms that SFM is a permittee in the grazing allotment where the water will be diverted. BLM asserts that there are other permittees in the same grazing allotment at SFM. Although consent from the other permittees is clearly a prerequisite to SFM constructing the project, it is not an element of review under Section 42-113 and is not a basis for the Department to deny the Notice. As with all of the other conditions set forth in Section 42-113(3)(a), this is simply a condition on the exercise of the water right. Non-compliance with any condition set forth in Section 42-113(3)(a) is a question of enforcement, not a basis to approve or deny a notice. *See* Idaho Code § 42-351 (authorizing the Department to initiate a notice of violation if any person diverts water in substantial violation of any condition set forth in statute).

CONCLUSIONS OF LAW

BLM’s Petition asks the Department to deny the Notice filed by SFM. The Department does not have the authority to approve or deny a notice filed pursuant to Idaho Code § 42-113(3) or a claim filed pursuant to Idaho Code § 42-243. BLM’s Petition seeks a remedy that is not available under Idaho Law. Therefore, BLM’s Petition must be denied.

ORDER

IT IS HEREBY ORDERED that the Petition filed by BLM is DENIED.

Dated this 12th day of March, 2025.



James Cefalo
Regional Manager

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of March 2025, I mailed a true and correct copy of the foregoing ORDER DENYING PETITION, with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below:

FRED PRICE
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1387 S VINNELL WAY
BOISE, ID 83709-1657

SHIFLETT FAMILY MANAGEMENT LLC
10502 W THIMBLEBERRY DR
STAR, ID 83669-6279



Christina Henman
Administrative Assistant