



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

May 20, 2014

Jerre and Jake Evans
5050 Bailey Rd.
Arbon, ID 83212

Re: Your Correspondence Dated April 29, 2014, and Email Dated May 7, 2014, Regarding Water Right 29-2470

Dear Gentlemen,

This letter responds to your correspondence and email referenced above. The correspondence dated April 29, 2014, was received by the Idaho Department of Water Resources ("Department" or "IDWR") on May 7, 2014, along with an email from you on the same date. The letter of April 29 is signed by both you and several other individuals who are copied in this response. The letter raises concerns about potential adverse impacts on certain properties and water sources resulting from the resumption of use of water pursuant to ground water right 29-2470. This water right may now be owned by Jacob Anderson. You allege that the that the right has been used for over 30 years. You ask in the letter that IDWR enforce Idaho Code regarding any potential forfeiture of the right. Your email of May 7 included a number of specific questions related to forfeiture of water rights. IDWR provides the following responses to your questions in the order provided in your email. These responses should address the concern raised in your letter of April 29.

- What is the actual intent or purpose of the five-year(s) of non-use code, that states a water right shall be lost and forfeited?
 - The Department has statutory jurisdiction to consider forfeiture in certain administrative matters which require an injury analysis, such as in water right transfer applications pursuant to Idaho Code § 42-222, and in water supply bank leases and rentals pursuant to Idaho Code § 42-1763. Additionally, IDWR may consider non-use or lack of beneficial use of a water right consistent with the criteria of Idaho Code §§ 42-222 and 42-223 when making water right recommendations in a general adjudication. IDWR lacks the express statutory authority to declare a water right forfeited that has been decreed by a court when that water right is not before the Department administratively.
- What is the department's role/responsibility when addressing forfeiture of a water right?
 - See response to the preceding question.
- If the department does play a role in determining whether a right is subject to forfeiture, what type of clear and convincing facts/evidence is needed?
 - Under the limited statutory authority and administrative proceedings cited above, the Department may consider various types of available information and records including but not limited to aerial imagery, water district water delivery records, watermaster statements (if in a water district), power consumption records, affidavits and other records. Idaho Code § 42-223 provides certain exemptions to forfeiture due to non use of a water right including enrollment of land in federal crop set aside programs, inclusion of a right in the water supply bank or a mitigation plan, and inability to use water due to a lack of water supply due to circumstances over which the owner has no control. Other defenses to forfeiture are included in Idaho Code § 42-223.

- Does the department perform any kind of due diligence to determine the validity of a water right when ownership of the right changes?
 - A change of ownership does not require the Director to conduct an injury evaluation, so forfeiture is not evaluated as part of its recording of ownership changes.
- Does the five-year of non-use rule/code have any other value besides allowing civil action to be taken?
 - As stated herein, the Department only considers forfeiture in certain limited administrative matters as provided by statute. The Snake River Basin Adjudication ("SRBA") district court would have the jurisdiction to declare a water right as forfeited, since the SRBA district court has jurisdiction over water rights for which it has issued partial decrees. The best avenue to raise the issue would be a civil suit in the SRBA district court.
- When or on what type of water transactions does the department seek or consider the public's interest?
 - Public interest may be raised in an administrative matter that requires the Director to consider the local public interest such as in a water right transfer pursuant to Idaho Code § 42-222, water supply bank rentals as per Idaho Code § 42-1763, and in new appropriation of water rights as per Idaho Code § 42-203A(5). Public interest does not play a role in the consideration of forfeiture.
- How is input or review of "local public interest" performed and how does the public's interest play or get considered in the department's review?
 - See response to the preceding question.

IDWR lacks statutory authority to declare a water right forfeited that has been decreed by a court. The Department recommends that water right forfeiture issues in your area be addressed through civil litigation in the SRBA district court. We further recommend that you consult an attorney regarding this matter. An attorney will be able to advise you about such a lawsuit as well as the type of evidence that would be needed to satisfy the clear and convincing evidence standard.

It is the Department's understanding that the lands to which right 29-2470 is appurtenant was enrolled in the Federal Crop Reserve Program ("CRP") although we do not know the period of time in which the lands were enrolled. As noted in one of the responses above, enrollment of land in the CRP is a defense against forfeiture. Additionally, you should be aware that right 29-2470 was decreed by the SRBA Court in 2004 but the court issued an amended decree in January, 2014. SRBA court decisions have determined that the statutory period for forfeiture is re-set upon the date that the right is decreed by the court. The decree dates for right 29-2470 may have a bearing on any future consideration of forfeiture by the court.

Please contact me directly at 208-287-4959 if you have further questions concerning this matter.

Sincerely,



Tim Luke
Water Compliance Bureau

Cc: Ken Estep
Stephen Lusk
Kevin North
Monte Evans
Jacob Anderson

TJ Budge
Kevin Garn
M. Jay Meyers
Richard Curry, WD 29-O Watermaster
IDWR Eastern Region

Luke, Tim

From: Jake Evans [Jake.Evans@onsemi.com]
Sent: Wednesday, May 07, 2014 2:58 PM
To: Luke, Tim
Cc: Jerre Evans; Cefalo, James; Peppersack, Jeff; Kestep@dcdi.net; mjmatty@pocatellolaw.net
Subject: Water Right 29-2470
Attachments: Signed Complaint Letter 050714.pdf

Dear Mr. Luke,

In your email below you stated we, the concerned property owners of the Arbon community, who think we may be injured by use of water right 29-2470 can submit a complaint and the department can respond based on the facts presented. Please consider the attached letter(s), which has signatures from those concerned, as our complaint letter. Along with this letter I am asking the department to also provide a response to the questions listed below. I believe answering these questions will help us understand the official role/responsibility of the Idaho Department of Water Resources, and hopefully eliminate some confusion and frustration.

- Forfeiture:
 - What is the actual intent or purpose of the 5-year(s) of non-use code, that states a water right **shall** be lost and forfeited?
 - What is the departments role/responsibility when addressing forfeiture of a water right?
 - If the department does play a role in determining whether a right is subject to forfeiture, what type of clear and convincing facts/evidence is needed?
 - Does the department perform any kind of due diligence to determine the validity of a water right when ownership of the right changes?
 - Does the 5-year of non-use rule/code have any other value besides allowing civil action to be taken?
- Public Interest:
 - When, or on what type of water transactions, does the department seek or consider the public's interest?
 - I noticed on an application to lease a water right that "local public interest" is a consideration.
 - How is input or review of "local public interest" performed and how does the public's interest play or get considered in the departments review?

Based on your comment that this matter may ultimately need to be addressed as a civil matter, we have began the process to seek legal action.

Please let me know if there is anything else I can provide in order to support our complaint.

I am optimistic the Idaho Department of Water Resources will give our complaint serious consideration and look forward to the department's response.

Sincerely,

Jake and All concerned property owners

April 29, 2014

Tim Luke
322 East Front Street
PO Box 83720
Boise, Idaho 83720-0098

RE: Water Right Number 29-2470

Dear Mr. Luke,

It has come to our attention that water right 29-2470 has recently changed ownership and there is an effort underway to restore operation of this water right. Restoring use of this water right raises concern for several community members (names are listed below). We have written this letter to inform the Idaho Department of Water Resources that water right number 29-2470 is a forfeited water right according to Idaho Code 42-222; it has not been in use for over 5-years and to our knowledge, does not meet any of the exceptions listed in Idaho Code 42-223.

Those of us listed at the bottom of this letter are property owners in Arbon Valley who have concern with the well/water right 29-2470. Several of us, who have been long term residents of Arbon, can attest that this well has not been utilized for its documented purpose, irrigation, for over 30-years.

There is a serious concern as to how restoring operation of this water right will adversely affect surface water that currently exists on nearby properties and vegetation, in nearby pastures, and nearby farm ground. Also of concern are nearby ground water wells and Bannock creek that will be adversely affected.

As I am sure you are aware, there is litigation in process with other members of the Arbon community on an almost identical topic. Restoring water right 29-2470 will further aggravate this litigation.

According to Idaho Code, water right 29-2470, is clearly a forfeited water right and should not be allowed to be restored. It was stated in the Acknowledgment letter, dated April 18th, that was sent to Jacob Andersen, *the department does not review the history of water use to determine if the right has been deliberately abandoned or forfeited through five years or more of non-use.* The intent and intended outcome of this letter is to inform the Idaho Department of Water Resources that this water right has not been in use for 5-years or more, and for the department to enforce Idaho Code.

Concerned Property Owners,

Kenneth L. Estep
Kenneth L. Estep
PO Box 49
4359 Arbon Valley Hwy.
Arbon, ID 83212
208-241-4142

Stephen T Lusk
Stephen T Lusk
4401 Arbon Highway
Arbon Id. 83212
208-335-2143

April 29, 2014

Tim Luke
322 East Front Street
PO Box 83720
Boise, Idaho 83720-0098

RE: Water Right Number 29-2470

well still leaking to
creek

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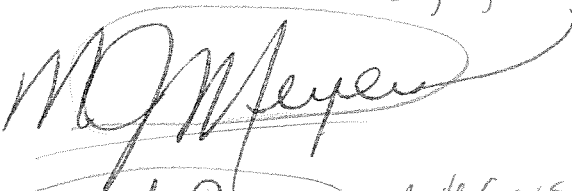
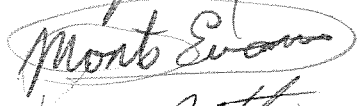
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Concerned Property Owners,

San Meyers

Monte Evans

Levin North

Ryan Jones

Jerre Evans

Jake Graw
