

ADMINISTRATOR'S MEMORANDUM

Multiple Programs Memo No. 2

To: Regional Offices
Water Allocation Bureau

From: Gary Spackman *Gary S*

Re: **FORFEITURE REVIEW PERIOD**

Date: March 5, 2012

Idaho Code § 42-222(2) provides that all rights to the use of water shall be lost and forfeited by a failure for the term of five years to apply it to the beneficial use for which it was appropriated. Idaho Code § 42-222(3&4) provides that the Department may grant an extension for an additional five years for good cause shown if an application for extension is made before the end of the five year period. Idaho Code § 42-223 provides for exceptions or defenses to forfeiture. Experience in the Snake River Basin Adjudication (SRBA) and other court cases have provided additional guidance on the subject of forfeiture. In general, forfeiture is not favored; however, the Department has a responsibility to review water rights to determine if forfeiture has occurred prior to approving (or denying) certain applications affecting existing water rights.

In 1999, the SRBA court issued a decision tolling the forfeiture period for a water right during the time period that a claim is pending in the adjudication. The Department has presumed that water rights are not forfeited for non-use during the five-year period following issuance of a partial decree. For many water rights decreed in the SRBA, the initial five-year period has ended or will end soon, and Department employees are increasingly faced with questions regarding a cut-off date to determine if forfeiture has occurred and when action must be taken to protect a water right from forfeiture. For example, if a partial decree is issued during the middle of the irrigation season, is it appropriate to assume that five full irrigation seasons of non-use (in addition to the first partial season) must pass before the right is considered to be forfeited? If so, would the right holder need to initiate some action to protect the right from forfeiture prior to the end of the five full seasons, or prior to the beginning of the sixth irrigation season, or some other time? In the past, the Department has presumed that resumption at the beginning of the sixth season would prevent forfeiture on the basis that junior irrigation rights would not have had opportunity to establish some reliance on the unused water during the non-irrigation season. What if the need for irrigation water is further delayed in the sixth season due to a wet spring?

The purpose of this memo is to address the timing questions that arise during forfeiture review by providing Department employees with a simple and uniform forfeiture review period. This memo applies to forfeiture review associated with applications to lease a water right to the Water Supply Bank, applications for extension of time to avoid forfeiture, and applications for transfer of a water right. This memo applies to both irrigation and non-irrigation water rights.

The Department will presume that beneficial use under a water right during a portion of a calendar year or any defense or protection from forfeiture applicable during a portion of a calendar year will apply to the entire calendar year. For example, if an irrigation right is used to establish a cover crop at the beginning of an irrigation season and is not used during the remainder of the irrigation season; the right will be considered protected from forfeiture through December 31 of that calendar year. Likewise, if an irrigation right is decreed at the beginning of a calendar year (prior to the beginning of the irrigation season) and is not used at any time during the irrigation season, the right will still be considered protected from forfeiture for that entire calendar year.

The Department will also presume that resumption of beneficial use under a water right for a portion of a calendar year or any defense or protection initiated during a calendar year will apply to the entire calendar year. For example, if an irrigation right is used to establish a fall crop at the end of an irrigation season, even if the right was not used earlier during the irrigation season, the right will be considered protected from forfeiture for that calendar year. Likewise, if an application for lease to the Water Supply Bank is submitted before the end of a calendar year and eventually approved and the right is not used at any time during that calendar year, the right will be considered protected from forfeiture for that calendar year.

Strict application of Idaho Code § 42-222(4) would require an application for extension of time to avoid forfeiture to be submitted prior to the end of the fifth unprotected year of non-use. However, the Department wishes to avoid questions and conflicts surrounding the timing of resumption during an irrigation season and to maintain simple and uniform guidance to Department employees. Therefore, the Department will presume that resumption of beneficial use or any defense or protection, including filing an extension of time to avoid forfeiture, initiated before the end of the sixth calendar year will prevent a finding of forfeiture by the Department.

As an example, if an irrigation right is decreed in the SRBA in January, 2004 and water is not used during 2004, 2005, 2006, 2007, 2008 and 2009, then resumption or action initiating a defense or protection from forfeiture must occur prior to the end of the calendar year in 2010. The 2004 calendar year is considered protected since the decree was issued during that year. The years 2005 through 2009 represent the five year period of non-use. The Department would not find forfeiture if use resumed before the end of calendar year 2010. An application to lease the water right to the Water Supply Bank or other action initiating a defense or protection from forfeiture would apply similarly¹.

As another example, if an extension of time to avoid forfeiture is granted for five years, the Department 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 the Department. Continuing with the example above, if an application for extension of time to avoid forfeiture was submitted in 2010 and the Department granted an extension for the years 2010, 2011, 2012, 2013 and 2014, then resumption or other action initiating a defense or protection from forfeiture must occur prior to the end of calendar year 2015. 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 end of 2014 that resumption and a report is due by December 31, 2014. However, the Department would not find forfeiture if resumption of beneficial use or

¹ Filing an application for transfer does not toll the statutory period for forfeiture of a water right due to non-use.

other action initiating a defense or protection from forfeiture occurred prior to the end of calendar year 2015.

This memo does not change Department policy on partial forfeiture. Forfeiture of a portion of a water right may occur if beneficial use is reduced for the statutory period as applied under the guidance of this memo. When discussing forfeiture issues, Department employees and water users should be mindful that any Department decision or action where forfeiture may be an issue can be contested and certain facts may lead to a different conclusion in an administrative hearing, or judicial review.