

## Assessment of Affidavits Asserting Non-Use Cert. 36367 and 36368

**To:** Casey Myers, *Public Works Director*  
City of John Day  
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Cc: Nick Ducote, Ducote Consulting  
Heather Rookstool, Mayor

**From:** Robert Long, *RG, LHG, CWRE*

**Date:** December 11, 2023

**Subject:** Response to Affidavits Asserting Non-Use of a Water Right

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This memorandum is in response to the City of John Day's (City's) request to understand the potential impact of recently submitted Affidavits Asserting Non-Use of a Water Right (Affidavits) for Certificates 36367 and 36368 in the name of San Juan Lumber Company, Inc. on proposed funding. The certificates allow for diversion from the John Day River for mill pond storage and then use for manufacturing and industrial purposes from the mill pond.

CwM H2O LLC (CwM) has reviewed the Affidavits provided by the City attached and have a few comments to share as to their relevance to the City. The Affidavits appear to be well documented personal observations as to the historic use of water, and lack of water use in the past several years on the former San Juan Lumber Company property. However, the Affidavit documentation is not material to the interests of the City regarding the fate of the transfers or funding.

The interest of the City was to make applications for transfer to in-stream water of any of the nine water rights acquired through recent property purchases found to be eligible for transfer. This was a condition of funding. CwM assessed the nine water rights and found four potentially eligible for instream transfer. The success of the applications is not as important to the City and its citizens. The City's obligation is to meet the requirement of the OWRD grant and make application on potentially transferable rights as a condition of the grant. The City is under no obligation to do any further work or ensure that the applications are approved. The City also has an obligation to manage municipal assets for the interest of the City.

In the transfer process the municipal interests of the City may still trump this citizen's statement of non-use as the non-use is a known factor in the City's application. The City is rebutting the presumed cancelation citing the municipal interest in the water right for future use, in this case instream transfer. The City is not claiming that the water has was used in the past five years or

longer. Non use for a period of greater than five years subjugates these certificates to presumed cancelation. This is a known condition and is addressed in the transfer applications. OWRD knows that the water rights are presumed canceled. The citizen Affidavits of non-use will not be news to the agency.

Bottom line is John Day made application because it is a condition of an OWRD grant. Non-use is already known by the agency but as a municipality the City might be able to make the transfers anyway, that is up to OWRD, who verbally confirmed that there was a path to transfer even though there has been a significant period of non-use.

It is always in the interest of the City to save whatever water rights it holds to preserve them for future use or instream use or a future trade or off-set for some other environmental situation that is, as yet, unknown. Water rights are valuable municipal assets and cannot be obtained through new applications as there is no available summertime surface water in eastern Oregon. In that respect the City has done its job to attempt the preservation of these water rights that are part of the lands the City purchased. Currently the City has multiple water rights in good standing that do not require a rebuttal of presumed cancellation that it can rely on for future grow or to attract industry.

The engagement and care that has been taken in preparing these affidavits of non-use is admirable and CwM commends all citizens that take the time to be aware of such transactions and state their position and knowledge of the situation. However, these affidavits will not influence the City's grant, which is the primary interest. This is because the grant does not require a positive outcome for the instream transfers in order to fund the City's project.