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Attorneys for Plaintiff
Big Willow Ranch, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BIG WILLOW RANCH, LLC, an Idaho limited liability company, Petitioner, v. IDAHO DEPARTMENT OF WATER RESOURCES, Respondent.	Case No. CV01-24-09674 **PETITIONER'S OPENING BRIEF**
IN THE MATTER OF A.L. CATTLE, INC.'S WATER RIGHT NOS. 65-1985, 65-3124X, AND 65-10537	

Petitioner Big Willow Ranch, LLC ("Big Willow"), by and through its counsel of record, Givens Pursley LLP, pursuant to Idaho Rule of Civil Procedure 84(p) and Idaho Appellate Rule 34, files this opening brief on judicial review in the above-captioned matter.

INTRODUCTION

The sole issue in this matter is whether the Idaho Department of Water Resources ("IDWR" or "Department") correctly or incorrectly determined that it lacks authority to determine that certain water rights are forfeited, namely A.L. Cattle, Inc.'s decreed water right nos. 65-1985, 65-3124X, and 65-10537 (collectively, the "Water Rights").

On September 5, 2023, Big Willow filed a *Petition for Forfeiture* with IDWR asking that the Water Rights be declared forfeited for non-use pursuant to Idaho Code § 42-222(2), together with supporting declarations. A.R. at 80-126.[1] On February 1, 2024, an IDWR Hearing Officer issued a *Preliminary Order Denying Petition for Forfeiture* ("*Preliminary Order*") in which they concluded that "the Department does not have the statutory authority to find [the Water Rights] forfeited . . . ." A.R. at 132. Big Willow subsequently filed exceptions to the *Preliminary Order* asking the Director to determine that IDWR has authority to declare the Water Rights forfeited under its "exclusive authority" over the appropriation of water under Idaho Code § 42-201(7). A.R. at 136-46. The Director denied Big Willow's exceptions, agreeing with the findings and conclusions in the *Preliminary Order* that IDWR lacks authority to declare the Water Rights forfeited. A.R. at 150-58.

The Department concluded that it does not have "express authority to render a forfeiture decision of [the Water Rights]" outside certain specific circumstances such as in a transfer proceeding or in an adjudication. A.R. at 156. It determined that "while the Department has specific authority to render forfeiture decisions in limited circumstances, there are no statutes that expressly grant the Department the authority to render a forfeiture decision of [the Water

[1] In this brief, "A.R." means the *Settled Agency Record on Appeal* filed by IDWR on August 26, 2024. Citations to the A.R. refer to the page numbers assigned by IDWR.

Rights]." *Id*. The Department also concluded that Idaho Code § 42-201(7) does not give it authority to render forfeiture decisions because the term "appropriation" in that statute means only "establishing a water right." A.R. at 152. Instead, the Department stated that the proper forum for seeking forfeiture of the Water Rights is in district court. A.R. at 156.

In light of IDWR's ruling, Big Willow filed an action in Gem County District Court, Case No. CV23-24-0042 (*Big Willow Ranch, LLC v. A.L. Cattle, Inc.*), and obtained a stipulated judgment determining the Water Rights are forfeited. A true and correct copy of the stipulated judgment is attached to this brief as Exhibit A. However, it still is not clear that a district court has authority to declare the Water Rights forfeited, as the Adams County District Court ruled in 2023, Case No. CV-02-000003 (*Henderson v. Madlen*), that IDWR has exclusive authority to determine forfeiture of water rights. A copy of a transcript of that oral ruling is attached hereto in Exhibit B. At this time, Big Willow is uncertain as to whether the Gem County District Court's determination of forfeiture is valid and binding, or whether only IDWR has authority to make a valid and binding forfeiture determination.

Here, Big Willow asks this court to resolve the conflicting viewpoints of whether IDWR has authority to determine forfeiture of water rights under its "exclusive authority over the appropriation of the public surface and ground waters of the state" under Idaho Code § 42-201(7), or otherwise. Big Willow understands that IDWR also desires an answer to this question.

ARGUMENT

I. The Department has exclusive authority over the appropriation of Idaho's public waters, and no other instrumentality of the state may prohibit, restrict, or regulate appropriations.

Idaho Code § 42-201(7) states:

> This title [42, Idaho Code] delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state. No other agency, department, county, city, municipal corporation or other instrumentality or political subdivision of the state shall enact any rule or ordinance or take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the state, and any such action shall be null and void.

This statutory provision is not ambiguous, and therefore should be given its plain meaning. *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009) ("statutory interpretation begins with the literal language of the statute. If the statutory language is unambiguous, we need not engage in statutory construction and are free to apply the statute's plain meaning." (internal citation omitted)).

Section 42-201(7)'s literal language gives IDWR "exclusive authority over the appropriation of the public surface and ground waters of the state." Big Willow believes this necessarily includes the authority to determine whether water rights are forfeited because forfeiture is inherent to an appropriation of water under Idaho law. That is, once a water right has been established, that right can be extinguished if it has been deemed forfeited under Idaho Code § 42-222(2). The second sentence of Section 42-201(7) supports the conclusion that IDWR has exclusive authority to determine forfeiture, as it does not allow any other instrumentality of the state to "prohibit, restrict, or regulate" the appropriation of water. Clearly, a forfeiture determination would prohibit, restrict, or regulate the appropriation of water.

IDWR disputes that prohibiting, restricting, or regulating an appropriation is akin to forfeiture. A.R. at 154. It is not clear to Big Willow how a forfeiture determination could be viewed as anything other than prohibiting, restricting, or regulating an otherwise valid water right.

The crux of this matter appears to be the definition of "appropriation" in Section 42-201(7). Big Willow argued to IDWR that the word "appropriation" includes the determination of forfeiture. A.R. at 137-140. Big Willow cited Black's Law Dictionary's definition of "appropriation" as "[t]he exercise of control over property, esp. without permission; a taking of possession." A.R. at 138 (quoting *Appropriation*, *Black's Law Dictionary* (11th ed. 2019)). Using this definition, Section 42-201(7) would be read to give IDWR "exclusive authority over the exercise of control of the public surface and ground waters of the state." Accordingly, because a forfeiture determination is a determination of whether a water right holder may still exercise control over the public waters or whether that right has been lost, IDWR has exclusive authority to make that determination under Section 42-201(7).

IDWR disagreed with this analysis, interpreting the word "appropriation" in Section 42-201(7) as meaning only "establishing a water right." A.R. at 152. In support of this interpretation, IDWR quoted other definitions of "appropriation," in particular that the "appropriation of water" means "[a]n appropriation of water flowing on the public domain consists in the capture, impounding, or diversion of it from its natural course . . . and its actual application to some beneficial use." A.R. at 152 (quoting *Appropriation of Water, Black's Law Dictionary* (5th ed. 1979)). Using this definition, Section 42-201(7) would say that IDWR has "exclusive authority over the capture, impounding, or diversion of [water] from its natural course . . . and its application to some beneficial use." A determination of forfeiture, of course, is a

determination that water has not been put to beneficial use. I.C. 42-222(2). Thus, even under this definition IDWR's exclusive authority over the appropriation of water encompasses determining forfeiture under Idaho Code § 42-222(2).

IDWR also cites the title of Chapter 2, Title 42, Idaho Code—"Appropriation of Water – Permits, Certificates, and Licenses"— in support of its conclusion that the word "appropriation" in Section 42-201(7) only covers the establishment of a water right. A.R. at 152. But IDWR fails to recognize that the forfeiture provisions in Section 42-222(2) are in the same Chapter 2. The placement of the forfeiture statute in the Chapter entitled "Appropriation of Water" is yet further support for the conclusion that determining forfeiture is an aspect of IDWR's authority over appropriations of water.

In sum, the definitions relied upon by IDWR do not materially differ from the definition cited by Big Willow or change the meaning of the word "appropriation" in Section 42-201(7), and the placement of Section 42-222(2) in Chapter 2, Title 42, actually supports a conclusion that IDWR has exclusive authority to determine forfeiture.

II. The legislative history cited by IDWR supports Big Willow's interpretation at least as much as it supports IDWR's.

In further support of its position, IDWR relied upon Section 42-201(7)'s Statement of Purpose and a purported statement made to the Senate Resources and Environment Committee. A.R. at 152-53. But IDWR's reliance on these is misplaced.

First, the Statement of Purpose begins with: "Title 42 of the Idaho Code delegates comprehensive authority to the Idaho Department of Water Resources over the appropriation of the waters of the State." Statement of Purpose, S.B. 1353, 58th Leg., 2d Reg. Sess. (Idaho 2006)

(emphasis added).[2] The forfeiture statute (42-222(2)) of course falls within Title 42's comprehensive statutory scheme. There is no reason to believe that the Legislature's description of Title 42 providing IDWR with "comprehensive authority" was limited to merely establishing a water right and excluded all other aspects of the Title, which includes (among other things) the administration of water rights in priority.[3]

Second, the Statement of Purpose's second sentence says that "[t]his delegation of authority preempts other agencies and political subdivisions from regulating the appropriation of the public waters of the State." *Id.* In other words, the Legislature confirmed their intention that Title 42 delegates IDWR authority over the subject matters addressed in Title 42, preempting others from "regulating" the appropriation of water. As already discussed, a forfeiture determination is quintessentially a regulation of the appropriation of water as it is a determination that a water right has not been put to beneficial use for the statutory period and is no longer valid.

The Statement of Purpose's third sentence says that "[t]his legislation further clarifies these principles to ensure that no other agency or political subdivision takes any action which impinges upon the Department of Water Resource's exclusive jurisdiction over the appropriation of the waters of the state." *Id.* This sentence simply summarizes the concepts set forth within

[2] It is worth noting that IDWR inaccurately quoted the Statement of Purpose's first sentence as saying that "§ 42-201(7) was enacted in 2006 to . . . Delegate[] comprehensive authority to the [IDWR] . . . ." A.R. at 152. As quoted in the main text above, the sentence actually says that the entire Title 42 "delegates comprehensive authority to the Idaho Department of Water Resources . . . ."

[3] "Under I.C. § 42-602 the Director has broad powers to direct and control distribution of water from all natural water sources, *within water districts*." *In re Idaho Dep't of Water Res. Amended Final Ord. Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009) (emphasis in original). As part of this, IDWR must understand which water rights remain valid and which are no longer valid. The Water Rights are within active Water District 65.

Section 42-201(7)—that IDWR has exclusive authority over the appropriation of water to the exclusion of all others.

In sum, the Statement of Purpose provides at least as much support for Big Willow's position as it does IDWR's.

To further support its position, IDWR also cited testimony provided to the Senate Resources and Environment Committee. A.R. at 152-53. However, IDWR did not quote the testimony, but rather paraphrased it. It is not clear whether IDWR's paraphrasing accurately or completely reflects the actual testimony provided to the Committee.

Finally, IDWR relies upon *Joyce Livestock Co. v. United States* ("*Joyce Livestock*"), 144 Idaho 1, 7, 156 P.3d 502, 508 (2007), for the proposition that "[a]fter enacting § 42-201(7), the Idaho Supreme Court even clarified that the purpose of adding the subsection was 'to require compliance with the statutory application, permit, and license procedure in order to acquire new water rights.'" A.R. at 153. This is inaccurate. The full quote from *Joyce Livestock* states:

> In 1971 the legislature amended Idaho Code §§ 42-103 and 42-201 to require compliance with the statutory application, permit, and license procedure in order to acquire new water rights.

Joyce Livestock, 144 Idaho at 7, 156 P.3d at 508 (2007). Subsection (7) was added to Section 42-201 in 2006, not in 1971. *Joyce Livestock* did not address Section 42-201(7) at all. Thus, contrary to IDWR's assertion, the *Joyce Livestock* Court was not addressing the purpose of adding Subsection to Idaho Code § 42-201, but instead was describing the Legislature's 1971 amendments. Thus, IDWR's reliance on the quote from *Joyce Livestock* mischaracterizes the history of Section 42-201(7) and the *Joyce Livestock* Court's statement.

III. The specific authorities cited by IDWR do not limit its exclusive authority under Section 42-201(7).

As opposed to having general (and exclusive) authority to determine forfeiture as urged by Big Willow, IDWR believes there are only "limited circumstances" in which it has authority to determine forfeiture, such as "within a water rights transfer proceeding (§ 42-222(1)) , a water rights adjudication (§ 42-1401B(1)), or forfeiture of stockwater rights (§ 42-224). A.R. at 155.

Notably, of these examples only the statute concerning forfeiture of stockwater rights (I.C. § 42-224) uses any version of the word "forfeit." In the other statutes, IDWR's authority is merely implicit. This is meaningful because IDWR contends that "[i]f the Legislature intended to include 'forfeiture' as one of the Department's enumerated actions in § 42-201(7), the Legislature would have expressly included it within the provision itself . . . ." A.R. at 154. Clearly, based on the statutes cited by IDWR (aside from the stockwater statute), the Legislature does not always expressly include the word "forfeiture" when giving IDWR authority to make that determination.

In any case, these examples do not preclude IDWR from exercising authority to determine forfeiture under Section 42-201(7). The cited statutes merely provide more explicit (or implicit) direction to IDWR to determine forfeiture in certain circumstances. In a transfer proceeding (Section 42-222(1)), the Legislature prescribed the criteria that IDWR must use to approve a change to a water right. In water rights adjudications (Section 42-1401B(1)), the Legislature prescribed IDWR's specific role and duties in that context. And in the forfeiture of stockwater rights on federal lands (Section 42-224), the Legislature prescribed a specific process for IDWR to follow in light of the *Joyce Livestock* decision. *See* I.C. § 42-501 ("in order to comply with the *Joyce [Livestock*] decision, it is the intent of the Legislature that stockwater rights acquired in a manner contrary to the Joyce [*Livestock*] decision are subject to forfeiture

pursuant to sections 42-222(2) and 42-224, Idaho Code."). In none of these circumstances did the Legislature suggest that IDWR did not already have authority to determine forfeiture, nor did they suggest they were expressly or implicitly taking such authority away from another instrumentality of the state. By contrast, in enacting Section 42-201(7), they made it expressly clear that IDWR has "exclusive authority" over the appropriation of water in the state, and no other instrumentality of the state can "prohibit, restrict, or regulate" the appropriation of water.

IV. District Courts in Idaho are conflicted as to whether they or IDWR have jurisdiction to determine forfeiture.

IDWR's position that district courts are the proper venues for determining forfeiture (outside of the limited circumstances it cites) is not clearly the view of the district courts themselves.

In 2023, Adams County District Judge Matthew J. Roker ruled that the court did not have jurisdiction to determine forfeiture because that authority lies with IDWR. *See* Exhibit B, p. 8.

More recently, following IDWR's determination that it lacked authority to determine Big Willow's *Petition for Forfeiture* in the underlying agency proceeding at issue here, Big Willow obtained a *Stipulated Judgment* from the Gem County District Court declaring that the Water Rights are forfeited. *See* Exhibit A.

In light of IDWR's position here, and these conflicting district court decisions, Big Willow asks this Court to determine whether IDWR has authority to determine forfeiture of the Water Rights or whether that authority is properly within the Gem County District Court.

CONCLUSION

Big Willow respectfully requests that this Court determine whether IDWR has authority to render a water right forfeited under its "exclusive authority" over the appropriation of water pursuant to Idaho Code § 42-201(7), or otherwise.

DATED September 30, 2024.

GIVENS PURSLEY LLP

By: _____
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of September, 2024, the foregoing was filed, served, and copied as set out below.

DOCUMENT FILED:

Clerk of the District Court – Ada County 200 W. Front Street Boise, ID 83702	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail/iCourt

SERVICE COPIES TO:

Idaho Department of Water Resources The Idaho Water Center 322 E Front St, Ste. 648 Boise, ID 83702 E-file: file@idwr.idaho.gov	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-file

COURTESY COPIES TO:

Travis L. Thompson Marten Law LLP 163 Second Ave. W PO Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com *Attorneys for A.L. Cattle, Inc.*	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

By _____
Michael P. Lawrence

EXHIBIT A

(Copy of July 22, 2024 *Stipulated Judgment* in *Big Willow Ranch, LLC, v. A.L. Cattle, Inc.*, Case No. CV23-24-0042, Gem County District Court)

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Attorneys for Plaintiff
Big Willow Ranch, LLC

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

BIG WILLOW RANCH, LLC, an Idaho limited liability company, Plaintiff, v. A. L. CATTLE, INC., an Idaho corporation, Defendant.	Case No. CV23-24-0042 **STIPULATED JUDGMENT**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That this Court has jurisdiction over the parties and the subject matter of this dispute pursuant to Idaho Code §§ 1-705 and 10-1201, and venue is proper in this court pursuant to Idaho Code § 5-401;

2. That decreed Water Right Nos. 65-1985, 65-3124X, and 65-10537 (collectively, the "Water Rights") have been forfeited in their entireties and are of no further force, effect, or validity pursuant to Idaho Code § 42-222(2) by failure to divert or apply them to beneficial use for a period of at least five (5) years since they were decreed by the Snake River Basin Adjudication Court;

3. That neither Defendant nor any predecessors-in-interest received approval of an application for extension of time to avoid forfeiture of the Water Rights from the Idaho Department of Water Resources ("IDWR") pursuant to Idaho Code § 42-222(3);

4. That none of the exceptions or defenses to forfeiture set forth in Idaho Code § 42-223 excuse the non-use of the Water Rights;

5. That this action constitutes the initiation of proceedings to declare forfeiture under Idaho Code § 42-223(12); and

6. That each party shall bear its own costs and fees pertaining to this action.

IT IS SO ORDERED.

DATED 7/22/2024 6:01:13 PM.

Honorable Brent L. Whiting
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on _____, I caused a true and correct copy of the foregoing to be served electronically through the iCourt system, which caused the following parties or counsel to be served by electronic means, as more fully reflected below:

Travis L. Thompson Marten Law LLP 163 Second Ave. West PO Box 63 Twin Falls, Idaho 83303-0063 Telephone: (208) 733-0700 tthompson@martenlaw.com	☐ Hand Delivery ☐ Facsimile ☐ Overnight Courier ☐ U.S. Mail ☒ iCourt Email
Michael P. Lawrence Taylor J. Barton GIVENS PURSLEY LLP 601 West Bannock Street Post Office Box 2720 Boise, Idaho 83701 mpl@givenspursley.com tjb@givenspursley.com	☐ Hand Delivery ☐ Facsimile ☐ Overnight Courier ☐ U.S. Mail ☒ iCourt Email

7/31/2024 4:25:09 PM

Rebecca Jones

Clerk of the Court

EXHIBIT B

(Copy of transcript of February 24, 2023 oral hearing in *Henderson v. Madlen*, Case No. CV02-21-0000032, Adams County District Court)

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Attorneys for Plaintiff
Big Willow Ranch, LLC

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BIG WILLOW RANCH, LLC, an Idaho limited liability company, Petitioner, v. IDAHO DEPARTMENT OF WATER RESOURCES, Respondent.	Case No. CV01-24-09674 **DECLARATION OF BARBARA BROWN**
IN THE MATTER OF A.L. CATTLE, INC.'S WATER RIGHT NOS. 65-1985, 65-3124X, AND 65-10537	

I, Barbara Brown, declare and state as follows:

1. I am over the age of eighteen and the facts stated below are based on my personal knowledge and experience. I make this declaration pursuant to Idaho Code Section 9-1406. I declare under penalty of perjury pursuant to the law of the State of Idaho that the following is true and correct.

2. I am word processing specialist employed at the law firm Givens Pursley LLP, the attorneys of record for petitioner Big Willow Ranch, LLC, in the above-captioned matter.

3. On or about March 9, 2023, I produced a transcript of an audio recording of the February 24, 2023 hearing held before Judge Matthew J. Roker in the matter of *Henderson v. Madlen*, Adams County District Court Case No. CV02-21-000003, a true and correct copy of which is attached to this declaration as Exhibit A.

4. Our office received the audio recording files on a thumb drive mailed by the Adams County District Court Clerk pursuant to a records request filed on or about February 28, 2023.

5. I produced the transcript attached as Exhibit A by listening to the audio recording files provided by the Adams County District Court Clerk, and it is my belief that the transcript accurately reflects the contents of the audio recording files.

DATED September 27, 2024.

GIVENS PURSLEY LLP

By: Barbara A. Brown
Barbara Brown

Exhibit A

TRANSCRIPT Court hearing on cross-motions for summary judgment, motion to amend, motion to strike declaration, and motion to amend pleadings to assert statute to limitations defense GP File No. 16405-2	
audio file: …24f6.trm	
Judge	for the LLC and then Ms. Munther, I see your signature as well, so I will review the orders and then I will get the Order signed. Is there anything further from either side? Ms. Munther?
Ms. Munther	No your Honor.
Mr. Gamms	[inaudible]
Judge	Alright, thank you. The parties are excused.
Mr. Gamms	Thank you.
Judge	Alright, in the last civil matter that I have is *Henderson v. Madlen.* The parties, in appear, Mr. Pingburn, which case were you on?
Mr. Pingburn	Your Honor, I was on Malloy v. Smith case. My understanding was is that this status conference **[END OF AUDIO FILE]**
audio file: …6b90.trm	…for today had been vacated because we have another one in April and we have a newly-scheduled trial in July, but I did receive notice of today's hearing from the Court and so I didn't want to not appear if the Court was expecting me and/or and the attorney for the other side to appear, but I think it was probably a mistake, your Honor.
Judge	Yeah, I do have that as reset for April 21st, so I don't have anything before me today on that matter.
Mr. Pingburn	Okay. That's what we, that's what I thought should have been the case, no, but didn't want to not be here when I should be here, your Honor.
Judge	Alright. Well thank you, Mr. Pingburn, you are excused.
Mr. Pingburn	Thank you.

TRANSCRIPT Court hearing on cross-motions for summary judgment, motion to amend, motion to strike declaration, and motion to amend pleadings to assert statute to limitations defense GP File No. 16405-2	
Judge	Alright, the Court is taking up *Arthur Henderson, Plaintiff, v. Kenneth Madlen and Pamela Madlen, Defendant*. This is case CV02-21-3, and this is the time set for an oral decision on the motions for summary judgment. There is also a motion hearing with regard to I believe, if I could find my note, motion to amend the Plaintiff's motion to amend the complaint.
?	And then the answer to the counterclaim, your Honor.
Judge	Motion to amend the answer to the counterclaim, and so what I will do first, and I will go ahead and give my ruling with regard to the motions for summary judgment. Again, I have before me Plaintiff's attorney Stephen Sherer. I have defense attorney Samuel Perry. All are present here in the courtroom and Mr. Madlen, I take it, is also present. So the Court at this time will enter its decision on this matter. Plaintiff's motion to strike portions of Kenneth Madlen's declaration and then there are cross-motions for summary judgment. Hearing on Plaintiff's motion to amend the pleadings to assert statute to limitations defense is also before the Court. The Court, with regard to Plaintiff's motion to strike portion of Kenneth Madlen's declaration, the Court will deny that issue. The Court will note that this is discretionary for the Court. The Court is willing to give it the weight, if any, the Court deems proper, appropriate. Evidence must be admissible. Hearsay is inadmissible unless an exception applies. Again, the Court notes that certainly Defendant at trial may need to provide more foundation for what is included in a declaration, but this Court is capable of giving the information in that declaration the weight, if any, that it should. Next, with regard to the cross-motions for summary judgment. The parties both moved for summary judgment on all claims and counterclaims. Summary judgment standards. The Court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. That's pursuant to Idaho Rule of Civil Procedure 56, subparagraph (a). As a general rule, a trial court does not make findings of fact when deciding a motion for summary judgment because it cannot weigh credibility, must liberally construe the facts in favor of the nonmoving party, and must draw all reasonable inferences from the facts in favor of the

TRANSCRIPT Court hearing on cross-motions for summary judgment, motion to amend, motion to strike declaration, and motion to amend pleadings to assert statute to limitations defense GP File No. 16405-2	
	nonmoving party. For claims tried to the Court in a bench trial, the Court may draw the most probable inferences from undisputed evidence. In the record, because the Court is the trier of fact at trial. It must still draw all reasonable inferences from disputed evidence in favor of the nonmoving party. When opposing parties both move for summary judgment based on the same theories and supporting facts, they effectively stipulate that there is no genuine issue of material fact. However, the Court is not thereafter precluded from concluding that an issue of material fact does in fact exist. Alternatively, when opposing parties file cross-motions for summary judgment based upon different theories, the parties should not be considered to have effectively stipulated **[END OF AUDIO FILE]**
audio file: ...8480.trm	there is no genuine issue of material fact. Here, the parties' respective factual recitations are frequently and materially incongruent with each other. Motion for summary judgment should be granted with caution. If reasonable people could reach different conclusions or inferences from the evidence, summary judgment is inappropriate. The trial court does not weigh evidence, determine credibility or decide truth of the matter. The question is simply whether there is a triable issue and not whether the nonmoving party will prevail at trial. The Court may deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. In addition to the record and summary judgment standards, the Court relies on the authority as follows: Title 6, the Idaho Code as it pertains to trespass. Title 42, the Idaho Code as it pertains to irrigation statutes. Title 56, the Idaho Code regarding nuisance. *Chester v. Wild*, Idaho case 519 P.3d 1152; *Hood v. Poorman*, 519 P.3d 769; *In Re CSRBA* Case No. 49576, 165 Idaho 489; *Barnes v. Jackson*, 163 Idaho 194; *Mortenson v. Barrian*, 163 Idaho 47; *Mullinex v. Kilgore*, 158 Idaho 269; *Telford Lands LLC v. Kane*, 154 Idaho 981; *Zingaber Investment LLC v. Haggerman Highway District*, 150 Idaho 675; *Joyce Livestock Company v. U.S.*, 144 Idaho 1; *Sage Willow v. Idaho Department of Water Resources*, 138 Idaho 831; *Bear Island Water Association Inc. v. Brown*, 125 Idaho 717. In the Nature of Proceeding Administrative or Judicial Law of Water Rights and Resources, § 7:5. Water rights and rights to use water and ditch rights, right

TRANSCRIPT Court hearing on cross-motions for summary judgment, motion to amend, motion to strike declaration, and motion to amend pleadings to assert statute to limitations defense GP File No. 16405-2	
	to use irrigation delivery systems to convey water are separate interests. Idaho appellate courts often discuss and analyze ditch rights as easement. In *Mullinex v. Kilgore*, 158 Idaho 269, a ditch right for the conveyance of water is recognized as a property right, apart from and independent of the right to uses the water conveyed therein. Each may be owned, held, and conveyed independently of the other. In *Zingaber Investment LLC v. Haggerman Highway District*, 150 Idaho 675, an irrigation ditch right, unlike a water right, acts like an easement in land. It also refers to Idaho Code § 42-1102. The existence of a visible ditch, canal or conduit shall constitute notice to the owner or any subsequent purchaser of the underlying servient estate that the owner of the ditch, canal or conduit has the right of way. *Olsen v. H&B Props Inc.*, 882 P.2d 536 at page 539. It's a New Mexico case. Water rights are derived from appropriation for beneficial use, while ditch rights are derived from ownership of the ditch water that runs through the servient estate upstream. The owner of the ditch is therefore the dominate estate owner. Although the person who has an easement for a ditch across the land of another does not thereby gain legal title to any portion of that land. And that's: *Reynolds Irrigation District v. Frote*, 69 Idaho 315. The owner of such an easement is often called the owner of the ditch. That's *Camp v. East Fork Ditch Company Ltd.*, 137 Idaho 850. Thus, *Zingaber* did not have any independent ditch rights in the portion of the ditch running over its land because an easement is defined as a right to the lands of another and therefore one cannot have an easement in his own lands. Also cited as *Gardner v.* **[END OF AUDIO FILE]**
audio file: ...39b0.trm	*Eagle*, 92 Idaho 767 at page 771. It appears the water rights granted by the Idaho Department of Water Resources are appurtenant to run with the land. Thus, it's doubtful that Plaintiff's personal agreement with Defendants' predecessor has any impact on Defendants' water rights. *Joyce Livestock Company v. The United States*, 144 Idaho 1, provides that unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them,

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	appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention appurtenances. Idaho Code § 42-220, water right licenses shall be binding upon the State as to the right of such licensee to use the amount of water mentioned therein and shall be *prima facie* evidence as to such right, and all rights to water confirmed under the provisions of this chapter or by any decree of court shall become appurtenant to and shall pass with the conveyance of the land for which the right to use is granted. The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure on the part of the user or holder of such right to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution or such water or for reasons set forth in this Title; provided that, when water is used for irrigation, no such license or decree of the court allotting such water shall be issues confirming the right to use of more than one second foot of water for each 50 acres of land so irrigated unless it can be shown to the satisfaction of the Department of Water of Resources in granting such license and to the court in making such decree that a greater amount is necessary and neither such licensee nor anyone claiming a right under such decree shall at any time be entitled to the use of more water than can be beneficially applied on the lands for benefits of which such right may have been confirmed and the right to the use of such water confirmed by such license shall always be held subject to the local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken when such rules or regulations have for their object economical use of such water. Next, any changes to water rights must be made through the Idaho Department of Water Resources. Title 42 likely doesn't permit individual water users to unilaterally, such as by contract, change rights afforded through the Idaho Department of Water Resources without the Idaho Department of Water Resources' permission. On this record, neither party has convinced the Court that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law. The better course is to proceed to trial. Therefore, the Court will deny the cross-motions for

	summary judgment. Questions regarding intent, knowledge, notice, reasonableness, use, beneficial use, prior use, resumption of use, existence/locations of ditches or deliver systems, exact on the ground locations of designated points of diversion and other conditions on the ground/terrain etc. are all triable and better adjudicated via a full trial. Whether alleged misconduct constituted a legal nuisance is triable and for the jury. Trespass claims generally tried to the jury. Ditch right issues appear largely dispositive here. The parties' respective factual statements are often different or incompatible. The Court is unable to decide whether a water right was abandoned or forfeited nor whether a point of diversion listed in the water right adjudicatory decree is illegal. The Court lacks present authority to make these determinations. These issues are not properly before the Court. Under Title 42, the Idaho Department of Water Resources has exclusive authority over the appropriation of public surface and ground waters of the State. **[END OF AUDIO FILE]**
audio file: …ee0.trm	No other agency, department, county, city, municipal corporation or other instrumentality or political subdivision of the State shall enact any rule or ordinance to take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the State, and any such action shall be null and void. That is Idaho Code 42-201, subparagraph 7. State courts are probably an instrumentality of the State. The Idaho Department of Water Resources has exclusive authority to set points of diversion. Water users provided to the Idaho Department of Water Resources their proof of beneficial use within five years. This is pursuant to Idaho Code § 42-204, 42-217, 42-218, 42-218A, and 42-222. Also, the Idaho Department of Water Resources decides whether to cancel a permit for failure to comply with Title 42. This is provided with the authority of Idaho Code 42-219-222 and -350. Most provisions in Title 42 provide for judicial review only after an aggrieved party exhausts administrative remedies and petitions for judicial review of the agency action. Example given: Idaho Code §§ 42-203A, 42-1701A, *In Re CSRBA* Case No. 49576, which is at 165 Idaho 489. This case primarily concerns access to irrigation delivery systems rather than use of water. Idaho Code § 42-1404 contemplates a private action, or private cause of action in district court by a claimant of a water right. Claimant is defined

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	in 42-1401A, subparagraph 1, as any person asserting ownership of rights to the use of water within the State of Idaho or on whose behalf ownership of rights to the use of water is asserted. The gravamen of Plaintiff's claim is not that he's asserting ownership of rights to the use of water; rather, the substance of the dispute is whether Defendant can legally enter upon Plaintiffs' property for irrigation purposes. Plaintiff doesn't appear to be a claimant of water rights in this case. *Barnes v. Jackson*, 163 Idaho 194, is distinguishable from Plaintiff because Plaintiff isn't suing a claimant to use of water but rather as a servient estate owner who doesn't want Defendant on his property. In *Barnes*, the court entertained water rights claim brought in district court between a junior and a senior water rights owners fighting over use of water, and it held because Barnes has failed to present facts that would support a finding of Blossom [sp??] did not use all of the water that was available to the parent right and filed the complaint before the five-year period of nonuse had run, the district court did not err when it ruled that Jackson's right was forfeited. Next, the Court is otherwise unaware of any statutory provision permitting a claim to be initially brought in district court to declare a neighbor's water right forfeited for purposes of keeping them off the servient estate and not as a claimant to water right. Plaintiff's complaint fails to state the Court's jurisdiction or show that he has standing in this case to challenge the validity of Defendants' purported water right or designated point of diversion. A petition for judicial review of an agency action is not before the Court. Plaintiff's complaint doesn't cite the grounds for the Court's jurisdiction as required under Idaho Rule of Civil Procedure 8(a)(1). Plaintiff is not suing as a claimant to use of water, but, rather, as servient estate owner with an irrigation delivery system on his property who doesn't want the Defendant to enter his property. Special procedures for claimant's private suit pursuant to 42-1404 is not addressed in the complaint. Plaintiff's Count III, paragraph 39, cites Idaho Code § 40-1201, et seq., as **[END OF AUDIO FILE]**
audio file: …55f0.trm	court proclaim that Plaintiff is entitled to declaratory judgment on forfeiture/validity of Defendants' water right. This may be a typo as the cited code section is another title and deals specifically with bridges, which is not applicable here. 42-1201 deals with

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	maintenance and repair of ditches but doesn't suggest any basis to seek declaratory judgment regarding validity of a water right. Alternatively, if the private cause of action is appropriately raised in district court, the record is inadequate to decide these issues on summary judgment. First, it doesn't appear that the notice and objection procedure was followed as required in Chapter 14, nor that the Idaho Department of Water Resources director prepared the report for the Court as contemplated in Idaho Code § 42-1410, 42-1411, and 42-1412. Likely, secondly, likely this is too close to trial to get a timely report from the director. Additionally, issues of abandonment or forfeiture are disputed questions of fact. The abandonment of water rights requires both the intent to abandon and the actual surrender or relinquishment of the water rights. The intent to abandon a water right must be evidenced by clear and unequivocal and decisive acts and mere nonuse is not per se abandonment. This is pursuant to *Joyce Livestock Company*, 144 Idaho 1 at page 15. Idaho Rule of Civil Procedure 11.2, subparagraph (b), permits a motion to reconsider if Plaintiff wants to persuade the Court with authority and argument. Notwithstanding those concerns, the Court believes it can decide easement/ditch right issues which are separate interests from water rights. Idaho Department of Water Resources' exclusive authority over appropriation of the public surface and ground waters of the State doesn't preclude this Court from declaring separate easement or ditch rights. As to the balance of the other issues on this record, the Court finds too many factual disputes to play in granting summary judgment to either party. The better course is to proceed to trial. Questions regarding intent, knowledge, notice, reasonableness, use, beneficial use, prior use, presumption of use, existence/locations of ditches or delivery systems, exact on the ground locations of designated points of diversion and other conditions of the ground/terrain etc. are all triable and better adjudicated with a full trial. Regarding Plaintiff's motion to amend, Plaintiff wants to amend the pleadings to assert the catch-all statute of limitations defense pursuant to Idaho Code 5-224 again Defendants' counterclaim based on *Easterline v. HAL Pacific Properties*, Docket No. 47919, a substitute opinion that was issued on January 25, 2023. It held

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	that the four year statute of limitations applies to easement claims. This is discretionary for the Court. Leave to amend should be freely given as justice so requires and Idaho Rule of Civil Procedure 15. In *Clark v. Olsen*, 110 Idaho 323, the Idaho Supreme Court recognized some of the reasons that would justify denying a motion to amend the pleading: undue delay, bad faith and dilatory motive on the part of the movant. Repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility. The request to amend is untimely under the scheduling orders. Deadline to file amended pleadings passed before the summary judgment hearing, the motion for summary judgment hearing. The Court only extends deadlines that would come due while the motion for summary judgment was pending. *Easterline v. HAL Pacific* substitute opinion didn't materially differ from the opinion that had been issued on December 21, 2021. Air go the statute of limitations could have been raised in the last two years and/or permitting addition of a new defense one month before the jury trial would cause undue prejudice to the opposing party. The court will deny the request to amend **[END OF AUDIO FILE]**
	ah, the pleadings to assert the catch-all statute of limitations defense against Defendants' counterclaim. Now, with regard to the jury trial setting on March 29, 2023. Considering the Court's ruling, I need to determine how the parties want to handle the jury trial setting. The courts, and not the jury, decide declaratory judgments or it's not been alleged in this case but similar to quiet title claims. If ditch rights issues are dispositive of other claims, it's necessary to bifurcate the trial to allow the Court to decide irrigation issues before a jury decides the trespass and nuisance claims. *Ada County Highway District v. Total Success*, 145 Idaho 360, indicates no right to a jury trial on an ejectment claim when it was necessary to determine the quiet title portion of the suit before reaching the ejectment issue. The quiet title action was an equitable action for which there was no right to a jury trial. We could have separate bench trials and later a jury trial if necessary on different dates. Makes more sense when witnesses and testimony will be different and it avoids the potential that it might confuse the jury to hear testimony that doesn't relate to anything it will decide. [talking/coughing] Can

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	we mute that? And it would seem that witnesses and testimony pertinent to irrigation rights would differ from trespassing and nuisance claims. For example, Idaho Department of Water Resources witnesses likely won't be in trespass nuisance claim. The Court could decide the primary irrigation right before irrigation season, and I normally expect that's going to be around the first of May, irrigation season.
Madlen	March 31st for my irrigation rights.
Judge	March 31st? Okay. Alright. Or we could have a jury come in and be an advisory jury on disputes of fact pertinent to the declaratory judgment issues. In that instance, the Court may accept or reject the advisory jury's findings but the Court ultimately makes findings on issues pertinent to the irrigation rights. Depending on the Court's findings on the irrigation rights issues, the jury then would be instructed and asked to decide the remaining trespass and nuisance claims. Idaho Rule of Civil Procedure 52, subparagraph (a), subparagraph (1), contemplates advisory juries in civil actions. Jury versus court trial. Legal claims, examples trespass and nuisance, are usually tried to a jury, whereas declaratory and equitable claims are tried to the court. In some instances, the parties may waive or stipulate otherwise, but generally the right of trial by jury exists for claims in law only and not for claims in equity. However, bringing a claim in equity does not automatically strip a defendant's right to a jury trial on issues of fact. Where the fact at issue determines an underlying claim or remedy at law, a jury trial is still required. Conversely, where an issue of fact relates only to a declaration of rights, status or other action sounding in equity, then a bench trial is appropriate. This is pursuant to *Morgan v. New Sweden Irrigation District*, 160 Idaho 47 at page 51, and that is citing the IDAHO CONSTITUTION, ART. I, § 7. The parties get a jury trial on their legal claims for trespass and nuisance. Nuisance claim against an adjacent property owner was for the jury pursuant to *Archer v. Shields Lumber*, 91 Idaho 861. Also, there is no right to a jury trial in a declaratory judgment or quiet title action. And that's *Sallaz v. Rise*, 161 Idaho 223; *Ada County Highway District v. Total Success Investments LLC*, 145 Idaho 360. The parties may want to consider how to address this issue. One option may be to bifurcate these proceedings to have a court trial on the irrigation issues first

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	and then proceed to have a jury decide any remaining legal claims. I would refer you to the *Ada County Highway District v. Total Success Investments LLC* at 145 Idaho 360, where they provide no right to jury trial on ejectment **[END OF AUDIO FILE]**
audio file: ...7230.trm	when it was necessary to determine the quiet title portion of the suit before reaching the ejectment issue. Quiet title action was an equitable action for which there was no right to a jury trial. The Court is open to the parties' suggestions. Mr. Sherer, I know that's a lot to take in, and so Mr. Perry, with regard to the Court's ruling in this case, essentially having denied the motions for summary judgment, denied the request to amend to include the, to assert the statute of limitations defense, I guess the next issue is how we want to try this case given the different claims before the Court. And so.
Sherer	Your Honor, perhaps a prefatory issue is, I heard you talking to the previous people about the March 29 date as very likely being bumped by criminal trials.
Judge	Yeah, and that's gonna be an issue that we need to address here because you know, I don't know if your involvement in criminal cases, but it's not unusual to have the parties bump and right up against trial date before they settle. And so the trial dates may be available. You'd heard my discussions with another party that has a civil trial set that's a day and a half that is also wanting to proceed as quickly as possible. Theirs is an older case than yours. So that's going to be an issue. And I don't know if the parties want to leave it on and then see as we get closer if things resolve. I don't think the civil case that's a head of you will resolve. I think that will, and I think the parties are pretty much indicating this is, we're gonna need a court trial on this. So with regard to this trial setting, if you're bumped, I guess we'll have to find another time to set this for. We can do, as was done in the other civil case, try to find a special set where we can address this, but we need to be able to address the issues of how we want to proceed with the trial given the issues that would be for the court itself versus those issues that would be before a jury. So.
Sherer	I would like a little time to process this.

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Judge	Okay
Sherer	But I guess what I'm thinking of now is we should probably get another date for a court trial on the issue, on the ditch rights, an issue that you talked about, and, again, you know, that may obviate the need for a jury trial.
Judge	Mr. Perry.
Perry	I too would like more time before we finalize, but I agree with that.
Judge	Alright. Let's go ahead and the Court will vacate the trial setting that we currently have. I think it makes sense what's being proposed that we set it for a court trial portion on those issues relating to the ditch itself. Yeah, my Clerk is just indicating it looks like we're still open for the week of April 3rd through the 7th if need be, so that may be something that we can set this for a court trial on the 3rd through the 7th. Keep in mind, if the jury trial, if the criminal trial goes and there's a speedy trial issue, I've got to find a place to put Ms. Hallock and Mr. Milliman's case, and so they may have priority on that April 3rd through the 7th.
Sherer	And that's not a good week for me, your Honor.
Judge	Alright.
Sherer	I've got three things planned for down in the valley that will require my presence.
Judge	Alright. And then we have afternoons available on the 3rd and the 4th and the 6th and the 7th, but what I'll do is I'll give the parties a chance to digest this and then do me a favor: contact my secretary in Caldwell, Rachel. Set a time just for a conference call **[END OF AUDIO FILE]**
audio file: …7580.trm	where we can maybe **[END OF AUDIO FILE]**