

**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,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV01-24-09674

IN THE MATTER OF A.L. CATTLE, INC.'S
WATER RIGHT NOS. 65-1985, 65-3124X,
AND 65-10537

RESPONDENT IDWR'S BRIEF

Judicial Review from the Idaho Department of Water Resources
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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a judicial review proceeding under the Idaho Administrative Procedure Act (“APA”). Petitioner Big Willow Ranch, LLC (“Big Willow”) appeals a final decision by the Director of the Idaho Department of Water Resources (“Department”) denying a petition requesting certain water rights be forfeited. The Director denied Big Willow’s petition because the Legislature has only granted the Director authority to find forfeiture in limited circumstances that did not apply to Big Willow’s request.

B. Statement of the Facts and Procedural Background

On September 5, 2023, Big Willow filed a *Petition for Forfeiture* with the Department requesting the Department declare A.L. Cattle, Inc.’s (“A.L. Cattle”) Water Right Nos. 65-1985, 65-3124X, and 65-10537 (“Water Rights”) forfeited for non-use pursuant to Idaho Code § 42-222(2). R. 80. The Water Rights authorized domestic use and irrigation of sixty-four acres with a total diversion rate of 1.28 cubic feet per second (“cfs”) diverted from Big Willow Creek. *Id.* Big Willow possesses water rights downstream from the Water Rights’ authorized point of diversion. R. 81. Big Willow argued the Water Rights should be forfeited because Big Willow’s manager had not witnessed domestic use since the mid-1980s and had not observed irrigation use since 2015. *Id.*

On February 1, 2024, the Department’s hearing officer issued a *Preliminary Order Denying Petition for Forfeiture* (“*Preliminary Order*”) concluding “the Department does not

have the statutory authority to find A.L. Cattle’s Water Rights forfeited as a result of the Petition.” R. 132.

On February 15, 2024, the Department received *Big Willow’s Exceptions to Preliminary Order Denying Petition for Forfeiture* (“*Exceptions*”) asking the Director “to declare the Water Rights forfeited” pursuant to the Department’s “exclusive authority over the appropriation” of Idaho’s water under Idaho Code § 42-201(7). R. 137. A.L. Cattle did not respond to the *Exceptions*.

On May 9, 2024, the Director issued an *Order on Exceptions; Final Order Denying Petition for Forfeiture* (“*Final Order*”) concluding the Department does not have exclusive jurisdiction to unilaterally issue a forfeiture decision under Idaho Code § 42-201(7). R. 151–55. The Director reasoned the Department may find water rights forfeited under limited circumstances including in a transfer proceeding, during an adjudication, or finding stockwater rights forfeited.¹ R. 155–56. The Director concluded, however, those limited circumstances were not present in this case. *Id.*

On June 6, 2024, Big Willow filed its *Petition for Judicial Review and Declaratory Judgment* (“*Petition*”) with the Ada County District Court. That same day, the *Petition* was subsequently reassigned “to the presiding judge of the Snake River Basin Adjudication [(“SRBA”)] District Court of the Fifth Judicial District.” *Notice of Reassignment SRBA*. The *Petition* was reassigned pursuant to an Idaho Supreme Court Administrative Order dated

¹ Idaho Code § 42-224 permits the Director to find a water right forfeited, but that determination is only prima facie evidence in a subsequent civil action.

December 9, 2009, declaring that all petitions for judicial review made under Idaho Code § 42-1701A of any decisions of the Department must be assigned to the SRBA District Court.

Following the issuance of the Director’s *Final Order*, Big Willow filed a civil action in Gem County District Court. *Pet’r’s Opening Br.*, at 3. On July 22, 2024, the court issued a *Stipulated Judgment* declaring the Water Rights forfeited based on the court’s jurisdiction over the dispute pursuant to Idaho Code §§ 1-705 and 10-1201. *Id.* at Ex. A. (*Big Willow Ranch, LLC v. A.L. Cattle, Inc.*, No. CV23-24-0042).

On September 30, 2024, Big Willow filed *Petitioner’s Opening Brief* requesting this Court determine whether the Department has jurisdiction to issue a forfeiture decision pursuant to its “exclusive authority over the appropriation of the public surface and ground waters of the state’ under Idaho Code § 42-201(7), or otherwise.” *Id.* at 3.

II. ISSUES PRESENTED ON APPEAL

The Department’s formulation of the issues presented is as follows:

1. Whether Idaho Code § 42-201(7) grants the Department authority to issue a forfeiture decision pursuant to its “exclusive authority over the appropriation” of Idaho’s waters.
2. Whether Idaho Code § 42-222(2) grants the Department authority to issue a forfeiture decision.
3. Whether the Department or a district court is the proper venue to issue a forfeiture decision.

III. STANDARD OF REVIEW

Judicial review of the *Final Order* is governed by the APA. I.C. §§ 67-5270–5279. The APA requires judicial review of an agency decision to be based on the record created before the

agency. I.C. § 67-5277. The district court's review “is limited to those issues raised before the administrative tribunal” and those “issues the administrative tribunal lacked the authority to decide.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011) (quoting *Johnson v. Blaine County*, 146 Idaho 916, 920, 204 P.3d 1127, 1131 (2009)).

The court shall affirm the agency decision unless it finds the agency’s findings and conclusions are: “(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.” I.C. § 67-5279(3); *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. The APA requires the court to interpret the meaning and effect of the law at issue de novo. I.C. § 67-5279(5). “In an action brought by or against an agency, after applying all customary tools of interpretation, the court shall exercise any remaining doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty.” *Id.*

IV. ARGUMENT

The issues presented in this case are questions of law; there are no issues of fact. No one, not even A.L. Cattle, is alleging that A.L. Cattle’s Water Rights have *not* been forfeited. The question here is whether the Department has the statutory authority to declare A.L. Cattle’s Water Rights forfeited. The Director’s *Final Order* must be affirmed because the Legislature has

only granted the Director authority to declare water rights forfeited in certain circumstances and those circumstances are not present here. Big Willow disagrees with the Director, arguing that Idaho Code § 42-201(7) gives the Director the *exclusive* authority to declare a water right forfeited, suggesting that even a district court would not have jurisdiction to declare a water right forfeited on its own. Big Willow’s argument is contrary to the plain reading of Idaho Code § 42-201(7). For the reasons that follow, this Court should reject Big Willow’s arguments and affirm the Director’s *Final Order*.

A. Idaho Code § 42-201(7) does not grant the Department exclusive authority over all forfeiture decisions.

Big Willow argues the plain language of Idaho Code § 42-201(7) grants the Department authority to issue a forfeiture decision. *Pet’r’s Opening Br.*, at 4. Determining whether the Department is authorized to issue a forfeiture decision begins with an analysis of the relevant statutes. Statutory interpretation begins with considering the statute as a whole and applying the plain, usual, and ordinary meanings to the words used in the statute. *Estate of Stahl v. Idaho State Tax Comm’n*, 162 Idaho 558, 562, 401 P.3d 136, 140 (2017) (quoting *State v. Shulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011)). In considering the statute as a whole, the “[p]rovisions should not be read in isolation, but must be interpreted in the context of the entire document.” *Id.*

If the plain language of the statute is unambiguous, a court does not need to apply the rules of statutory construction. *Id.* However, if a statute is ambiguous, a court can “look to rules of construction for guidance and consider the reasonableness of proposed interpretations.” *City*

of *Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 582, 416 P.3d 951, 954 (2018) (internal citations omitted). If the statute is considered ambiguous, then a court may review the statute’s legislative history. *Id.* at 583, 416 P.3d at 955. However, a statute is not ambiguous “merely because the parties present differing interpretations to the court.” *Id.* at 582, 416 P.3d at 954. Rather, a statute “is ambiguous where reasonable minds might differ or be uncertain as to its meaning.” *Id.*

i. Idaho Code § 42-201(7) simply grants the Department exclusive authority to issue water right permits and licenses under the statutory method of appropriation.

Big Willow argues that Idaho Code § 42-201(7) grants the Department authority to issue a forfeiture decision. *Pet’r’s Opening Br.*, at 4. Big Willow points to Section 42-201(7)’s statement that the Department has “exclusive authority over the appropriation” of Idaho’s waters and argues this means the Director can issue a forfeiture decision “because forfeiture is inherent to an appropriation of water under Idaho law.” *Id.* Big Willow fundamentally misinterprets Idaho Code § 42-201(7). Idaho Code § 42-201(7) states:

This title 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.

Idaho Code § 42-201(7) is unambiguous, so the plain language of the statute should be applied.

a. Appropriation refers to the process of obtaining a water right.

The key to interpreting Idaho Code § 42-201(7) is the word appropriation. The whole statute may be considered to interpret the plain meaning of appropriation. *Stahl*, 162 Idaho at

562, 401 P.3d at 140. Idaho Code § 42-201(1) provides critical context on how the Legislature defined the term appropriation. It states:

All rights to *divert and use the waters of this state for beneficial purposes* shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title, all the waters of this state shall be controlled and administered in the manner herein provided. *Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title*; provided, however, that in the event an *appropriation has been commenced by diversion and application to beneficial use* prior to the effective date of this act, *it may be perfected under such method of appropriation.*

I.C. § 42-201(1) (emphasis added).

Subsection (1) uses the term appropriation in the context of establishing water rights. First, it recognizes that prior to the enactment of Idaho Code § 42-201(1), a water user could appropriate water under the constitutional method of appropriation by diverting it and applying it to a beneficial use. *Id.* Second, after the enactment of Idaho Code § 42-201(1), a water user could appropriate water under the statutory method of appropriation by filing an application with the Department and following the statutory procedures outlined in Title 42 to obtain a water right permit or license.² *Id.*; *see, e.g.,* I.C. § 42-203A (governing the application procedures for obtaining a water right permit). The meaning of appropriation as used in subsection (1) informs

² Big Willow argues that the Director's reliance on *Joyce Livestock* is misplaced because the Idaho Supreme Court addressed the purpose of enacting Idaho Code § 42-201 in 1971, and not subsection (7) in 2006. *Pet'r's Opening Br.*, at 8 (citing *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007)). Although Big Willow is correct that *Joyce Livestock* addressed Idaho Code § 42-201's enactment generally, the Court's reasoning supported the Director's plain meaning interpretation of appropriation in the *Final Order* when it recognized water rights may only be established by the statutory method of appropriation after the enactment of Idaho Code §§ 42-201 and 42-103. *See Joyce Livestock*, 144 Idaho at 7, 156 P.3d at 508 (acknowledging that new appropriations could not be made under the constitutional method of appropriation but still recognizing those water rights exist); *see also* I.C. § 42-103 (establishing that water rights may only be acquired "by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted").

the use of appropriation in subsection (7). When Idaho Code § 42-201 is viewed in its entirety, it is clear that the Legislature enacted subsection (7) to give the Department exclusive authority over the appropriation process—the process for perfecting a water right—to prevent any other entity from prohibiting, restricting, or regulating the establishment of water rights. That is all.

The dictionary definition of appropriation also supports the conclusion that forfeiture does not qualify as appropriation like Big Willow suggests. *See Pet'r's Opening Br.*, at 5–6. Appropriation is defined as taking possession or control over property typically without permission.³ As mentioned above, after the enactment of Idaho Code § 42-201(1), a water user may only obtain a water right through the statutory method of appropriation. This means a water user must apply for and obtain a water right permit with the Department's permission. I.C. § 42-203A. The water user then possesses the water right permit granted by the Department. *Clear Springs Foods*, 150 Idaho at 814, 252 P.3d at 95 (internal citations omitted) (recognizing that “a water right is real property” but “a water right ‘does not constitute ownership of the water’”).

In addition, Big Willow argues that forfeiture qualifies as appropriation because forfeiture is an absence of beneficial use. *Pet'r's Opening Br.*, at 5–6. This argument ignores the fact that Idaho Code distinguishes between forfeiture and appropriation. Idaho Code § 42-222(2)

³ Defining appropriate as “1. to take exclusive possession of, 2. to set apart for or assign to a particular purpose or use, 3. to take or make use of without authority or right.” *Appropriate*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/appropriate#h2> (last visited Oct. 10, 2024). Defining appropriation as “1. an act or instance of appropriating something, 2. something that has been appropriated.” *Appropriation*, Merriam-Webster <https://www.merriam-webster.com/dictionary/appropriation> (last visited Oct. 10, 2024). Defining appropriation as “[t]he exercise of control over property, esp. without permission; a taking of possession.” *Appropriation*, Black's Law Dictionary (12th ed. 2024).

refers to forfeiture and appropriation as separate processes: “when any right to the use of water shall be lost through nonuse or *forfeiture* such rights to such water shall revert to the state and be again subject to *appropriation* under this chapter.” (emphasis added).

The term “forfeiture” is expressly used in Idaho Code §§ 42-222(2), 42-223, and 42-224, not in Idaho Code § 42-201(7). If the Legislature intended to grant the Department exclusive authority to issue forfeiture decisions under Idaho Code § 42-201(7), the Legislature would have granted that authority using express terms, not by using a vague reference to the term “appropriation” as Big Willow suggests. *See Pet’r’s Opening Br.*, at 9. “It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997) (citing *K. Hefner, Inc. v. Caremark, Inc.*, 128 Idaho 726, 732, 918 P.2d 595, 601 (1996)). In *Hagerman*, the Idaho Supreme Court reasoned that general references to the beneficial use doctrine in Title 42 do not grant the Department authority to find forfeiture. *Id.* Similarly, references to appropriation in Idaho Code § 42-201(7) are general in nature and do not indicate the Department has authority to declare forfeiture which is specifically addressed in Idaho Code § 42-222(2). Therefore, forfeiture does not fit within the plain meaning of appropriation in Idaho Code § 42-201(7).

b. The phrase “exclusive authority” in Idaho Code § 42-201(7) refers to the Department’s sole jurisdiction over the appropriation of Idaho’s waters.

Subsection (1) and subsection (7) of Idaho Code § 42-201 work conjunctively to grant the Department authority to control the appropriation of Idaho’s water resources. Subsection (1)

states: “all the waters of this state shall be controlled and administered in the manner herein provided.” I.C. § 42-201(1). And subsection (7) states: “This title delegates to the [Department] exclusive authority over the appropriation . . .” of Idaho’s waters. I.C. § 42-201(7). Title 42 is the statutory scheme “by which the Legislature set out to effectuate [the beneficial use doctrine] and other constitutional principles regarding the use and administration of water in the state.”

Hagerman, 130 Idaho at 743, 947 P.2d at 416. The conjunctive nature of subsections (1) and (7) ensures that no other state instrumentality (e.g., agencies, departments, counties, cities, or any other political subdivision) interferes with the express authority granted to the Department over the appropriation of Idaho’s waters within the provisions of Title 42. Therefore, the use of “exclusive authority” in subsection (7) effectuates the Department’s authority to control the establishment of a water right in accordance with Title 42.

c. The power to “prohibit, restrict or regulate” does not include forfeiture.

Big Willow argues that a forfeiture determination would fall under the Department’s authority to “prohibit, restrict or regulate” the appropriation of water. *Pet’r’s Opening Br.*, at 4–5. The plain meaning of “prohibit, restrict or regulate” as used in subsection (7) does not include issuing a forfeiture determination like Big Willow suggests. “Restrict” is defined as confining, restraining, or limiting the use or enjoyment of property.⁴ “Prohibit” is defined as “[t]o forbid by law” or “[t]o prevent, preclude, or severely hinder.” *Prohibit*, Black’s Law Dictionary (12th ed.

⁴ Defining “restrict” as “1. to confine within bounds: restrain, 2. to place under restrictions as to use or distribution.” *Restrict*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/restrict> (last visited Oct. 10, 2024). Defining “restriction” as “a: a regulation that restricts or restrain, b: a limitation on the use or enjoyment of property.” *Restriction*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/restriction> (last visited Oct. 10, 2024).

2024). “Regulate” is defined as “[t]o control (an activity or process) esp. through the implementation of rules.” *Regulate*, Black’s Law Dictionary (12th ed. 2024). Forfeiture is defined as:

1. The divestiture of property without compensation.
2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.
 - Title is instantaneously transferred to another, such as the government, a corporation, or a private person. . . .
5. A judicial proceeding, the object of which is to effect a confiscation or divestiture.

Forfeiture, Black’s Law Dictionary (12th ed. 2024).

The definitions of “prohibit, restrict or regulate” do not align with the definition of forfeiture. Although restrict is the most akin to forfeiture, the two meanings are still different because restrict does not divest a right or a privilege while forfeiture divests a right or privilege and reverts the right or privilege back to the government. Due to the differing meanings of “prohibit, restrict or regulate” and forfeiture, the Legislature likely would have expressly included forfeiture in the enumerated actions listed in subsection (7) if it intended to grant the Department authority to issue a forfeiture determination under that statute.

Therefore, the plain meaning of Idaho Code § 42-201(7) unambiguously grants the Department exclusive jurisdiction to implement the statutory method of appropriation of Idaho’s waters instead of involving other state instrumentalities in the process and does not grant the Department authority to issue a forfeiture determination.

ii. *Idaho Code § 42-201(7)'s legislative history does not imply the Department has authority to issue a forfeiture decision under that statute.*

Because the language of Idaho Code § 42-201(7) is clear, the Court does not need to look beyond the plain language. However, if this Court finds Idaho Code § 42-201(7) to be ambiguous, the legislative history also supports the Department's interpretation that subsection (7) does not authorize the Department to find forfeiture.

a. *The Statement of Purpose includes the intent to ensure the Department manages the appropriation of Idaho's water resources.*

In 2006, the Legislature amended Idaho Code § 42-201 to add subsection (4) which is now codified at subsection (7).⁵ The Statement of Purpose for adding that subsection states:

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. This delegation of authority preempts other agencies and political subdivisions from regulating the appropriation of the public waters of the State. This 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. The legislation will not affect the right of an agency or political subdivision to file a protest in a water right proceeding. It will have no impact on the zoning authority or other powers inherent in political subdivisions. There would also be no impact on private contracts, covenants, or restrictions.

Statement of Purpose, S.B. 1353, 58th Leg., 2d Reg. Sess. (Idaho 2006).

First, the Statement of Purpose limits the Department's comprehensive authority under Title 42 as it pertains to the appropriation of Idaho's water and does not reference the authority

⁵ For the purposes of this Brief, the Department will refer to subsection (7) to maintain consistency with the current statute.

to determine forfeiture under Idaho Code § 42-222(2) as Big Willow suggests.⁶ See *Pet'r's Opening Br.*, at 7. Although Idaho Code § 42-222(2) falls within the comprehensive statutory scheme of Title 42, the Statement of Purpose does not reflect or expressly authorize the Department to declare forfeiture under Idaho Code § 42-201(7). Instead, the Statement of Purpose limits the Department's comprehensive authority under Title 42 to the appropriation of Idaho's waters. An example of an express delegation of power related to the appropriation of water is the Department's authority to issue water right permits.⁷ See I.C. § 42-203A.

The Statement of Purpose also indicates that other state instrumentalities are preempted from taking “any action which impinges upon the [Department's] exclusive jurisdiction over the appropriation” of Idaho's waters. Big Willow interprets the preemption to mean that only the Department is authorized to declare forfeiture since forfeiture is addressed in Title 42. *Pet'r's Opening Br.*, at 7. However, the preemption ensures the Department is the only agency authorized to manage the appropriation of Idaho's waters—i.e., issuing water right permits in accordance with the statutory method of appropriation. See I.C. § 42-203A. The preemption does not infer that the Department is the only authority to render forfeiture decisions.

⁶ Big Willow notes the Director misquoted the Statement of Purpose by failing to include the Title 42 part. *Pet'r's Opening Br.*, at 7 n.2. The *Final Order* omitted Title 42 from the quote because the Statement of Purpose reflects the enactment of subsection (7) and the purpose it serves to grant the Department authority over the appropriation of water. Similarly, the *Final Order* also omitted the last three sentences because it did not directly relate to, or conflict with, the Director's assertion in the *Final Order*.

⁷ Big Willow suggests that because the Water Rights are within a water district, the Department is required to determine which water rights are valid or invalid when controlling the distribution of water during priority administration. *Pet'r's Opening Br.*, at 7 n.3. However, nothing in Idaho Code § 42-602 states the Department is required to determine forfeiture when distributing water within water districts for purposes of priority administration. Moreover, the Department's authority over priority administration is a separate process from the Department's authority over the appropriation of water.

b. The testimony provided to the Senate Resources and Environment Committee reflects Idaho Code § 42-201(7)'s purpose of authorizing the Department to issue water right permits and licenses.

Big Willow questions why the *Final Order* paraphrased the testimony provided to the Senate Resources and Environment Committee when subsection (7) was enacted. *Pet'r's Opening Br.*, at 8. The testimony provided states, in full:

Mr. Semanko presented this bill also. He said it provides for the exclusive authority of the Department of Water Resources (IDWR) over the appropriation of the waters of the State. It also clarifies that no other agency or political subdivision will take any action which impinges upon the IDWR's exclusive jurisdiction. He said in 1903, the Legislature provided in a statute that if you wanted to create a new water right in Idaho, you would go to IDWR and obtain a permit. It didn't become mandatory for ground water until 1963. One of the challenges that came out was whether the Constitutional provision would dictate that the state can't regulate that. The Supreme Court in Idaho said that you can regulate it as a state and that is what the IDWR does. In some cases, there is confusion about jurisdiction. IDWR is responsible for water resources in the state, counties and cities are responsible for zoning, and DEQ is responsible for air quality.

Hearing on S.B. 1353 Before the S. Comm. on Res. & Env't, 58th Leg., 2d Reg. Sess. (Idaho 2006) (statement of Norm Semanko, Exec. Dir., Idaho Water Users Ass'n, Inc.). The *Final Order* paraphrased the testimony because the testimony and the Statement of Purpose reflect the same sentiment and confirm the Department's sole authority to manage the appropriation of Idaho's water resources. Ultimately, if multiple state instrumentalities were engaged in the appropriation process, it would be nearly impossible to determine where users get their water from, how much water they get, and when they get their water. The testimony reflects that enacting subsection (7) allocated water management authority to one agency to ensure water

users could obtain water right permits from the Department so long as they met the statutory method of appropriation requirements.

Therefore, the plain meaning and the legislative history of Idaho Code § 42-201(7) supports the Department's authority over the appropriation of Idaho's waters and does not authorize the Department to issue a forfeiture decision.

B. The Department may find forfeiture in limited circumstances, including in a transfer proceeding, forfeiting stockwater rights, or a water rights adjudication.

Idaho courts generally disfavor findings of forfeiture of water rights. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2002). Idaho Code §§ 42-222(2), 42-223,⁸ and 42-224 are the only sections of Title 42 that expressly reference forfeiture. The Legislature authorized the Director to find forfeiture under limited circumstances, such as during a transfer proceeding, finding stockwater rights forfeited, or during a water rights adjudication.

First, the Department may find forfeiture under Idaho Code § 42-222(2) when conducting an injury analysis during a transfer proceeding. *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). Idaho Code § 42-222(2) states:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho

⁸ Idaho Code § 42-223 discusses the exceptions or defenses to forfeiture which are not at issue here.

Code. The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.

The Department may only pursue actions authorized by the Legislature. *In re Idaho Workers Compensation Bd.*, 167 Idaho 13, 20, 467 P.3d 377, 384 (2020). The Director is expressly authorized to approve or deny a transfer application “to change the point of diversion, place of use, period of use or nature of use” of a water right. I.C. § 42-222(1). In a transfer proceeding, the Director must consider whether a water right has been forfeited for non-use when conducting its injury or enlargement analysis. *Jenkins*, 103 Idaho at 387, 647 P.2d at 1259. If a water right is forfeited and the water becomes available for further appropriation by another user, the Department’s injury analysis ensures a subsequent appropriator will not be injured by the resumption of use of a forfeited water right. *Id.* at 388, 647 P.2d at 1260. Therefore, the Department’s authority to find forfeiture in a transfer proceeding does not give the Department authority to find water rights forfeited in this case.

Second, Idaho Code § 42-224 expressly authorizes the Director to find stockwater rights forfeited pursuant to Idaho Code § 42-222(2), but only in two situations. The first situation is when a stockwater right holder fails to timely respond to a show-cause order the Director issued in response to a petition alleging the stockwater right had been forfeited. I.C. § 42-224(7). The second situation is when the stockwater right holder responds to the show-cause order, but the Director determines, based on evidence and argument presented at hearing, that the stockwater right has been forfeited. I.C. § 42-224(8). And even in these situations, the Director’s order does not mean that the stockwater rights are forfeited. The Legislature stipulated that any forfeiture

order the Director issues pursuant to subsections (7) and (8) “shall have no legal effect” other than constituting prima facie evidence of forfeiture in the subsequent civil action before this Court. I.C. § 42-224(9)–(12). Only this Court has the authority to make a legally effective determination that the stockwater right has been forfeited. *Id.* Ultimately, this statute further exemplifies that the Legislature has limited the Department’s role in determining when a water right is forfeited.

Third, Idaho Code § 42-1401B(1) authorizes the Director to recommend forfeiture in the adjudication process under the Department’s role as an “independent and technical expert to the court” if the Department finds evidence of non-use of a water right meeting the statutory forfeiture requirements set forth in Idaho Code § 42-222(2).

Therefore, the limited circumstances described above are examples in which the Department may find or recommend forfeiture, but Idaho Code § 42-222(2) does not unilaterally authorize the Department to issue a forfeiture decision.

C. District courts are the proper venue to issue a forfeiture decision because the Department lacks express authority to determine forfeiture.

Big Willow claims district courts are split as to the appropriate venue to issue forfeiture decisions. *Pet’r’s Opening Br.*, at 10. However, the following examples indicate that district courts are the proper venue to determine forfeiture and not the Department.

First, in 2014, the Idaho Supreme Court decided a case that involved the forfeiture of a water right. *Barnes v. Jackson*, 163 Idaho 194, 196, 408 P.3d 1266, 1268 (2018). The plaintiff, Barnes, filed a suit against Jackson in district court “seeking a declaration of forfeiture as to

Jackson’s water right.” *Id.* The Court held that “the district court did not err when it ruled that Jackson’s right was not forfeited” because Barnes filed the complaint too early before the claim of right for five years of non-use could be asserted. *Id.* at 199, 408 P.3d at 1271. This holding infers the district court’s authority to issue a forfeiture decision despite Barnes failing to meet the requisite burden of proof and filing the complaint too early.

Second, Big Willow attached the *Stipulated Judgment* obtained from the Gem County District Court which concluded the court had jurisdiction to determine the Water Rights forfeited. *Pet’r’s Opening Br. Ex. A*, at 1. In addition, the judgment indicated “[t]hat this action constitutes the initiation of proceedings to declare forfeiture under Idaho Code § 42-223(12).”⁹ *Id.* at 2.

Third, Big Willow attached a declaration that includes a transcript of an oral order denying a motion for summary judgment. *Pet’r’s Opening Br. Ex. B (Henderson v. Madlen, No. CV-02-000003 (Adams County Dist. Ct. Idaho Feb. 24, 2023))*. There, the court concluded it is a state instrumentality and it should not issue a forfeiture decision because the Department has authority to decide water use under Idaho Code § 42-201(7). *Id.* at 8. However, the court also stated that “issues of abandonment or forfeiture are disputed questions of fact” and questions

⁹ Idaho Code § 42-223(12)(a) states: No portion of any water right shall be lost or forfeited for nonuse if, after the five (5) year period of nonuse, use of the water is resumed prior to a claim of right by a third party. A third party has made a claim of right if the party has: (a) Instituted proceedings to declare a forfeiture;” Although this provision is unclear whether the proceedings should be brought before the district court or the Department, the legislative history indicates this provision codifies the standards in *Sagewillow* and *Barnes*. Statement of Purpose. H.B. 615, 65th Leg., 2d Reg. Sess. (Idaho 2020); compare *Sagewillow*, 138 Idaho at 836, 70 P.3d at 674 (finding forfeiture in a transfer proceeding before the Department prior to a petition for judicial review being filed with the district court), with *Barnes*, 163 Idaho at 196, 408 P.3d at 1268 (filing a civil action in district court to declare another water right forfeited).

regarding “use, beneficial use, prior use . . . are all triable and better adjudicated via a full trial.” *Id.* at 8, 10. Ultimately, the court did not decide whether the court was the appropriate venue to determine forfeiture because the main issue in the case was a trespass issue. *Id.* at 9.

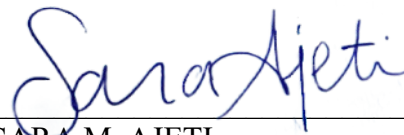
Therefore, although only the *Stipulated Judgment* expressly stated the district court was the appropriate venue to determine forfeiture, the other two examples infer that the district court is the appropriate venue to issue forfeiture determinations and not the Department.

V. CONCLUSION

The question of whether the Department has the general authority to declare a water right forfeited is a question that frequently arises. The Department’s historic position has been the same as presented in this case: that the Legislature has authorized the Department to find a water right forfeited only in limited circumstances. The Department believes the questions presented here are important questions for the Court to answer. For the reasons explained above, the Department requests that the Court affirm the Director’s *Order on Exceptions; Final Order Denying Petition for Forfeiture*.

DATED this 28th day of October 2024.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



SARA M. AJETI
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October 2024, I caused to be served a true and correct copy of the foregoing, via iCourt E-file and Serve, upon the following:

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