

DEC 05 2024

TRENT TRIPPLE, Clerk  
By ERIC ROWELL  
DEPUTY

**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  | ) | Case No. CV01-24-9674      |
|   | ) |                            |
| Petitioner,   | ) | <b>MEMORANDUM DECISION</b> |
|   | ) | <b>AND ORDER</b>           |
| vs.   | ) |                            |
|   | ) |                            |
| THE IDAHO DEPARTMENT OF WATER<br>RESOURCES,   | ) |                            |
|   | ) |                            |
| Respondent.   | ) |                            |
| _____   | ) |                            |
|   | ) |                            |
| IN THE MATTER OF A.L. CATTLE,<br>INC.'S WATER RIGHT NOS. 65-1985,<br>65-3124X, AND 65-10537 | ) |                            |
| _____   | ) |                            |

**I.**

**BACKGROUND**

This matter concerns forfeiture. On September 5, 2023, Big Willow Ranch, LLC filed a petition for forfeiture with the Idaho Department of Water Resources. R., 80. The petition requests the Department declare three water rights held by A.L. Cattle, Inc. forfeited due to non-use under Idaho Code § 42-222(2).<sup>1</sup> R., 80. Two of the water rights at issue divert from Big Willow Creek. R., 5 & 44. The third is a groundwater right. R., 1. Big Willow Ranch owns water rights on Big Willow Creek that divert downstream from A.L. Cattle's surface rights. R., 81. It filed the petition for administrative purposes. Namely, it seeks to have A.L. Cattle, Inc.'s water rights forfeited so its water right(s) move up the administrative ladder of priority.

<sup>1</sup> The water rights at issue are 65-1985, 65-3124X, and 65-10537.

The Department entered a Preliminary Order denying the petition on February 1, 2024. R., 129. The denial is based on the finding that the Department lacks authority to declare a water right forfeited under the circumstances presented. R., 129. The Petitioner filed exceptions with the Director. R., 136. The Director issued his Final Order Denying Petition for Forfeiture on May 9, 2024 (“Final Order”). R., 150.

In the Final Order, the Director determines the Department lacks authority to act upon a petition for forfeiture filed under Idaho Code § 42-222(2). He concludes such a petition must be filed with the district court. R., 156. The Director therefore denies the Petition. R., 156. Big Willow Ranch filed a Petition for Judicial Review and Declaratory Judgment on June 6, 2024 (“Petition”). The Petition asserts the Final Order is contrary to law and requests the Court set it aside. It seeks a declaration that the Department is authorized to determine that a water right has been forfeited pursuant to a petition for forfeiture. The parties submitted briefing on the issues raised on judicial review and a hearing on the Petition was held before the Court on November 21, 2024.

Meanwhile, on January 18, 2024, Big Willow Ranch initiated a judicial forfeiture proceeding with the district court in the third judicial district. The district court entered a Stipulated Judgment declaring the three water rights at issue to be forfeited on July 31, 2024. That said, the parties seek clarity in this proceeding as to whether the Department has jurisdiction over a petition for forfeiture under Idaho Code § 42-222(2).

## II.

### STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency’s findings, inferences, conclusions, or decisions 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). Further, the

petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

### III. ANALYSIS

The issue presented is whether the Department is authorized to determine a petition for forfeiture filed under Idaho Code § 42-222(2). Idaho has had a forfeiture statute since 1903. 1903 Idaho Sess. Law 223, 234. It presently provides as follows:

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

I.C. § 42-222(2). A water right that has been forfeited "reverts to the state and is subject to further appropriation." *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 387-388, 647 P.2d 1256, 1259-1260 (1982).

Forfeiture is disfavored under the law. *Sagewillow, Inc v. Idaho Dept. of Water Resources*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2003). As such, Idaho recognizes the resumption-of-use-doctrine. *Id.* at 842, 70 P.3d at 680. Under that doctrine, "statutory forfeiture is not effective if, after the five-year period of nonuse, use of the water is resumed prior to the claim of right by a third party." *Id.* A third party claim of right occurs if the third party has (1) instituted proceedings to declare a forfeiture, (2) obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, or (3) used the water pursuant to an existing water right. *Id.* In this respect, forfeiture is not self-executing. The fact that a water

right is not used for five years or longer does not automatically mean it has been forfeited under Idaho Code § 42-222(2). To the contrary, use may lawfully resume under the original priority date so long as it is done prior to a claim of right by a third party.

As forfeiture is not self-executing, the law contemplates situations where a forfeiture proceeding must be commenced to declare a water right forfeited so as to remove it from the books for purposes of administration.<sup>2</sup> The question is whether such a proceeding may be pursued administratively or judicially. The Department asserts it cannot act on a petition for forfeiture under Idaho Code § 42-222(2) for two reasons. First, it asserts lacks the statutory authority to entertain a petition for forfeiture. Second, it asserts it lacks the authority to declare a property right forfeited. Each will be addressed in turn.

**A. The Director's determination that the Department lacks statutory authority to determine a petition for forfeiture under Idaho Code § 42-222(2) is set aside.**

The Department is an administrative agency. As a general rule, "administrative agencies are tribunals of limited jurisdiction." *In Re Idaho Workers Compensation Board*, 167 Idaho 13, 20, 467 P.3d 377, 384 (2020). As such, administrative agencies "have no authority outside of what the Legislature specifically grants to them." *Id.*

The forfeiture statute is silent on whether a forfeiture proceeding may be commenced judicially or administratively. However, the Idaho Supreme Court has provided some direction on the issue. In *Jenkins*, the issue of forfeiture was raised in the context of an administrative transfer proceeding before the Department. Keith Jenkins, the individual who commenced the transfer proceeding, argued the Department lacked jurisdiction to address the issue of forfeiture. *Jenkins*, 103 Idaho at 386, 647 P.2d at 1258. The Idaho Supreme Court disagreed, concluding the Department had jurisdiction over the issue.

In reaching its conclusion, the Idaho Supreme Court did not rely upon the forfeiture statute to find jurisdiction. *Id.* Rather, it relied on the transfer statute.<sup>3</sup> *Id.* That statute is found at Idaho Code § 42-222(1). It requires any person who desires to make a change to an element of

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<sup>2</sup> Indeed, Idaho Code §42-222(2)'s language stating that "the party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence" contemplates the initiation of a proceeding wherein forfeiture must be proven.

<sup>3</sup> As well as other cited case law.

his water right to make application to the Department for approval. I.C. § 42-222(1). At the time pertinent to *Jenkins*, the transfer statute provided in part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby and the change does not constitute an enlargement in use of the original right.

*Jenkins*, 103 Idaho at 387, 647 P.2d at 1259; 1980 Idaho Sess. Law 238.

The Idaho Supreme Court recognized the transfer statute authorizes the Director to determine whether a proposed transfer would injure other water rights. As part and parcel of that authority the Court reasoned the Director must necessarily have authority to determine the question of forfeiture in an administrative transfer proceeding:

Based on the foregoing decisions and statute, we conclude that the director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights. While ordinarily abandonment and forfeiture are to be determined in a separate proceeding, it is clear that when a water right is sought to be transferred and protestors allege that it has been abandoned or forfeited, and that to allow resumption of that right would cause some injury, *a determination of abandonment or forfeiture is necessary for the performance of his powers of determining injury* [under the transfer statute].

*Jenkins*, 103 Idaho at 387, 647 P.2d at 1259 (emphasis added). The Court thus found the Department's jurisdiction to make a forfeiture determination in *Jenkins* derived from the authority granted it under the transfer statute. *Id.* The Idaho Supreme Court's decision in *Jenkins* is instructive. It stands for the proposition that the Director's authority to determine forfeiture may be found under the umbrella other statutory authorities granted it.

The Legislature has given the Director the statutory authority to administer and distribute water in accordance with the prior appropriation doctrine:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of

chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

I.C. § 42-602. The Director's authority to administer water rights "is an essential government function." *South Valley Ground Water Dist. v. Idaho Dept. of Water Resources*, \_\_ Idaho \_\_, 548 P.3d 734, 769 (2024).

The water rights at issue in this proceeding are in a water district. As a result, the Director has the authority and mandate to administer and distribute water under those rights in accordance with the prior appropriation doctrine. I.C. § 42-602. Determining whether a water right is forfeited and therefore lost under Idaho Code § 42-222(2) is part and parcel of that authority. This is because water users on a source are divided into senior and junior users in relation to one another. A junior user is entitled to the distribution of water only when his water right is in priority. Idaho Const., Art XV, § 3; I.C. § 42-106. A junior's right is in priority when the water rights of all senior users on the source have been, or are being, satisfied. Courts refer to this administrative tabulation of junior and senior rights as "the ladder of priority." If a senior right has been forfeited, "the priority of the original appropriator is lost . . . and the junior appropriators move up the ladder of priority" for purposes of administration. *Jenkins*, 103 Idaho at 388, 647 P.2d at 1260. That is the case here. Big Willow Ranch seeks to have A.L. Cattle, Inc.'s water rights forfeited and taken off the books so its water right(s) move up the ladder of priority for purposes of administration. Determining forfeiture with respect to A.L. Cattle, Inc.'s water rights is therefore necessary for the performance of the Director's powers to distribute and administer senior and junior water rights on Big Willow Creek. It follows that the Director is authorized to determine a petition for forfeiture under Idaho Code § 42-222(2) as part and parcel of his statutory authority to administer and distribute water in accordance with the prior appropriation doctrine.<sup>4</sup>

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<sup>4</sup> The Court's holding is limited to forfeiture determinations under Idaho Code § 42-222(2). The Legislature has enacted a separate statutory scheme found in Idaho Code § 42-224 for the forfeiture of stockwater rights. This decision does not address forfeiture under Idaho Code § 42-224.

**B. The Director's determination that the Department lacks the authority to declare a property right forfeited is set aside and remanded.**

A water right "is tantamount to a real property right." *In Re SRBA Case No. 39576 No. 37-00864*, 164 Idaho 241, 253, 429 P.3d 129, 141 (2017). On judicial review, the Department asserts it lacks the authority to determine a petition for forfeiture because it cannot declare a property right to be forfeited. The Court finds the Idaho Supreme Court resolved this issue in *Jenkins*.

In *Jenkins*, the Idaho Supreme Court specifically provides the Director has jurisdiction to determine the question of forfeiture in the context of an administrative transfer proceeding. *Jenkins*, 103 Idaho at 387, 647 P.2d at 1259. A water right determined to be forfeited is "lost" and is therefore removed from the books for purposes of administration. I.C. § 42-222(2). It follows the Director has the authority to declare a water right forfeited (i.e., lost) under *Jenkins*.

The Department makes a rather nuanced argument in response to the Court's holding in *Jenkins*. When it addresses the issue of forfeiture in an administrative transfer proceeding it asserts it does not issue an "order of forfeiture." Rather, it issues an "order denying application for transfer" based on the determination the water right at issue has been forfeited. In this sense, it is the Department's position it is not taking a water right, but simply denying a transfer of that right. Stated differently, the Department asserts it is making a forfeiture determination for purposes of the proposed transfer only, but not for any other purpose, including that of water right administration. It then asserts that a determination by it that a water right has been forfeited in the context of a transfer proceeding does not have res judicata effect on subsequent proceedings.

An example is illustrative. Water User A has a water right on Creek River. Water User A has not used water under that water right for more than five years. However, forfeiture is not self-executing, so Water User A's water right is still on the books for purposes of administration. During the period of non-use, Water User B establishes a water right on Creek River. Water User A then resumes use of its water right. In conjunction with the resumption of use, Water User A seeks to transfer the place of use of its water right to a new location. Water User B contests the proposed transfer and raises the issue of forfeiture. Following a full hearing on whether the water right was forfeited, the Director determines Water User A's water right has been forfeited due to nonuse. Further, that injury would result to Water User B's priority should

use occur under the proposed transfer. *See e.g., Jenkins*, 103 Idaho at 388, 647 P.2d 1256, 1260 (stating “priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder”). Therefore, the Director issues an “order denying application for transfer.”

In this illustration, the Department’s position is that its determination of forfeiture does not result in Water User A’s water right be “taken” or “lost” for purposes of administration. Rather, the determination of forfeiture is simply a basis on which to deny the transfer. This reasoning leads to an absurd result. That being the transfer is denied because the water right has been forfeited, but the water right is not removed from the books (i.e., removed from the ladder of priority) for purposes of administration on Creek River. Presumably, the Department must continue to deliver water to Water User A’s water right for purposes of administration despite having found the water right forfeited for purposes of denying the transfer.<sup>5</sup>

This result cannot stand. A water right is either determined to be forfeited under Idaho Code § 42-222(2) or it is not. The Court has directed that “statutory forfeiture is based upon the legislative declaration in I.C. § 42-222(2) that water rights may be lost if they are not applied to a beneficial use for a period of five continuous years.” *Jenkins*, 103 Idaho at 389, 647 P.2d at 1261 Therefore, a water right that has been declared forfeited is lost for all purposes. *Id.* ; I.C. § 42-222(2). The Department may style the caption of its orders how it wishes. However, if the Director makes a determination that a water right has been forfeited due to nonuse under Idaho Code § 42-222(2), that water right is lost no matter how the caption of the Director’s order reads. The Director cannot determine a water right to be forfeited for one purpose but not another.

Furthermore, the Court disagrees with the assertion that a determination by the Department that a water right has been forfeited in the context of a transfer proceeding does not have res judicata effect on subsequent proceedings. The Department relies on the Idaho Supreme Court’s decision in *Sagewillow, Inc v. Idaho Dept. of Water Resources*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2003). The Department misreads *Sagewillow*. The doctrine of res judicata applies to administrative proceedings. *Sagewillow*, 138 Idaho at 844, 70 P.3d at 682. However, the Court in *Sagewillow* carved out an exception to the general rule of res judicata where the issue of forfeiture is not actually raised in a transfer proceeding. It held that “if

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<sup>5</sup> Presumably, this is also true if Water User A sought judicial review of the Director’s determination and the determination was affirmed by the district court on appeal.



forfeiture . . . is not actually raised as an issue in a proceeding to transfer the point of diversion or place of use of a water right, the final order in the transfer proceeding is not res judicata on the issue of whether the water right at issue had been forfeited.” *Id.* at 845, 70 P.3d at 683.

Therefore, the Court’s holding in *Sagewillow* is limited to situations where the issue of forfeiture is not raised. Where it is raised, principles of res judicata apply.

The Idaho Supreme Court has recognized that issues of forfeiture may be determined in a stand-alone proceeding, as is the case here. *Jenkins*, 103 Idaho at 387, 647 P.2d at 1259.

However, it has also recognized that issues of forfeiture, due to their nature, will continue to arise in disputes between water users in conjunction with other proceedings before the Department. That is what happened in *Jenkins* where the issue of forfeiture was raised in the context of an administrative transfer proceeding. The Court can envision situations where forfeiture might be raised in the context of an administrative delivery call proceeding before the Department as a defense to the call (i.e., a junior protesting a call on the basis all or a portion of the senior’s water right(s) have been forfeited). Or, in the context of an administrative application for permit to appropriate water (i.e., where a water user seeks to appropriate water he asserts has reverted to the State as a result of forfeiture).

In each of these scenarios, the Director is authorized to make an Idaho Code § 42-222(2) forfeiture determination as part and parcel of his statutory authority to administer and distribute water in accordance with the prior appropriation doctrine for the reasons stated herein. He need not stay the administrative proceedings before the Department and require the same parties to commence a separate judicial proceeding to determine the issue of forfeiture.<sup>6</sup> For these reasons, the Director’s determination that the Department lacks the authority to declare a property right forfeited is set aside and remanded.

**C. The Court rejects Big Willow Ranch, LLC’s argument that the Department’s jurisdiction over forfeiture issues is exclusive.**

Big Willow Ranch, LLC argues that the Department has exclusive jurisdiction over issues of forfeiture. The Court disagrees. Article V, Section 20 of the Idaho Constitution gives the

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<sup>6</sup> This would be especially problematic where forfeiture is raised in the context of an administrative delivery call proceeding. Delivery call proceedings are “necessarily expedited” to prevent out-of-priority water use. *South Valley Ground Water Dist. v. Idaho Dept. of Water Resources*, \_\_\_ Idaho \_\_\_, 548 P.3d 734, 769 (2024).

District Court original jurisdiction in all cases, both in law and equity. The Idaho Supreme Court recently affirmed a district court judgment addressing issues of forfeiture that originated in the district court. *Barnes v. Jackson*, 163 Idaho 194, 208 P.3d 1266 (2017). The district court therefore shares concurrent jurisdiction with the Department over issues of forfeiture under Idaho Code § 42-222(2).

**IV.**  
**ORDER**

Therefore, **BASED ON THE FOREGOING**, it is ordered the Director's Order on Exceptions; Final Order Denying Petition for Forfeiture dated May 9, 2024, is hereby set aside and remanded for further proceedings as necessary.

Dated 12 / 5 / 24

  
\_\_\_\_\_  
ERIC J. WILDMAN  
District Judge

**CERTIFICATE OF SERVICE**

I certify that on this day I served a copy of the attached to:

Michael P Lawrence  
Taylor J Barton

tjb@givenspursley.com

via Email

Garrick Baxter  
Sara Ajeti  
garrick.baxter@idwr.idaho.gov  
sara.ajeti@idwr.idaho.gov

via Email

Date: 12/5/2024

Trent Tripple  
Clerk of the Court

By Erin Rowell  
Deputy Clerk

