6-27-2017

Barnes v. Jackson Appellant's Brief Dckt. 44894

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHAD BARNES and JANE BARNES,

Plaintiffs/Appellants,

v.

KIRK JACKSON,

Defendant/Respondent.

Supreme Court Docket No. 44894-2017

Bannock County Case No. CV-2014-3466

APPELLANTS' BRIEF

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Bannock;
Honorable David C. Nye, District Judge, Presiding

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Appellants Chad Barnes and Jane Barnes (the "Barneses"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Appellants' Brief.*

I. STATEMENT OF THE CASE.

A. Nature of the Case.

This case is about how legal forfeiture of a water right is analyzed and determined. This area of Idaho law begs for clarification from this Court as there are few cases on the matter and little written material from the Idaho Department of Water Resources ("IDWR") regarding forfeiture of a water right. Given the conclusion of the Snake River Basin Adjudication, the issue of forfeited water rights is going to be raised with increasing frequency and useful guidance from this Court will help lower courts and water users better understand forfeiture, act prudently, and engage in the correct forfeiture analysis.

Here, uncontroverted facts show that an irrigation water right was not used on a portion of its authorized place of use for more than five years (the "Jackson Property," more specifically defined below). The water right owner ("Bloxham", more specifically defined below) instead concentrated water diverted under his water right to irrigate a different portion of his property (the "Barnes Property", also more specifically defined below). After Bloxham declared bankruptcy, the bankruptcy trustee sold the Jackson Property to defendant/respondent, Kirk Jackson ("Jackson") in 2012, while Bloxham—and later, the Barneses—continued irrigating the Barnes Property. From the time Jackson bought the Jackson Property, he claims to have begun gradually re-irrigating parts of the Jackson Property, claiming to use that portion of Bloxham's original water right appurtenant thereto.

The Barneses have instituted this action to declare that the water right appurtenant to the Jackson Property has been forfeited by: (A) nonuse for more than five years, meaning the failure to apply any of the water to beneficial use on the Jackson Property; (B) there are no statutory exceptions that extend that five year forfeiture period; and (C) Bloxham, by irrigating the Barnes Property continuously, made a claim of right that the Barneses may assert on the forfeited water before Jackson resumed any use or, alternatively, this action was instituted before Jackson fully resumed his use of the water right, and there are fact issues surrounding how much of Jackson's water right has been forfeited. The District Court applied a correct analytical framework, but erred in its consideration of "nonuse" and in finding that the Barneses could not assert their predecessor-in-interest's claim of right.

B. Course of Proceedings.

The Barneses instituted this action against Jackson on August 29, 2014, to have the District Court declare that Jackson's water right, Water Right No. 29-14032 ("29-14032"), has been forfeited and, as a result, that Jackson has no right to divert water from Spring Creek. Clerk's Record ("R.") at 7-13. Jackson denied the Barneses' were entitled to any such relief and counterclaimed, alleging the Barneses' water right, Water Right No. 29-14115 ("29-14115"), was forfeited. R. at 22-26. The Barneses denied that 29-14115 was forfeited. R. at 30-31.

On January 15, 2016, the Barneses moved for summary judgment. R. at 55. This was supported by the *Affidavit of Craig V. Bloxham* (the "*Bloxham Affidavit*"). R. at 57-81. Originally, the hearing on this motion was scheduled for February 29, 2016. R. at 95. However, because Jackson changed counsel and the parties were exploring potential settlement options, the

hearing was moved several times, to March 15, 2016, R. at 102; then to April 4, 2016, R. at 105; until finally the April 4th hearing was converted to a status conference, R. at 3. Because settlement negotiations had been unsuccessful, the District Court entered the *Second Order Setting Court Trial* to get the case back on an adverse litigation schedule. R. at 106-11.

After engaging in discovery, the Barneses reset the hearing for their outstanding motion for summary judgment for October 31, 2016. R. at 118. The Barneses also submitted an *Amended Memorandum in Support of Plaintiffs' Motion for Summary Judgment*, R. at 120-38, the *Declaration of Roy Calvin Henderson* (the "*Henderson Declaration*"), R. at 139-41, and the *Affidavit of Robert L. Harris* (the "*First Harris Affidavit*"), R. at 142-236. Jackson objected. R. at 242-56. In support of his objection, Jackson submitted the *Affidavit of Kirk Jackson in Support of Defendant's'* [sic] *Objection to Plaintiff's Motion for Summary Judgment* (the "*First Jackson Affidavit*"), R. at 257-61, and the *Affidavit of Peter M. Wells* (the "*Wells Affidavit*"), R. at 262-317. After the Barneses' reply, R. at 318-46, the District Court heard argument on October 31, 2016. R. at 349.

On November 17, 2016, the District Court issued its *Decision on Motion for Summary Judgment* (the "*SJ Decision*"). R. at 350-362. The *SJ Decision* found that, although uncontroverted evidence showed that Water Right No. 29-10420 ("29-10420")—the parent right from which both 29-14032 and 29-14115 derive—had not used the water on Jackson's property between 2004 and 2011, 29-10420 (owned by Craig and Vern Bloxham, together referred to as "Bloxham") had been used in full on a ***part*** of the authorized place of use (the portion that would become that Barneses' property), which prevented the occurrence of any non-use to precipitate

forfeiture. R. at 355. Further, the *SJ Decision* also found that the Barneses could not assert Bloxham's claim of right to foreclose Jackson's resumption of use of 29-14032 and, since Jackson resumed (some) use of 29-14032 on his property before the Barneses bought their property and the water right appurtenant thereto, the Barneses' claim of right also could not foreclose Jackson's resumption of use. R. at 358. The *SJ Decision* partly denied the Barneses' motion—instead granting summary judgment as to the Barneses' claims in favor of Jackson—but granted the Barneses' motion as to Jackson's counterclaim. R. at 361. The District Court entered a *Judgment* dismissing the Barneses' complaint and Jackson's counterclaim with prejudice. R. at 363-64.

On December 1, 2016, the Barneses filed *Plaintiffs' Motion for Reconsideration.* R. at 365-67. In their supporting memorandum, the Barneses sought to clarify some errors they contend the District Court made in the *SJ Decision.* R. at 368-88. Specifically, the Barneses contended that use or non-use of an agricultural irrigation water right, such as 29-14032 (separately or as a part of the parent right), is determined by its application to beneficial use on the authorized irrigated acres. R. at 371-76; *see also* R. at 376-80 (regarding the interaction of partial forfeiture with the beneficial use of irrigating authorized acres). Further, the Barneses explained why they were allowed to assert the claim of right made by their predecessor-in-interest, Bloxham. R. at 380-84. The Barneses also submitted a second affidavit from their counsel, Robert L. Harris. R. at 389-403. Jackson objected, arguing that 29-14032 could not be forfeited because there was no evidence showing there was enough water during the relevant time period to fully satisfy 29-10420—the common parent right—and that Bloxham (the owner

of 29-10420) cannot be a third party to assert a claim of right against 29-14032. R. at 412-15. Jackson also submitted another affidavit. R. at 417-19. After the Barneses' reply brief, R. at 422-31, the District Court held the hearing on the Barneses' motion for reconsideration on December 22, 2016. R. at 445.

At the hearing on December 22, 2016, Jackson's counsel brought up a decision of the Snake River Basin Adjudication ("SRBA") known as the Monarch Greenback decision. Transcript ("Tr."), p. 88, ll. 11-23. To address this newly introduced persuasive authority, the District Court allowed the parties to submit supplemental briefs after the hearing. Tr., p. 100, l. 13–p. 101, l. 12; R. at 446-47; *see also* R. at 432-440, 441-44, 448-56 (the supplemental briefs).

On January 25, 2017, the District Court issued its *Decision on Motion for Reconsideration* (the "*Reconsideration Decision*"). R. at 457-71. The *Reconsideration Decision* reasserted the same holding as had the *SJ Decision*. R. at 470. Thereafter, the Barneses filed this appeal. R. at 472-79.

C. Statement of Facts.

On March 7, 1990, Bloxham filed a claim of water right with the SRBA. R. at 60, 79-81 (*Bloxham Affidavit*, ¶ 15 and Exhibit 3, respectively). This water right, administratively denoted 29-10420 by IDWR, was decreed by the SRBA in a partial decree dated March 22, 2004. *See Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 29-10420* (available from the IDWR's Website at: http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/36gh01_.PDF).

Bloxham originally used 29-10420 to irrigate three parcels he called the "Penrose Place," the "lower Wilding Place," and "the [upper] Wilding Place," which were all within the decreed

place of use for 29-10420. R. at 58-60. However, Bloxham only irrigated the upper Wilding Place once, at "some point between 1993 and 1996." R. at 60 (*Bloxham Affidavit*, ¶ 14). The upper Wilding Place "has not been irrigated with Spring Creek water [*i.e.*, with 29-10420] since the mid-1990s" and specifically not "between 2004 and 2012," while Bloxham owned the property. R. at 60 (*Bloxham Affidavit*, ¶¶ 15-16). This is significant because the upper Wilding Place was sold to Jackson on April 26, 2012 (and is referred to herein as the "Jackson Property"). R. at 60 (*Bloxham Affidavit*, ¶ 16), 216-17.

In contrast, Bloxham created an irrigation system for the Penrose Place and the lower Wilding Place. R. at 58-60. Bloxham actively used 29-10420 to irrigate these parcels through 2014. R. at 61 (*Bloxham Affidavit*, ¶ 20). On January 31, 2014, Bloxham sold these parcels to the Barneses (and they are referred to herein as the "Barnes Property"). These properties and the shape files for the appurtenant water rights are depicted in Addendum A, attached hereto.

Craig Bloxham filed Bankruptcy on October 12, 2005. R. at 271 (*Wells Affidavit*, Ex. 2). There was some confusion surrounding Bloxham's interest (and thus, the interest of the bankruptcy estate) in the Jackson Property and other property. *See* R. at 271-72 (*Wells Affidavit*, Ex. 2, ¶ 3). Ultimately, the bankruptcy trustee sold the Jackson Property to Jackson on April 26, 2012. R. at 216-17; *see also* R. at 206 (Jackson's response to request for admission number 1, providing that "Craig Bloxham is not [Jackson's] immediate predecessor-in-interest on his property, the Federal Bankruptcy Court is").

It is completely uncontroverted that neither Bloxham nor the bankruptcy trustee irrigated the Jackson Property at any time between 2004 (when 29-10420 was decreed) and 2011. R. at

60 (*Bloxham Affidavit*, ¶ 16). When the Jackson Property was sold to Jackson, Bloxham was still using 29-10420 to irrigate the remainder of his property—including the Barnes Property. R. at 61 (*Bloxham Affidavit*, ¶ 20). In contrast, Jackson's claimed irrigation of the Jackson Property was extremely limited.[1] Jackson filed a change of ownership notice[2] with the IDWR on May 31, 2012, which split 29-14032 off from 29-10420. R. at 213.

From July through September 2012, Jackson asserts he irrigated a grove of saplings using a 500 gallon tank four or five times per week for a period of ten to twelve weeks. R. at 132 (citing R. at 193, 167 (*First Harris Affidavit*, Ex. C, p. 6; *id.*, Ex. A)). This means that, at most, Jackson used 30,000 gallons (or 0.092 acre feet) of water during 2012. R. at 132 (citing R. at 228 (*First Harris Affidavit*, Ex. G, p. 5)).

The next year, from April through July 2013, Jackson claims to have used 29-14032 to irrigate ten acres of the Jackson Property. R. at 132 (citing R. at 194 (*First Harris Affidavit*, Ex.

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1 Jackson has made many claims regarding irrigation occurring on the Jackson Property. The Barneses have submitted evidence from Bloxham (who, previous to Jackson, owned the Jackson Property and water right appurtenant thereto) and Roy Calvin Henderson (a neighbor to the Jackson Property who has lived there for over 30 years) demonstrating that the Jackson Property has not been irrigated between 2004 and 2012. R. at 57-62 (*Affidavit of Craig V. Bloxham*), 139-40 (*Declaration of Roy Calvin Henderson*). These issues present conflicting issues of fact that, for purposes of summary judgment, must be resolved in Jackson's favor. However, one question raised in this appeal is whether the facts (assumed in Jackson's favor) are material to preventing the forfeiture of 29-14032.

2 A processed change of ownership submission to IDWR simply updates IDWR's water right records and is not evidence that the water right is valid. The *Notice of Change in Water Right Ownership* form requires a copy of the conveyance document to be submitted with it, and ownership is updated accordingly. A copy of this form is *available at* http://www.idwr.idaho.gov/files/forms/notice-of-change-of-water-right-ownership.pdf. A processed *Notice of Change in Water Right Ownership* does not mean the water right subject to the ownership change is valid. In fact, the correspondence accompanying the processed *Notice of Change in Water Right Ownership* makes it clear that "[u]pdating the ownership record for a water right does not reconfirm the validity of the right. When processing an ownership change notice, the department does not review the history of water use to determine if the right has been deliberately abandoned or forfeited through five years or more of non-use." *See, e.g.*, letter regarding change of ownership for Water Right No. 25-7060, *available at* http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/n0j201_.PDF.

C, p. 7)). Further, to the extent any irrigation occurred in 2011, there appears to be some overlap between these ten acres and those irrigated acres. R. at 132 (citing R. at 168, 181-82 (*First Harris Affidavit*, Ex. A, pp. 55, 36, 35)).

As to 2014, Jackson has only provided information that he began irrigating the Jackson Property in September 2014. R. at 133 (citing R. at 194 (*First Harris Affidavit*, Ex. C)). The Barneses filed this case on August 29, 2014. R. at 7. Thus, any irrigation (or other events) that occurred in 2014 or thereafter are irrelevant to this appeal.

II. ISSUES PRESENTED ON APPEAL.

A. Did the District Court apply an erroneous analysis to the question of forfeiture and partial forfeiture of a water right?

B. Did the District Court err in determining that the application of a water right to beneficial use had no bearing on the use or non-use of a water right?

C. What is "beneficial use" in the context of a water right forfeiture analysis?

D. Did the District Court err in holding that no portion of an agricultural irrigation water right can be forfeited when the water user applies all available water on only a portion of the authorized acres?

E. While "water must be available to satisfy the water right" in order for a water right to be forfeited, does this require the actual availability of all the allowed diversion rate described in the water right or is it the legal entitlement to use a portion of water that is available?

F. Did the District Court err in determining that a water user who has forfeited a portion of his water right on certain property cannot, after being alienated from the property, assert a claim of right effective to foreclose any effort to resume use of the water right on the property?

G. In the event of a partial forfeiture, are only the authorized irrigated acres under the water right reduced, or is a pro-rated portion of the diversion rate authorized under the water right also reduced?

H. Just as partial forfeiture exists under Idaho law, if a water user only partially resumes use of a water right before a claim of right is asserted, is the water user entitled to the full water right or only that portion he has resumed use of?

I. Did the Court err in granting summary judgment on behalf of Kirk Jackson and dismissing the Barneses' claim?

III. STANDARD OF REVIEW.

When reviewing a summary judgment decision, this Court has explained that it "employs the same standard used below." *Wyman v. Eck*, 161 Idaho 723, ____, 390 P.3d 449, 451 (2017) (citing *J-U-B Eng'rs, Inc. v. Sec. Ins. Co. of Hartford*, 146 Idaho 311, 314-15, 193 P.3d 858, 861-62 (2008)). "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." Idaho R. Civ. P. 56(a). In analyzing summary judgment, "[t]his Court liberally construes all disputed facts in favor of the non-moving party and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion." *Wyman*, 161 Idaho at ____, 390 P.3d at 451 (quoting *J-U-B*, 146 Idaho at 314, 193 P.3d at 861)). However,

when—as here—"an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

In order to survive summary judgment, the non-moving party must submit more than just conclusory assertions in response to a motion for summary judgment. In other words, "[a] mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact." *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). "Instead, the nonmoving party must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009) (citation omitted).

IV. ARGUMENT.

Water right forfeitures are generally disfavored under Idaho law, and thus, "[t]he party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by clear and convincing evidence." *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2003) (citing *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944)). A three-step analysis is required to determine whether a water right has been forfeited: (A) whether there has been five years of non-use of the water right, Idaho Code § 42-222(2); (B) whether a statutory exception applies to prevent the forfeiture, Idaho Code § 42-223; and (C) whether use of the water right was resumed before a

third party asserted a claim of right to the forfeited water, *Sagewillow*, 138 Idaho at 836, 70 P.3d at 674 (quoting *Carrington v. Crandall*, 65 Idaho 525, 531–32, 147 P.2d 1009, 1011 (1944)). This forfeiture analysis applies identically to both complete forfeiture and partial forfeiture. *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680.

This case presents a relatively straightforward forfeiture case, but for the factual complication created by Bloxham's bankruptcy. While Bloxham's bankruptcy does not affect the forfeiture analysis or provide a statutory defense (*see* Section IV.B.1., *infra*), it does splinter a partial forfeiture of 29-10420 (*i.e.*, a forfeiture of the portion of the water right originally appurtenant to the Jackson Property) into what is now a complete forfeiture of 29-14032 (*i.e.*, the water right now appurtenant to the Jackson Property, descending from an administrative split of 29-10420). Here, there is no evidence demonstrating that any portion of the water right appurtenant to the Jackson Property[3] was used to irrigate the Jackson Property between 2004 and 2011. It was only in 2012 after purchasing the Jackson Property that Jackson alleged he resumed irrigation (an alleged fact that is disputed). However, neither of the two circumstances claimed by Jackson provide any basis for applying a statutory exception or defense. And after Jackson bought the Jackson Property, Bloxham was a third party who, by using the forfeited water, made a claim of right against the water not used on the Jackson Property. In any event, this action, filed on August 29, 2014, constitutes a *per se* claim of right, preventing any resumption of the

[3] For ease of reference, "29-14032" is generally used throughout this brief to refer to the water right appurtenant to the Jackson Property, both before Jackson owned the Jackson Property (when the parent right, 29-10420, encompassed the Jackson Property) and after Jackson purchased the Jackson Property and filed a change of ownership for that portion of 29-10420 that was then administratively assigned the identifying number 29-14032.

use of 29-14032 after that date.

This Court has correctly stated that issues of water law "are extraordinarily complex" and "there are no easy answers." *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). Forfeiture is certainly among "those principles [that] are more easily stated than applied." *Id.* Any forfeiture decision is "highly fact driven and [will] sometimes have unintended or unfortunate consequences." *Id.* Here, the District Court understood the general framework of the forfeiture analysis, but erred while engaging in that analysis. As a result, the District Court must be reversed.

A. Jackson's water right, 29-14032, has been forfeited because it has not been applied to the beneficial use for which it was appropriated for at least five consecutive years.

Under Idaho law:

> 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.

Idaho Code § 42-222(2) (emphasis added). Here, the District Court focused on the less precise question of "use" or "nonuse" rather than the application of the water right to the beneficial use for which it was appropriated. R. at 355-357. This led the District Court to erroneously conclude that the mere diversion of the full rate allowed by the water right by Bloxham—irrespective of consideration of the water's end beneficial use (or lack of beneficial use)—was sufficient to preserve all of the water right from forfeiture. R. at 357. However, the District

Court's focus on the amount of water diverted pursuant to 29-10420, rather than the application of that water to beneficial use on the Jackson Property, was erroneous.

1. Non-use of a water right means the failure apply the water to the beneficial use for which it is appropriated.

In its *SJ Decision*, the District Court held that "[f]orfeiture of a water right relates to the water right's non-use, not the extent of the right's use, or non-use, within the property that the water right is attached to. In essence, forfeiture occurs when the owner does not use his full water right." (R. at 355 (footnote citation omitted)). The District Court's holding flies in the face of the statutory text of § 42-222(2) and the principle of partial forfeiture.

The purpose of a water right is to put water diverted under the water right to an actual beneficial use. IDAHO CONST., Art. XV, § 3. Thus, "[t]he appropriation [of water] must be for some useful or beneficial purpose, and **when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.**" Idaho Code § 42-104 (emphasis added). Consequently, a water right is "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." Idaho Code § 42-222(2). Although these statutes do not explicitly provide for partial forfeiture, this Court has unequivocally held "that partial forfeiture is provided for by [Idaho Code] § 42-222(2)." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). Allowing unused water rights to perish after five years of nonuse and then be beneficially used by another is an affirmation of the "traditional policy of the state of Idaho, requiring the water resources of this

state to be devoted to beneficial use in reasonable amounts through appropriation." Idaho Code § 42-226.

"Beneficial use is enmeshed in the nature of a water right," *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 113, 157 P.3d 600, 607 (2007), and is "the basis, the measure and the limit" of a water right, *Id.* at 111, 157 P.3d at 605. "In Idaho it is 'a well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law.'" *Pioneer*, 144 Idaho at 110, 157 P.3d at 604 (quoting *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 60, 231 P. 418, 422 (1924)). Any appropriator of water "**must apply the water to a beneficial use** in order to have a valid water right in Idaho." *Pioneer*, 144 Idaho at 110, 157 P.3d at 604 (emphasis added). In *Pioneer*, the Idaho Supreme Court made clear that it was the application of water to a beneficial use (the irrigation of acres) that creates a valid water right for the irrigator, and that the entity that is merely "diverting, storing, and distributing the water" does not have a water right because it is not applying water to beneficial use. *See Pioneer*, 144 Idaho at 111, 157 P.3d at 605. In other words, it is the application to beneficial use—not merely the diversion of water, as the District Court found significant—that sustains a valid water right. *See id.*

For that reason, beneficial use is also enmeshed in the forfeiture analysis. The "doctrine of forfeiture is predicated upon a statutory declaration that all **rights to use water may be lost where an appropriator fails to make beneficial use of the water for a statutory period** regardless of the intent of the appropriator." *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976) (citations omitted, emphasis added). This principle also applies to partial forfeiture.

See Hagerman Water Right Owners, 130 Idaho at 735, 947 P.2d at 408. Thus, partial forfeiture of a water occurs "if **beneficial use** is reduced for the statutory period." R. at 396 (part of an "Administrator's Memorandum," dated March 5, 2012, from IDWR Director relating to forfeiture) (emphasis added).

Because of the failure to put water diverted pursuant to a water right to the decreed beneficial use, the District Court's focus on the diversion of water only and its corresponding disregard for beneficial use of the water conflated the forfeiture analysis. This Court has explained that "[i]f a water user cannot apply a portion of a water right to beneficial use during any part of the statutory period, ... a [partial] forfeiture has taken place." *Hagerman*, 130 Idaho at 735, 947 P.2d at 408. In contrast, the District Court concluded that because "Bloxham never indicated any instance where he did not use his full amount, or in the least, the full amount available to him" he "did not forfeit any of his water right and the five year statutory period was never satisfied." R. at 355-357. On reconsideration, the District Court explained that "because the [District] Court found that the statutory five year period had not run, a more in depth analysis of beneficial use under §42-222 [sic] was unnecessary." R. at 459. The District Court applied an erroneous analysis. Water rights are "forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated." Idaho Code § 42-222(2). There is no way to properly analyze forfeiture under § 42-222 without an in depth analysis of the beneficial use (or non-use) of the water diverted under the water right in question.

2. The measure of beneficial use of an agricultural irrigation water right is the acres irrigated thereby and the non-application of 29-14032 (then a portion of 29-10420) to

irrigate the Jackson Property for more than five years satisfies the first prong of the water right forfeiture analysis.

"The right to appropriate water is for 'beneficial uses.'" *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (2011) (quoting IDAHO CONST., Art XV, § 3). Irrigation is one such beneficial use. *See, e.g., Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 271, 346 P.3d 286, 288 (2015) (considering the "beneficial use of irrigation"). The measure of beneficial use for an agricultural irrigation water right—such as 29-10420,[4] 29-14032, and 29-14115—is the number of acres irrigated thereby. Said differently, the only beneficial use for an agricultural irrigation right is to irrigate the authorized acres; other elements of an irrigation water right—specifically the volume of water and the diversion rate—are derived from the number of irrigated acres. Idaho Code § 42-220; *see also* Idaho Code § 42-202(6).

The volume of water that may be diverted by an agricultural irrigation water right depends on the number of acres to be irrigated. No water user is ever "entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed." Idaho Code § 42-220. "[U]nless it can be shown to the satisfaction of [IDWR] in granting such license, and to the [SRBA] court in making such decree, that a greater amount is necessary," *id.*, the maximum volume of water that may be used for agricultural irrigation has been specified by the IDWR. *See* R. at 226. Thus, in the area in which 29-14032 (near Downey,

[4] For the sake of completeness, 29-10420 also includes a beneficial use for stockwater. R. at 278. However, while under the "PURPOSE AND PERIOD OF USE" heading, 2.24 cfs is for irrigation and 0.03 cfs is for stockwater, the overall "QUANTITY" of 29-10420 is limited to 2.24 cfs and "the quantity of water under this right for stockwater use shall not exceed 13,000 gallons per day." R. at 278. This 13,000 gallon per day (approximately 0.03 cfs) is in keeping with the so-called "domestic exemption", which includes stockwater for livestock. *See* Idaho Code § 42-111(1)(a). Because the stockwater domestic use of 29-10420 has no bearing on the analysis, it will not be discussed further.

Idaho), the amount of water an irrigation right is entitled to is 3.5 acre feet per year per acre (of which 2.5 acre feet per year per acre is the consumptive irrigation requirement). R. at 226. This volume is reflected in the text of 29-14032. *See* R. at 232 (specifying that the "Generic Max Volume per Acre" is "3.5" acre feet per year).

Likewise, the diversion rate, which was the District Court's primary consideration in evaluating the non-use of 29-14032, R. at 356-57, is derived from the number of irrigated acres beginning at the very genesis of a water right. Idaho Code § 42-220; *see also* Idaho Code § 42-202(6). When water is first appropriated for agricultural irrigation, the IDWR's field examination must yield a report including:

> g. **If the water is used for irrigation**, the boundaries of the various **irrigated areas** and the location of the project works providing water to each shall be platted on the maps submitted with the report and the full or partial acreage in each legal subdivision of forty (40) acres or government lot shall be shown.
>
> h. **Irrigated acreage** shall be shown on the field report to the nearest whole acre in a legal subdivision except the acreage shall be shown to the nearest one-tenth (0.10) acre for permits covering land of less than ten (10) acres.

IDAPA 37.03.02.35.01 (emphasis added). The field examination report's focus on irrigated acres for an agricultural irrigation water right determines the duty of water. *See* IDAPA 37.03.02.35.03.a. ("For irrigation purposes, the **duty of water** shall not exceed five (5) acre feet of stored water for **each acre of land to be irrigated** or more than one (1) cubic foot per second for **each fifty (50) acres of land to be irrigated** unless it can be shown to the satisfaction of the Director that a greater amount is necessary" (emphasis added)). This presumptive diversion rate, based on the duty of water relates to "a cardinal principle established by law and the

adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it." *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207, 252 P. 865 (1926); *see also* Jeffrey C. Fereday et al., WATER LAW HANDBOOK 31-32 (Givens Pursley LLP, September 1, 2016) (footnotes omitted) (available at: http://www.givenspursley.com/uploads/pdf/water-law-handbook-9-15-16.pdf, and contained in the record, *see* R. at 398-403). Thus, the amount of acres irrigated under a farm irrigation water right determines a presumed diversion rate (*i.e.*, one miner's inch or 0.02 cfs, **per acre**). This diversion rate is also reflected in the text of 29-14032. *See* R. at 232 (specifying that the "Generic Max Rate per Acre" is "0.02" cfs).

Here, the District Court incorrectly conducted the "nonuse" portion of the forfeiture analysis by conflating "nonuse of a water right" to mean the diversion of less water than is allowed by the water right instead of the failure to apply the water right to the beneficial use for which it was appropriated. The District Court found that "[a]lthough Bloxham may have 'forfeited' his land [*i.e.*, the Jackson Property] because he did not water it, the Court looks to the water right itself, not the appurtenant land, and by all accounts Bloxham put that (the water right) to full and beneficial use." R. at 357. The District Court ultimately held:

> Bloxham beneficially used his water right, all that was available to him, at all relevant times in question. Where on the subject property he watered is not dispositive in this case. ... Not using water on what would become the Jackson [P]roperty is not indicative of non-beneficial use requiring forfeiture. Bloxham used his water right period.

R. at 465.

Simply, the District Court got this point wrong. Whether Bloxham diverted all of the

water allowed by the 29-10420, the parent right, is immaterial to the question of nonuse. It is the "failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated" that constitutes nonuse and causes forfeiture. Idaho Code § 42-222(2). Applying more water for irrigation than is necessary is waste, because it is by definition a "use of more water than can be beneficially applied." Idaho Code § 42-220. A "water user is not entitled to waste water." *Hagerman*, 130 Idaho at 735, 947 P.2d at 408. Such waste cannot preserve a water right from forfeiture. *See id.* ("a water right holder cannot avoid a partial forfeiture by wasting that portion of his or her water right that cannot be put to beneficial use during any part of the statutory period. If a water user cannot apply a portion of a water right to beneficial use during any part of the statutory period, but must waste the water in order to divert the full amount of the water right, a forfeiture has taken place"). Under 29-10420, Bloxham applied water to beneficial use on the Barnes Property and did not do so on the Jackson Property. R. at 60. Allowing Bloxham's concentration of water to preserve the entire water right will subvert the decreed and statutory limitations on the volume and diversion rates of water rights throughout Idaho. The District Court's interpretation of "nonuse" would render Idaho Code §§ 42-202(6), 42-220, and IDAPA 37.03.02.35.03.a. merely advisory rather than mandatory.

Further, the District Court's treatment of 29-14032 reflects an erroneous view of water rights that treats them like personal property—*i.e.*, property that can be moved at will within an authorized place of use, and even concentrated on any portion thereof, without any impact on the whole. A water right is real property. Idaho Code § 55-101; *see also Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). A water right is a "complement of, or

one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied." Idaho Code § 42-101. This is a longstanding principle of Idaho water law. *See Koon v. Empey*, 40 Idaho 6, ___, 231 P. 1097, 1098 (1924) ("there can be no question that **a water right becomes appurtenant to the land to which it has been applied and upon which the water has been used for irrigation**" (emphasis added)).[5] Thus, whenever the land is conveyed, any water right associated with the land is also conveyed, unless the deed makes special mention or deals otherwise with the water right. *See Russell v. Irish*, 20 Idaho 194, ____, 118 P. 501, 502 (1911). When only part of the property associated with a water right is sold, the water right is split proportionately according to the acreage, again unless the deed reserves the water right or expressly asserts a different allocation of the split of the water right. *Id.* ("In the first place, it is well established that a water right is an appurtenance to the land on which it has been and will pass by conveyance of the land. **A division of the land would divide the appurtenant water right in the same proportion as it divided the land**. . . It had become appurtenant to the whole tract, and not to a specific portion thereof, or alone to the 60 acres retained by [Russell]" (emphasis added)). For that reason, one way of considering partial forfeiture is that the water right has become appurtenant to the land where it is put to beneficial use, *see Mullinix*, 158 Idaho at 277, 346 P.3d at 294 ("Ordinarily water ... become[s]

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[5] This has long been the law in other western states as well. See *Smith v. Hawkins*, 120 Cal. 86, 88, 52, P. 139 (1898) ("No matter how great in extent the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to beneficial use at sometime within the period by which the right would otherwise be barred for nonuse."); *see also* Charles B. Roe, Jr. and William J. Brooks, *Loss of Water Rights – Old Ways and New*, 39 Rocky Mtn. Min. L. Inst. 23-1, 23-11 (1989) (forfeiture statutes serve to "clean up" paper rights so they confirm to what an appropriator is actually authorized to put to beneficial use).

appurtenant to the land when used upon or in connection with such land" (quoting *Molony v. Davis*, 40 Idaho 443, 448-49, 233 P. 1000, 1001 (1925), emphasis omitted)), and by failing to put the water to beneficial use on certain acres for five years, Idaho Code § 42-222(2), the water right appurtenant to those acres is forfeited. Thus, any conveyance of those acres (the water right appurtenant to which has been forfeited) will not convey any water rights. *See Russell*, 20 Idaho at ____, 118 P. at 502.

Regarding the status of a decreed water right in the SRBA, "[o]nce a partial decree is issued for the water right, the non-user has five years within which to put the water to beneficial use before the decreed right is subject to forfeiture. [In other words,] once the decree is issued the statutory time period for non-use begins to run anew." *In Re SRBA*, Case No. 39576, Subcase No. 65-05663B (*Wood v. Troutt*) (Idaho Fifth Judicial Dist. – SRBA, May 2002) (Judge Roger S. Burdick) at 21; *see also Final Unified Decree*, *In re SRBA*, Case No. 39576 at 12 (Aug. 26, 2014) (providing that "[t]he time period for determining forfeiture of a partial decree based on state law shall be measured from the date of issuance of the partial decree and not from the date of [the] Final Unified Decree"). Here, 29-10420 (the parent right of 29-14032) was decreed on March 22, 2004. *See* R. at 231 (under "Decreed Date"). Bloxham averred that other than for one year in the mid-1990s, he had not used 29-10420 to irrigate the Jackson Property since that time. R. at 60 (*Bloxham Affidavit*, ¶ 16). This failure to irrigate the Jackson Property constitutes "a failure ... to apply it to the beneficial use for which it was appropriated." Idaho Code § 42-222(2). Thus, by March 22, 2009, the five-year statutory forfeiture period was satisfied.

B. No exceptions or defenses apply to prevent the forfeiture of 29-14032.

Forfeiture is caused by a five year failure to apply the water right to the beneficial use for which it was appropriated, "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." Idaho Code § 42-222(2). Idaho Code § 42-223 also explicitly provides for other defenses to forfeiture, however, Jackson has never asserted any defense outside § 42-223.

At the outset of this prong of the forfeiture analysis, it is important to note that, although there is little guidance for applying Idaho Code § 42-223, it appears that the statute only applies to the five year statutory forfeiture period of § 42-222(2). Idaho Code § 42-223 describes its own application thusly:

> A right to the use of water shall not be lost by forfeiture pursuant to the provisions of section 42-222, Idaho Code, for a failure to apply the water to beneficial use under the conditions specified in any subsection of this section.

Idaho Code § 42-223. Thus, if the "failure to apply the water to beneficial use" for five years is caused by any of the "conditions specified in any subsection of" § 42-223, the water user has a viable defense to forfeiture. *Id.*

Here, the five consecutive years of nonuse were completed in 2009. Jackson has never offered any evidence relating to any time prior to 2011, as Jackson only became aware of the Jackson Property in 2011. Thus, none of the issues raised by Jackson in this regard can utilize any defense in § 42-223 to prevent the forfeiture of 29-14032.

However, even considered on their merits, Jackson's previously-raised arguments asserting various defenses to forfeiture must all fail. In this respect, the District Court was correct. R. at 468 (finding that "a defense [Idaho Code § 42-223(6)] was raised, but not found valid by the [District] Court"). But, given the standard of review, the Barneses address Jackson's claimed defense—and all of the factual circumstances asserted by Jackson—below. The only basis ever asserted by Jackson as a defense to forfeiture is a statutory exemption contained in § 42-223(6). R. at 194. That statute provides:

> No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.

Idaho Code § 42-223(6). Specifically, in discovery, Jackson only asserted two factual bases:

> 1. From June of 2006 to April of 2012 the property was under the control of the United States Bankruptcy Trustee. The water right owner at that time, Mr. Bloxham had no ability to control the water and the land to which it was to be applied.
> 2. After purchasing the property in 2012, Bloxhams prevented Defendant from exercising his water right as they told him they would not allow him to access the diversion through their property or allow the water to be transported through the customary transportation structure for the water. Defendant therefore had to make other arrangements for the transportation of his water and resumed use of the water in earnest in 2013.

R. at 194. Further, it appears that, despite never supplementing his discovery responses—as required by Idaho Rule of Civil Procedure 26(e)(1)(A)—Jackson has asserted a third factual basis for applying § 42-223(6).[6] This third basis Jackson belatedly asserted is that Bloxham used

[6] Because this Court is considering the Barneses' summary judgment motion under the same standard as the District Court, this Court "may exclude the testimony of any witness or the admission of evidence not disclosed

all of the water available to him. None of these circumstances warrant application of Idaho Code § 42-223(6) to prevent the forfeiture of 29-14032.

1. The facts and legal consequences of Bloxham's bankruptcy have no legal impact on Jackson's interest in 29-14032.

At one point, Jackson contended that "[t]his case turns on the murky interrelationship of water rights, property transfers, and bankruptcy law." R. at 242. Jackson explained that "any interest [Bloxham] had in real property became part of his bankruptcy estate" when he filed for bankruptcy on October 12, 2005. R. at 245; *see also* 11 U.S.C. § 541(a). However, Jackson also explains that "[t]here was a dispute as to who actually owned the property that Jackson would eventually purchase from the bankruptcy trustee until 4/12/2012 when Eagle Eyes, Ltd. and the Chapter 7 Bankruptcy Trustee entered into an agreement related to who would retain what portions of the property." R. at 250 (footnote omitted). The circumstances are further explained by Jackson:

> [Bloxham] thought he had transferred any interest he had in the property when the property was transferred to Eagle Eyes, Ltd. This may have even been his intent. Eagle Eyes, Ltd., and the Bankruptcy Trustee did not sort out the ownership of the property until the Stipulation was reached in April 2012.

R. at 250 (footnote 3). Nevertheless, Jackson has asserted multiple arguments relating to Bloxham's bankruptcy. Initially, Jackson contended that the issue of control (between Bloxham

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by a supplementation required by [Rule 26]." Idaho R. Civ. P. 26(e)(3). The Barneses requested that Jackson "identify which exemptions provided in Idaho Code § 42-223 and common law you claim exempt 29-14032 from forfeiture." R. at 194. However, while Jackson provided a supplemental response, R. at 202-07, Jackson did not supplement this response to include this third basis for a forfeiture defense. Thus, the Barneses invite the Court to exclude all the evidence relating to the third basis Jackson proposes to prevent the forfeiture of 29-14032.

and the bankruptcy trustee) was a circumstance beyond Bloxham's control that prevented the irrigation of the Jackson Property. But this argument was rather quickly abandoned, because the bankruptcy trustee has control over the bankruptcy estate, 11 U.S.C. § 741—so either Bloxham or the trustee had control over both the Jackson Property and the appurtenant water right whenever ownership actually passed. Thus, Jackson changed his argument to assert that the "bankruptcy automatic stay tolls [the] statutory five year non use, [so] no forfeiture could be decreed so long as [the Jackson] Property was part of the bankruptcy estate." R. at 251 (emphasis omitted, capitalization omitted).

This argument is unavailing because, as a matter of law, the automatic stay, 11 U.S.C. § 362(a), does not apply as Jackson has contended. *See* R. at 326-41 (providing detailed arguments regarding the inapplicability of the automatic stay to this situation). First, the automatic stay, in relevant part, only bars "any **act** to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). This requires an **affirmative action** to be stayed. H.R. Rep. 95-595, 340-41, 1978 U.S.C.C.A.N. 5963, 6297-98. However, the running of time is not an affirmative action, and is thus outside the scope of the automatic stay provision cited by Jackson. *See In re Pridham*, 31 B.R. 497, 498 (Bankr. E.D. Cal. 1983); *see also Johnson v. First Nat. Bank of Montevideo, Minn.*, 719 F.2d 270, 276 (8th Cir. 1983).

Second, the bankruptcy code's tolling statute, 11 U.S.C. § 108, rather than the automatic stay, applies to toll the passage of time. The tolling statute provides:

> if applicable nonbankruptcy law ... fixes a period within which the debtor ... [may] cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 60 days after the order for relief.

11 U.S.C. § 108(b). The "order for relief" in this statute is not the final bankruptcy discharge, but is "[t]he commencement of a voluntary case under a chapter of [the bankruptcy code]." 11 U.S.C. § 301(b). "[W]here one section of the [bankruptcy] Code explicitly governs an issue, another section should not be interpreted to cause an irreconcilable conflict." *In re Liddle*, 75 B.R. 41, 44 (Bankr. Mont. 1987) (citation omitted). Because § 108(b) specifically governs this topic, that statute, and not the automatic stay, should apply. *In re Petersen*, 42 B.R. 39, 41 (Bankr. Or. 1984); *see also* R. at 335-37 (citing numerous cases, demonstrating that this is the majority position adopted by most courts, including the Idaho Bankruptcy Court and the Ninth Circuit Bankruptcy Appellate Panel). Here, Bloxham filed bankruptcy on October 12, 2005. R. at 184-86. Thus, to whatever extent the Jackson Property (including the portion of 29-10420 appurtenant thereto) entered the bankruptcy estate before March 22, 2009 (the posited forfeiture date), it could only have been tolled, by operation of 11 U.S.C. § 108(b), until May 21, 2009 (60 days beyond the posited forfeiture date). Jackson has offered no evidence of any resumption by even May 21, 2009.

Third, the bankruptcy code itself excepts the automatic stay from barring "the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's or organization's police and regulatory power." 11 U.S.C. § 362(b)(4).

To whatever extent forfeiture constitutes an "action or proceeding," the water right forfeiture statute falls within this exception. The Ninth Circuit views the satisfaction of **either** of two tests as sufficient to classify a government action as within the scope of § 362(b)(4). *City & County of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1123-24 (9th Cir. 2006). "Under the pecuniary purpose test, the court determines whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of safety and welfare." *Id.* at 1124-25 (citation and quotation marks omitted). "If the action primarily seeks to protect the government's pecuniary interest, the automatic stay applies. If the suit primarily seeks to protect the public safety and welfare, the automatic stay does not apply." *Id.* at 1124. Here, water right forfeiture does not protect Idaho's pecuniary interest, but protects public safety and welfare because forfeited "rights to such water shall revert to the state and be again subject to appropriation under this chapter." Idaho Code § 42-222(2). In other words, Idaho's government gains nothing from the forfeiture, but furthers the purposes of putting water to beneficial use. *See* Idaho Code § 42-104. Likewise, "[u]nder the 'public purpose' test, the court determines whether the government seeks to 'effectuate public policy' or to adjudicate 'private rights.'" *PG & E Corp.*, 433 F.3d at 1125 (citation omitted). "If the primary purpose of the suit is to effectuate public policy, then the exception to the automatic stay applies. However, a suit does not satisfy the public purpose test if it is brought primarily to advantage discrete and identifiable individuals or entities rather than some broader segment of the public." *Id.* (internal citation, quotation marks, and brackets omitted). Here, the primary focus of Idaho's water right forfeiture statute is to further the public policy of maximizing the beneficial use of water within

the state, not to benefit any specific individuals. The forfeited water is again available for appropriation by anyone. Idaho Code § 42-222(2). Because Idaho's forfeiture statute satisfies both of the Ninth Circuit's tests—even though it must only satisfy one or the other—the exception to the automatic stay contained in 11 U.S.C. § 362(b)(4) applies.

Finally, Jackson's proposed application of the automatic stay to protect 29-14032 would impermissibly allow federal law to enlarge or create a substantive property right. "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. U.S.*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). Thus, "[i]n bankruptcy cases the rights of parties in [property] are governed by state laws unless there are contrary provisions in the Bankruptcy Code." *In re Dulan*, 52 B.R. 739, 741 (Bankr. C.D. Cal. 1985). In *Dulan*, the court ruled that the automatic stay could not extend a time period provided by state law because it was not a contrary provision, as that issue of timing was addressed by 11 U.S.C. § 108. *Id.* Preserving the status quo is a goal of the automatic stay, but it is not the touchstone of the entire bankruptcy code—as the Eighth Circuit has explained:

> Even accepting the debtor's argument that § 362(a) is designed in part to preserve the status quo as of the date of the petition in bankruptcy, **their right remains only to redeem the property within the period established by statute. To hold that § 362(a) operates as an automatic stay of the running of the statutory period of redemption would be to enlarge property rights created by state law, a result we view as unjustified by the language of § 362(a) and as unintended by Congress.**

Johnson, 719 F.2d at 277 (emphasis added). Idaho law defines a water right and imposes a "use it or lose it" principle. Idaho Code § 42-222(2). The automatic stay cannot alter Idaho substantive law to enlarge the property interest in a water right.

2. The 2012 interactions between Jackson and Bloxham—which were admittedly negative—have no legal impact on Jackson's interest in 29-14032.

Jackson's second argument centers on the negative interactions between him and Bloxham in 2012 that, Jackson claims, prevented him from accessing his water. However, this argument is unpersuasive because the exceptions provided in Idaho Code § 42-223 only relates to the "failure to apply the water to beneficial use" and has no bearing on extending, tolling, or otherwise protecting the resumption of use of a water right. Idaho Code § 42-223. In other words, by 2012, when the alleged interactions occurred, the water right was **already** "lost by forfeiture pursuant to the provisions of section 42-222, Idaho Code, for a failure to apply the water to beneficial use" and so the "conditions specific in any subsection of [§ 42-223]" are inapplicable. *Id.*

However, even on the merits, this argument must fail. By statute, if a landowner refuses to allow the passage of a ditch, canal, or conduit, the landowner may choose to exercise the right of eminent domain and institute an eminent domain action when denied access to the water source of his or her water right. Idaho Code § 42-1106; *see also Telford Lands LLC v. Cain*, 154 Idaho 981, 303 P.3d 1237 (2013) (Upholding action by landowner under eminent domain to condemn pipeline easement). Further, to the extent that an open ditch already existed to the Jackson property, the easement interest in having the water conveyed through it was appurtenant

to the Jackson Property and any interference with that right was actionable at law. In other words, Jackson had remedies, easily accessible and readily available, that he chose not to avail himself of. Thus, the circumstances could not be beyond his control within the meaning of Idaho Code § 42-223(6) after Jackson has obtained the Jackson Property in 2012.

3. Water was always legally available (*i.e.*, in priority) to the water right owner for application to beneficial use on the Jackson Property, thus its non-use effects a forfeiture.

Jackson has admitted that Bloxham only watered the Barnes Property, and not the Jackson Property, but contends that because water is scarce on Spring Creek (the source for 29-10420 and all water rights deriving therefrom) Bloxham "did like most farmers do when they don't have the full water allotment decreed, he used the available water in the location at the time where he thought he could get the best use" and because there is no "intent to abandon the water on the [Jackson Property]" and "[t]he amount of water that a stream produces is beyond the control of the water user," there can be no forfeiture. R. at 250. Intent is immaterial because forfeiture under Idaho Code § 42-222(2) is at issue; not abandonment under Idaho Code § 42-237. Jackson claims to find a basis for the remainder of this argument in *Sagewillow*, which held:

> Water rights are not forfeited because of the failure to use them for a period of five years if such failure is caused by circumstances beyond the control of the water right holder. *Jenkins v. State, Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). The fourteen surface water rights appurtenant to the Knollin and Bird Ranches were later priority rights that could only be delivered during high water flows. Sagewillow raised the defense below that the evidence did not show water was available during the years of nonuse. The Department did not make any finding on that issue. Because water rights cannot be forfeited by

> nonuse if the water was not available and Sagewillow raised that issue, the Department must find that water was available for Sagewillow's use before it can find that Sagewillow forfeited water rights by nonuse of the water. Therefore, on remand the Department can address this issue.

Sagewillow, 138 Idaho at 843, 70 P.3d at 681; *see also* R. at 412 (quoting this same passage, emphasizing the last two paragraphs). However, Jackson's focus on a viable defense because "water was not available" in *Sagewillow* ignores the stated reason **why** that water was not available there—because the water rights in question "were **later priority rights** that could only be delivered during high water flows." *Sagewillow*, 138 Idaho at 843, 70 P.3d at 681 (emphasis added). In other words, the water was unavailable to the forfeited water rights as a matter of law because they were junior to other water rights. *See id.* The facts in this matter are very different. There is no basis for Jackson's argument that physical unavailability of water is a basis for preventing forfeiture.

Further, this situation is distinguishable from any unavailability of water in *Sagewillow*. There, water was actually unavailable because the supposedly forfeited water rights were junior to other water rights and, thus, were out of priority. *Id.* Here, 29-14032 and 29-14115 share the same priority date because they both descend from the same parent right—29-10420. *See* R. at 230 (listing a priority date of "05/19/1920" for 29-14032); *compare with* R. at 234 (listing a priority date of "05/19/1920" for 29-14115). As a result, 29-14032 was entitled[7] to 40% of the available water in Spring Creek—the proportion of the Jackson Property to the rest of the

[7] More accurately, Jackson is entitled to 40% of the flows in Spring Creek if all other water rights are calling for water. If the other water rights on Spring Creek were not calling for water (because, for example, hay has been swathed on the other portions of the authorized place of use and is drying), then Jackson would be entitled to more than 40% of the flows in Spring Creek, and perhaps even up to 100% of his entitlement. For purposes of this brief, reference to 40% of the water presupposes that other rights are calling for their water even though there are times when Jackson would have been entitled to more than 40% of the water in Spring Creek.

authorized place of use of 29-14115—as asserted by Jackson. R. at 259 (*First Jackson Affidavit*, ¶ 28, explaining that Jackson "used 40% of the water because [he] own[s] about 40% of the original ground that [29-10420] was decreed to irrigate"). Thus, the amount of the flow in Spring Creek—which is the crux of Jackson's argument and a basis for the District Court's *SJ Decision* in favor of Jackson—is irrelevant. Pursuant to the water right appurtenant to the Jackson Property (which would be denoted 29-14032), the Jackson Property was always entitled to some water; in other words, **there was always water available to the Jackson Property** (*i.e.*, 40% of the total flows) and when Bloxham owned the Jackson Property, he made a decision not to use it at that location. R. at 355 (where the District Court noted that "Bloxham **chose** not to water the future Jackson [P]roperty" (emphasis added)). Whether there was 1 cfs or 10 cfs in Spring Creek, 29-14032 was always entitled to 40% of its flows, up to the full amount of its decreed diversion rate. It is beyond contest that if Jackson did not use any water on the Jackson Property for the next five years, it would forfeit his water right—regardless of low water levels—because (as things stand under the District Court's decision) Jackson is entitled to use 40% of the Spring Creek flows. Because the partial forfeiture analysis is identical to forfeiture in this regard, the result should not be any different before 2012, when Bloxham owned both the Jackson Property and the Barnes Property.

As to any exception or forfeiture defense, there is no genuine issue of fact regarding any basis to deny that 29-14032 was forfeited by 2009. The only remaining question is whether beneficial use of 29-14032 was resumed before a third party asserted a claim of right.

C. Beneficial use of 29-14032 was not resumed before other water users made a claim of

right on its water.

Finally, because 29-14032 was forfeited by 2009 and no exception applies, the final prong of the forfeiture analysis considers the "resumption-of-use doctrine," which is described as an affirmative defense as follows:

> although statutory abandonment did actually occur, the forfeiture is not effective if, after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party.

Sagewillow, 138 Idaho at 836, 70 P.3d at 674 (quoting *Carrington v. Crandall*, 65 Idaho 525, 531-32, 147 P.2d 1009, 1011 (1944)). Thus, a claim of right is the only event that can foreclose, or cut off, a water user's resumption of use. This Court explained that

> A third party has made a claim of right to the water if [1] the third party has either instituted proceedings to declare a forfeiture, or [2] has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, or [3] has used the water pursuant to an existing water right.

Sagewillow, 138 Idaho at 842, 70 P.3d at 680 (internal citations omitted). With particular reference to the second and third methods of making a claim of right:

> Prior to diversion, the water obviously cannot be identified as being the water entitled to be used by any particular appropriator. Whether or not a third party has made a claim to the water will usually depend upon evidence showing that the water source was overappropriated and, because of nonuse of water by the senior appropriator, water was available for use and used to fill junior water rights, or by evidence showing that resumption of use by the senior appropriator would diminish the quantity of water being used by junior appropriators from an interconnected water source.

Id. at 842, n. 3, 70 P.3d at 680, n. 3. Further, the resumption can be made by a successor in interest to the original appropriator. *Id.* at 839, 70 P.3d at 677. Because forfeiture is effectuated

by a failure to put the water right to beneficial use for five consecutive years, any claimed resumption must put the water right to beneficial use "upon the land to which the water right is appurtenant." *See id.* at 842, 70 P.3d at 680; *see also* I.C. § 42-222(2).

A claim of right does not complete a forfeiture, but rather forecloses the efficacy of any resumption of use. *Sagewillow*, 138 Idaho at 837, 70 P.3d at 675 ("although statutory abandonment **did actually occur**, the forfeiture is not effective if, after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party" (citation and quotation marks omitted, emphasis added)). The only timeframe involved in resumption of use is the already-elapsed five year timeframe during which nonuse has occurred. Idaho Code § 42-222(2). In contrast, resumption of use and a claim of right are events, not timeframes.

Here, Jackson did not resume use of the water right appurtenant to the Jackson Property before Bloxham, a "third party," had asserted a claim of right to that forfeited water. *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680. There are two events in the record that constitute claims of right. After the Jackson Property was alienated[8] from Bloxham's ownership, Bloxham still continued to irrigate the Barnes Property—immediately becoming a third party asserting a claim of right by using all of the water from Spring Creek (which is overappropriated) to irrigate.

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[8] While the sale of the Jackson Property to Jackson on April 26, 2012, provides a definitive date when Bloxham no longer owned the Jackson Property, it is important to remember that the Jackson Property did not pass directly from Bloxham to Jackson. As Jackson has repeatedly asserted, his immediate predecessor-in-interest to the Jackson Property was the bankruptcy trustee of Bloxham's bankruptcy. *Harris Aff.*, Ex. D, p. 5 (Response to Request for Admission No. 1). Consequently, at some point—which is not exactly delineated in the record—the Jackson Property passed from Bloxham's ownership to the bankruptcy trustee's ownership. It is at **that** point in time that Bloxham became a third party relative to the Jackson Property.

Additionally, this action itself constitutes a *per se* claim of right. Jackson disputes the efficacy of the first claim of right, but cannot rationally dispute the second (which poses more fact questions that were unresolved by the District Court).

1. The Barneses are entitled to assert the claim of right made against 29-14032 in 2012 by their predecessor-in-interest, Bloxham.

A claim of right may be asserted by a "third party" who "has used the [forfeited] water pursuant to an existing water right." *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680. A claim of right made by a third party in this way depends on **(a)** "evidence showing that the water source was overappropriated and, because of nonuse of water by the [forfeited] senior appropriator, was available for use and used to fill junior water rights" asserting the claim of right; or **(b)** "evidence showing that resumption of use by the senior appropriator would diminish the quantity of water being used by junior appropriators [asserting the claim of right] from an interconnected water source." *Id.* at 842, n. 3, 70 P.3d at 680, n. 3.

A third party is a "person who is not a party to a lawsuit, agreement, or other transaction but who is usu[ally] somehow implicated in it; someone other than the principal parties." BLACK'S LAW DICTIONARY 1617 (9th ed. 2009). *Sagewillow* requires that a claim of right be made by a "third party." *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680. Once Bloxham no longer owned the Jackson Property, he was a third party relative to the Jackson Property and could, therefore, assert a claim of right against the water right appurtenant to the Jackson Property. There is nothing in *Sagewillow* that requires the party alleging forfeiture must be the same party that has made a claim of right by either the second or third methods. Likewise, there

is no privity requirement on the "third party." *See Sagewillow*, 138 Idaho at 842, 70 P.3d at 680. The District Court erred in imposing such a requirement and not allowing the Barneses to assert Bloxham's claim of right as the Barneses' predecessor-in-interest. R. at 358. Thus, while the timing complicates this point, after Bloxham was no longer the owner of the Jackson Property,[9] he was a third party—like any other person who did not own the Jackson Property—capable of asserting a claim of right against 29-14032.

29-14032 and 29-14115 are interconnected because they both came from the same "parent" water right before the parent right was split into different portions for the Barnes Property and the Jackson Property. Therefore, these water rights have the same elements of use. Spring Creek is over-appropriated. R. at 177 (Jackson's deposition testimony at 117:4-19, showing that there is not enough water to satisfy all water rights on Springs Creek); *see also* R. at 61 (*Bloxham Affidavit*, ¶ 19, stating that "[t]here is typically not enough water to supply all of the water rights on the system" even without Jackson resuming use of 29-14032). It is uncontested that the Barneses and other Spring Creek water users will suffer from diminished quantities of water if Jackson resumes use of 29-14032. R. at 177 (Jackson's deposition testimony at 117:16-19: "Q. So if you stopped irrigating, that water would be used and relied

[9] The District Court found that "Bloxham could not have any kind of third party legal status to his own estate. [Thus,] Bloxham cannot claim that he was a third party under *Sagewillow* to defeat Jackson's resumption of use defense." R. at 468. However, it makes no impact on the analysis when Bloxham is considered a "third party" relative to the Jackson Property. The Barneses have contended that Bloxham was alienated from the Jackson Property (and thus became a third party) when the bankruptcy trustee received the Jackson Property into the bankruptcy estate (which could be considered on or about April 12, 2012, *see* R. at 250). However, **there is absolutely no question that Bloxham was a third party relative to the Jackson Property by April 26, 2012** (when Jackson bought the Jackson Property from the bankruptcy trustee, *see* R. at 281-83). In either event, the impact on the forfeiture analysis is the same. Bloxham, who was continually irrigating the Barnes Property, was a third party capable of asserting a claim of right against 29-14032 by April 26, 2012. Jackson did not resume any use of 29-14032 until after that date.

upon by Barnes and other users that have water rights on Spring Creek? A. Yep."); *see* R. at 60-61 (*Bloxham Affidavit*, ¶¶ 17-19).

Because Spring Creek is over-appropriated, any use of the water forfeited by 29-14032 by a third party water user on Spring Creek after 2009, is a claim of right to the water, barring Jackson's resumption of use claim. Such a use was made by Bloxham. Bloxham used 29-10420, in full, to "actively irrigate[] the property that Chad and Jane Barnes [now] own up until" January 31, 2014, when Bloxham sold the Barnes Property to the Barneses. R. at 61 (*Bloxham Affidavit*, ¶ 20). Because Spring Creek is overappropriated and any resumption of 29-14032 will reduce the water available to other water users on Spring Creek, Bloxham's ongoing irrigation of the Barnes Property (from 2004 to 2014) is a claim of use that preempts any portended resumption by Jackson.

As a result, Jackson has not shown the existence of a genuine issue of material fact with regard to his resumption of use of 29-14032 because Bloxham has continually irrigated the Barnes Property and, when Bloxham became a third party relative to the Jackson Property that continual irrigation constituted a claim of right on the overappropriated waters of Spring Creek.

2. <u>The Barneses made their own claim of right by filing this suit, which limits the resumed use of 29-14032 to what Jackson beneficially used in 2012 and 2013.</u>

In the event that the Court, for any reason, does not consider Bloxham to have asserted a claim of right against 29-14032, the institution of this action by the Barneses constitutes a *per se* claim of right that prevents any resumption or further resumption of use by Jackson. *See Sagewillow*, 138 Idaho at 842, 70 P.3d at 680. Thus, any resumption of use of 29-14032 after

August 29, 2014, when the Barneses' *Complaint* was filed, is ineffective. R. at 7. Thus, the facts of what resumption was accomplished before August 29, 2014, are extremely significant if the analysis reaches this point.

Jackson contended that he "resumed use of water right 29-[14032] prior to the filing of Plaintiffs' Complaint." R. at 23 (*Answer and Counterclaim*, ¶ 3). In his responses to discovery requests and deposition testimony, Jackson describes what he contends is the resumption of use of 29-14032.

After purchasing the Jackson Property in April 2012, Jackson contends that from July through September 2012, he "[h]auled water from source in a 500 gallon tank for saplings." R. at 193 (Response to Interrogatory No. 10). Jackson explained that he used the 500 gallon tank "once" per instance, "four or five times a week" for a period of "10 or 12" weeks. R. at 167 (Jackson's deposition testimony at 54:5-24). This amounts, even giving Jackson every reasonable inference, to no more than 30,000 gallons (500 gallons × 1 instance × 5 times per week × 12 weeks). While this may sound like a great deal of water, in terms of irrigation, this is only 0.092 acre feet. R. at 228 (IDWR's Watermaster Handbook, showing that 1 acre-foot of water is 325,850 gallons). For perspective, it is worth remembering that each acre of farmland in the area of the Jackson Property is entitled to apply 3.5 acre feet of water—or 1,140,475 gallons—per acre during the irrigation season. R. at 226; *see also* R. at 232 (the Water Right Report for 29-14032 listing the "Generic Max Volume per Acre: 3.5"). Thus, Jackson's contended 2012 water usage amounts to just over **3%** of what would typically irrigate only one acre of farmland. This *de minimis* amount is not sufficient to resume use of the water right.

However, it is important to note that as late as 2013, Jackson had represented to the Natural Resources Conservation Service ("NRCS"), a part of the United States Department of Agriculture, that he "planned on putting in an orchard" (implying it did not already exist) but agreed that the system he was then installing would not "ever be used to water the orchard." R. at 210 (email from NRCS to Jackson). The testimony of Craig Bloxham, a prior owner of the property, and Roy Henderson, a neighbor who literally lives across the street from the Jackson property and has lived there for approximately thirty (30) years, is that the property was never irrigated. R. at 60 (*Bloxham Affidavit*, ¶ 16); *see also* R. at 140 (*Henderson Declaration*, ¶¶ 5-7).

From April through July 2013, Jackson contends he "pumped water to flood irrigate [a] wheat crop in [the] center to south area approximately 10 acre area." R. at 194 (Response to Interrogatory No. 10).

The final, relevant year of Jackson's contended resumption is 2014, when he claims to have "pumped water for fall planting" in September 2014. R. at 194 (Response to Interrogatory No. 10). However, this case was filed on August 29, 2014. R. at 7. Thus, the Barnes' "instituted proceedings to declare a forfeiture" prior to any claimed resumption of use by Jackson in September 2014 or thereafter, which renders any resumption after the institution of this action ineffective. *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680 (citation omitted).

The Barneses contest Jackson's factual assertions. And, as mentioned, there are many factual issues associated with this portion of the forfeiture analysis. This makes only more mystifying the District Court's explanation that: "With all of these questions there is noticeably a

lack of 'clear and convincing evidence' as required to prove a forfeiture. One might then wonder why summary judgment was not simply denied and the case moved to trial. Forfeiture is a legal question under Idaho Code §42-222 therefore this Court made a legal determination. The clear and convincing standard was not met." R. at 465. However, this Court has recognized partial resumption, stating: "a resumption of use of only a portion of a water right prior to a claim of right by a third party will only prevent the forfeiture of that portion of the water right." *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680 (citing *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937)). Thus, if the Court determines that the Barneses *Complaint* constitutes the first claim of right against the water forfeited by 29-14032, there are fact issues surrounding how much of 29-14032 was resumed before the *Complaint* was filed—requiring a remand.

V. CONCLUSION.

The District Court, despite correctly framing the forfeiture analysis, erred in conducting that analysis. The Jackson Property was not irrigated from 2004 through 2011, which is a period in excess of the five-year statutory time period. Jackson has not raised a valid statutory or common law defense to forfeiture. Finally, Bloxham's continual irrigation of the Barnes Property from the overappropriated Spring Creek, after the Jackson Property was sold, constitutes a claim of right that bars any of Jackson's efforts to resume use of 29-14032. In the alternative, this action constitutes a *per se* claim of right and fact issues remain surrounding how much use of 29-14032 was resumed before the Barneses' *Complaint* was filed. In any event, the District Court's errors have upheld a water right that should have been declared forfeited, to the detriment of the Barneses and their efforts to irrigate the Barnes Property.

Forfeiture is an area of Idaho water law that has not been frequently addressed. The pertinent case law is few and far between. With the conclusion of the Snake River Basin Adjudication, forfeiture issues are likely to become increasingly frequent. Idaho water users (and IDWR) require guidance in how to apply the forfeiture analysis. For example, the issue of pivot corners—discussed by the District Court, *see* R. at 356—presents one arena of forfeiture that recurrently arises for farmers throughout Idaho. The Barneses ask this Court to engage in the full forfeiture analysis to provide guidance, clarify the details of that analysis, and correct the errors made by the District Court by reversing the *Judgment* as to the Barneses' claims and entering summary judgment on behalf of the Barneses.

RESPECTFULLY SUBMITTED this 26th day of June, 2017.

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CERTIFICATE OF MAILING

I hereby certify that on this 26th day of June, 2017, two true and correct copies of *Appellants' Brief* were served via Email and Federal Express, on the following:

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ADDENDUM A

As this matter constitutes a dispute regarding real property—specifically whether the water right denoted 29-14032 has been forfeited—the Barneses hereby submit the following map in accordance with Idaho Appellate Rule 35(g), which depicts the land and water right shape files of the real property interests at issue. The map is supported by the following evidence in the record:

- *See* R. at 8 and 23 (the *Complaint*, alleging ownership of certain property and water rights, and the *Answer and Counterclaim*, admitting those specific allegations with some additional clarification);
- *See* R. at 216-18 (the Trustee's Deed, including the legal description of the Jackson Property, by which Jackson received the Jackson Property);
- *See* R. at 230-32 (IDWR's Water Right Report showing the elements (including the place of use) of 29-14032);
- *See* R. at 304-306 (the Warranty Deed, including the legal description of the Barnes Property, by which the Barneses received the Barnes Property);
- *See* R. at 234-36 (IDWR's Water Right Report showing the elements (including the place of use) of 29-14115);
- *See* R. at 57-71 (the *Bloxham Affidavit* and Exhibit 1 thereto, describing and depicting the properties);
- *See* R. at 181-82 (exhibits from Jackson's deposition, which he confirmed depicted the Jackson Property and marked as described in the deposition);
- *See* R. at 267-269 (aerial imagery depicting the place of use of 29-10420 in 2004, 2006, and 2009); and
- *See* R. at 308 (an IDWR pedigree search result, showing that both 29-14032 and 29-14115 descend from a common parent right, 29-10420).

BARNES v. JACKSON

Prepared by:
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6/23/2017
2009 NAIP Aerial Photo