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Barnes v. Jackson Respondent's Brief Dckt. 44894

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHAD BARNES and JANE BARNES Plaintiff/Appellants, vs. KIRK JACKSON Defendant/Respondent.	Supreme Court Docket No. 44894-2017 Bannock County Case No. CV-2014-3466

RESPONDENT'S BRIEF

On Appeal from the decision of the District Court of the Sixth Judicial District of the State of Idaho in and for the County of Bannock;

Hon. David C. Nye, District Judge, Presiding

Mary E. Shea, ISB #6115
MERRILL & MERRILL, CHARTERED
109 N. Arthur Ave., 5th Floor
Pocatello, Idaho 83204
Telephone: (208) 232-2286
Facsimile: (208) 232-2499
Email: mary@merrillandmerrill.com

Attorney for Defendant/Respondent Kirk Jackson

Robert L. Harris, ISB #7018
D. Andrew Rawlings, ISB #9569
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwald Drive, Suite 200
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
Email: rharris@holdenlegal.com
Arawlings@holdenlegal.com

Attorneys for Plaintiffs/Appellants Chad Barnes And Jane Barnes

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Respondent Kirk Jackson by and through his attorneys of record, Merrill and Merrill Chartered, states his Respondent's Brief as follows:

STATEMENT OF THE CASE

A. Summary of the Case

This is a water rights case of first impression in which the Appellants Chad and Jane Barnes ("Barnses" herein) ask this Court to expand the forfeiture doctrine in a manner that has never been recognized by the Idaho Courts. Specifically, the Barnses asks this Court to find that when a predecessor property owner indisputably does not have enough water for the entire property, and chooses to use all of his available water for only a portion of his land, he thereby forfeits his water rights for subsequent purchasers of the un-watered portion of land upon partition of the tract. Such a decision would result in a finding that Respondent Kirk Jackson, ("Jackson" herein), the subsequent purchaser for value of the portion the Barnses claim was unwatered, takes his parcel without any water rights whatsoever, and that the Barnses thereby obtained *all* the water rights that originally ran appurtenant to both parcels when they were unified. Barnes asks for this result even though it is undisputed that the predecessor owner of the two unified parcels, Craig Bloxham ("Bloxham" herein) "beneficially used his water right, all that was available to him, at all times in question." (R. 465, Decision on Motion for Reconsideration p. 9). Forfeiture of water rights is strongly disfavored under Idaho law. This Court has expressly stated that water rights cannot be forfeited by nonuse if the water was unavailable. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 843, 70 P.3d 669,

(2003). In the "Monarch Decision," the Snake River Basin Adjudication recognized the *Sagewillow* defense to water forfeiture to be water unavailability. In Re SRBA Case No. 39576 (*Monarch Greenback, LLC*), Dec. 9, 2009, pp. 14-15. The SRBA had held previously that "[i]n order for a water right to be forfeited water must be available to satisfy the water right during the alleged period of nonuse." *Wood v. Trout*, SRBA subcase no. 65-05663B (May 9, 2002), (emphasis added). Because this Court has never measured forfeiture by examining how the water was applied to the land, and because this Court has never held that water rights could be forfeited when there was not enough water to fulfill the right, and because it is undisputed that the parent water rights on the unified parcel were always fully put to beneficial use, this Court should reject the Barnes' invitation to expand the forfeiture doctrine and affirm the District Court decision.

Although the District Court did not reach this issue, because it found that there was no forfeiture at all, this Court may also affirm on the alternative grounds that the Idaho forfeiture statute was tolled while the property in question was in bankruptcy, from October 12, 2005, until April 2012 when Jackson purchased the property from the bankruptcy trustee. (R 251-253, Defendant's Memorandum in Support of Objection to Plaintiff's Motion for Summary Judgment). If this Court agrees, it must also grant summary judgment in favor of Jackson and against the Barnses, because the statutory period of forfeiture was not met on this record.

This Court should affirm the District Court's dismissal of the Barnses' claim on alternative grounds, because the evidence is undisputed that Jackson resumed partial use of the

water on his parcel in 2012, and he resumed full use of water on his parcel in April 2013. The District Court found this evidence to be undisputed for purposes of summary judgment analysis. (R. 458, Decision on Motion to Reconsider p. 2, fn 5; R. 408, Decision on Motion for Summary Judgment, p. 9). The Barnses did not make a claim of right until they filed their lawsuit in August 2014. Even if this Court agrees that the water rights on Jackson's parcel were forfeited, Jackson's undisputed resumption of use before the Barnses made a claim of right leads to the same conclusion, and Barnes' claims must be dismissed.

To avoid the resumption of use defense to dismiss their claim of forfeiture, the Barnses ask this Court to find that they may rely on the continued use of water rights by the predecessor owner of the entire parcel, Bloxham, to pre-empt Jackson's undisputed resumption of use argument. The Barnses ask this Court to treat Bloxham as a third party in interest asserting water rights on what subsequently became the Barnes' parcel before Jackson resumed use on his parcel. This Court must reject this contention for the same reason that the District Court rejected it. The property was in bankruptcy from 2005 until Jackson purchased a part of the property in 2012, and the Barnses purchased the remaining parcel in 2014. (R.184-186, Bloxham Banrkputcy Petition; R. 281-283 Trustee's Deed to Jackson; R.304-306; R. 310-314 Quitclaim Deed from Bloxham to his parents; R. 315-317 General Warranty Deed to Barnses). Bloxham was always the legal title owner until the property was sold through the Bankruptcy Trustee to Jackson, and through Bloxham's parents to Barnes. Bloxham was indisputably in continuous physical control of the property. (R 57-63, Bloxham Affidavit). Bloxham himself testified that

he considered himself the owner of the parcels until they were sold. (R. 60, Bloxham Affidavit page 4, ¶ 16). As the District Court found, Bloxham could not be a third party in interest to his own property.

This argument is additionally illogical: The Barnses ask this Court to treat Bloxham as the senior water rights holder able to forfeit the water rights Jackson otherwise would have taken, and at the same time ask this Court to treat Bloxham as the junior water rights/third party based on the same conduct on the same property, thereby preventing Jackson from resuming use on the very same forfeiture. He is asking this Court to hold, through legal tap dancing, that Bloxham created the forfeiture because he owned the property to which the water right attached, and simultaneously prevented any resumption of use to defeat the forfeiture because he was a third party to the same forfeiture. The forfeiture rules are intended to protect junior water rights holder's expectations of "moving up in the queue" when senior water rights are not put to beneficial use for five years or more. They are intended to prevent waste or hoarding of water, or monopolization of water rights. *See* Peter R. Anderson and Aaron J. Kraft, *Why does Idaho's Water Law Regime Provide for Forfeiture of Water Rights?* 48 Idaho L. Rev. 419 (2012). They are not intended to permit a landowner at his sole discretion to concentrate his water rights into a single parcel when he partitions his property, presumably thereby increasing the property value of the parcel he retains. This Court must reject a rule of law that would permit a property owner to forfeit water rights without any possibility of resumption of those rights by a derivative claim of equal priority, based on such legal gymnastics.

Taking these arguments together, the Barnses are asking this Court to craft a rule of forfeiture that would turn Idaho water rights law on its head. The Barnses are asking for a rule of law that would permit landholders to select parts of their land to concentrate their water rights through their water distribution, and to keep those full water rights on a smaller parcel than the original right provided simply by partitioning the land. Such a rule would encourage private land owners essentially to hoard and monopolize water rights to increase property values on smaller pieces of land, instead of using the water rights fully to benefit the lands to which they were originally assigned. Over time, this could restrict water rights allocation throughout the state of Idaho, as water rights become concentrated on smaller parcels, and selectively neglected parcels are left without any water rights. It could additionally permit the Idaho Department of Water Resources to take away water rights through forfeiture for farmers or ranchers who do not have enough water to fully utilize their acreage, and who must therefore make business decisions about how to best distribute and utilize the water they get.

This rule of law advocated by the Barnses would require landowners to spread their water use proportionally to every inch of their land or risk losing their water rights, regardless of whether spreading their water this way puts it to the most efficient and beneficial use. This rule of law would make it extraordinarily difficult to negotiate fair market value of land having water rights, because it would require purchasers and lenders to try to determine whether the parcel they want to purchase has forfeited water rights before a partition through selective non-watering, even though there is no record of such forfeiture, and evidence of forfeiture would not

always be apparent on visual inspection of the property. This has never been the law of Idaho . This Court must reject this invitation to change Idaho water rights law in a way that invites inequitable results and thwarts public policy.

B. Prior Proceedings

Jackson does not disagree substantially with Barnes' recitation and characterization of the Course of Proceedings, Appellant's Brief pages 2-5, with two exceptions: First, the District Court did *not* make any findings regarding whether Bloxham had ever watered the Jackson parcel, 29-14032. (R. 485; Decision on Motion for Summary Judgment p. 6). The facts are in dispute on this issue. (See Appellants' Brief page 7, footnote 4; Appellant's Brief page 8, citing R. at 168, 181-82). This dispute of fact was not material to the Judge's decision below, and it is not material to a determination on appeal. The District Court found, even assuming Bloxham's assertions to be true, (that he did not water the section of his land which subsequently became Jackson's parcel between the years 2004-2012), his conduct did not amount to forfeiture of any water rights on the entire parcel to which they were assigned as a matter of law. Jackson notes however, this dispute of material fact prevents an award of summary judgment in the Barnses' favor, and it would make it very difficult for them to meet their evidentiary burden of proof of clear and convincing evidence of forfeiture if this case were remanded for trial.

Second, although the District Court did not reverse its prior decision on reconsideration of summary judgment, the District Court did clarify its findings on beneficial use. (R. 495-501, Decision on Motion for Reconsideration). The District Court additionally specifically addressed

and rejected the Barnes' claim that they could rely on Bloxham's assertion of water rights as a third party in interest. (R. 502-504, Decision on Motion to Reconsideration).

C. Statement of Facts

As a threshold matter, Respondent Kirk Jackson agrees and stipulates that the map provided in Appellant's Brief, Addendum A, page 2, is a true and accurate depiction of the current boundaries for the Water Rights Points of Use for both the Jackson (29-14032) and the Barnes' (29-14115) properties. Jackson includes in his brief as an Addendum pursuant to Idaho Appellate Rule 35(g) the aerial maps depicting the original Bloxham Water Rights Points of Use for the property when it was unified (29-10420). These maps were relied on, in part, by the Barnses in creating Addendum A to Appellant's Brief.

Craig Bloxham is one of the predecessor owners of a single parcel of property, with a single water right, Water Right 29-10420, located in the town Downey, Bannock County, Idaho. (R. 57-63, Bloxham affidavit). The other owner of the property was Eagle Eyes, Ltd., which it appears from the record was intended to be a holding company for the Bloxham family, although the record is unclear. (*See* R. 271-276, Exhibit 2, Wells Affidavit, Bankruptcy Motion to Approve Sale, p. 2, § 3). Bloxham and his parents, Vern and Delores Bloxham, obtained title to the property in 1992. (R. 271-276 ¶ 3) Vern and Delores Bloxham subsequently conveyed their interest in the property to a trust, which subsequently conveyed the trust interest to Eagle Eyes, Ltd. (R. 271-276 ¶ 3). It appears from the record that Bloxham never conveyed his interest in the property the Eagle Eyes, Ltd. Trust, (R. 271-276 ¶ 3), and it appears that Bloxham did not at

least initially disclose his interest in the property to the bankruptcy court. (R. 184-186, Petition for Bankruptcy).

On March 22, 2004, the SRBA Water Court issued a Partial Decree of Water Right 29-10420, for owners Craig V. Bloxham and Vern Bloxham. (R 278-279, Partical Decree for Water Right 29-10420 Exh 3 Wells Affidavit). Water Right 29-10420 is diverted from a source known locally as Spring Creek. This Water Right permitted seasonal irrigation of 2.24 CFS, and annual stockwater of .03 CFS. at the place of use. The Water Right 29-10420 referenced Water Right 29-10419 with combined use limits, but the record below is unclear as to any relationship between the Bloxhams and the owners of Water Right 29-10419. Water Right 29-10420 states that "this right is limited to the irrigation of 112.0 acres within the place of use described above in a single irrigation season." The evidence is undisputed that Water Right 29-10420 is the parent water right for both the Jackson's Water Right 10432, and the Barnes' Water Right, 14115. (*See* R. 288-293, Proof of Water Right Exhibit 6, Wells Affidavit).

Craig Bloxham filed for bankruptcy on October 12, 2005. The evidence is undisputed that Bloxham used and controlled the real property interests in this dispute throughout the period of bankruptcy, and until the property was sold by partition, first one parcel to Jackson in 2012, and then the second parcel to Barnes in 2014. (R.184-186, Bloxham Bankruptcy Petition; R. 281-283 Trustee's Deed to Jackson; R.304-306; R. 310-314 Quitclaim Deed from Bloxham to his parents; R. 315-317 General Warranty Deed to Barnses). The evidence is additionally undisputed that Bloxham held record title to the property, by operation of law, throughout the

bankruptcy. (R. 310-314). The evidence is undisputed that Bloxham considered himself the owner of the property during the period of bankruptcy. (R. 60, Bloxham Affidavit page 4, ¶ 16).

On April 26, 2012, Jackson purchased a portion of the property owned by Craig Bloxham from the bankruptcy trustee. (R. 281-283 Trustee's Deed to Kirk Jackson). Jackson purchased the property with the intent to living there, and planting a twenty acre orchard to be watered by Spring Creek. (R. 257-260, Jackson Aff., ¶ 8). Jackson believed when he purchased the property from the Bankruptcy Trustee that he was acquiring water rights inherited from the parent parcel of land, amounting to approximately forty percent of the water available for diversion from Spring Creek. (R. 259 Jackson Aff. ¶ 28). Shortly after purchasing the property, Jackson approached Vern Bloxham requesting access to a diversion structure and pipeline he believed was owned by Vern, so that he could take his water out of the historical diversion point. Vern Bloxham told Jackson he would not permit that use. (R. 258, ¶ ¶ 4, 5).

Jackson decided to avoid conflict with his neighbors, so he found another way to access his water rights. Jackson spent $2,000 to purchase an easement from another neighbor, so that he could construct a pipeline and diversion structure to get the water from Spring Creek to his property. (R. 258, ¶ ¶ 6, 7). In May or June 2012, Jackson planted over one hundred fruit trees on his property. Jackson began digging a pipeline for his irrigation system. Jackson worked with the Idaho Natural Resources Conservation Service (NRCS herein) to design a diversion system that would use forty percent of the water from Spring Creek. The NRCS shared costs for the portion of the system that would be used for stock water. (R. 258).

On May 31, 2012, Jackson filed his Notice of Change of Water Right Ownership with the Idaho Department of Water Resources (IDWR herein). (R. 213 Exhibit F attached to Affidavit of Robert Harris). Water Right number 29-10420 was split into two Water Rights, 29-14031 and 29-14032. Jackson obtained 29-14032, and Craig Bloxham retained 29-14031. (R. 288-293, Proof of Water Right).

While Jackson's diversion system was being installed, Jackson began using the water from Spring Creek to the best of his ability. From July to September, 2012, Jackson hauled water to his trees from Spring Creek with a 500 gallon water truck, four to five days a week. (R. 165-168; Depo. Kirk Jackson p. 53-55). Beginning in April of 2013 and continuing through July of 2013, Jackson pumped water from Spring Creek to his property to irrigate ten (10) acres of wheat he planted there. Jackson rented a pump to irrigate the wheat, and he continued to water his orchard. (R. 168-171, Depo. Kirk Jackson p. 55-58), In the fall of 2014, Jackson used his water to irrigate his ground as part of his fall planting. (R 171-173, Depo. Kirk Jackson, p. 58-60).

Jackson testified, and his testimony was unrebutted, that the flow rate of Spring Creek was around 240 gallons per minute, and that it does not change substantially throughout the year. (R. 259, Jackson Affidavit, ¶ 16). Jackson testified about his experience and training in building and using weirs to measure water flow. (R. 259, Jackson Affidavit ¶¶ 17-21). Jackson testified, and his testimony was unrebutted, that his permitted water right, 29-114032, was for .840 cfs, which equates to 377.01 gallons per minute. (R. 279, Jackson Affidavit, ¶¶ 23-25). Jackson

testified that the flow rate of Spring Creek was insufficient to satisfy his full water right, which was approximately forty percent of the parent water right belonging to Craig Bloxham, 29-10420. (R. 279, Jackson Affidavit, ¶¶ 23-24). Jackson testified, and his testimony was unrebutted, that he took all the available water out of Spring Creek to which he was entitled, forty percent of the water available from Spring Creek based on flow rate, and he put that water to beneficial use watering his trees and ten acres of a wheat crop, from April to July 2013. (R. 259, Jackson Affidavit ¶ 25-27). In 2014, Jackson's pipeline and diversion structure was completed, and he used it to divert his forty percent of the Spring Creek water to irrigate his fall crop of wheat and sainfoin. (R. 259, Jackson Affidavit ¶¶ 26, 27).

Chad and Jane Barnes purchased their parcel from Vern and Delores Bloxham. (R. 315-317 General Warranty Deed to Barnses). The Barnses applied to change the ownership of Water Right 29-14031, which was still owned by Craig and Vern Bloxham. (R. 303, Notice of Change in Water Right Ownership, Exh. 9 Wells Affidavit). IDWR split Water Right 29-14031 and created Water Right 29-14115, the Barnes' water right. Thus, Bloxham's Water Right is still 29-14031; Jackson's Water Right is 29-14032; and the Barnes' Water Right is 14115. All three rights came from the parent right, 29-10420. (R. 308, Pedigree Search, Exh 10 Wells Affidavit).

In July 2015, Craig Bloxham destroyed Kirk Jackson's headgate, curtailing Jackson's ability to take his water. Bloxham was charged with and he pled guilty to a misdemeanor, Idaho Code § 18-14306. (R. 299-301). He was ordered to pay Jackson $3,534.14 for restitution.

Jackson testified that as of October 17, 2016, Bloxham had paid him only $70. (R. 260, Jackson Affidavit, ¶ 36).

The facts are undisputed that due to the Snake River Basin Adjudication tolling periods, any claim of forfeiture must be for conduct occurring in 2004 or beyond (and not considering other tolling periods such as the bankruptcy stay). (R. 355, Decision on Motion for Summary Judgment, fn. 14 & fn. 15) Craig Bloxham has testified that he did not water what subsequently became the Jackson property at all from 2004-2012. (R. 60, Bloxham affidavit ¶ 16). This is the factual basis for his claim of forfeiture of the water rights for the Jackson's Water Rights, 29-14032. Jackson testified that he personally observed flood irrigation on the property shortly before he purchased it (R.156-162, Depo. Kirk Jackson pp. 26-49). Craig Bloxham testified that he "actively irrigated" the portion of his property that became the Barnses' parcel before and after he sold the Jackson parcel. (R. 61, Bloxham Affidavit ¶ 20). This is the factual basis for his third- party claim of right, to prevent Jackson's claim of resumption of use. Jackson disputes the Barnes' evidence that Bloxham actively irrigated what subsequently became their property after 2012. Jackson testified that based on his personal observations, the parcel that subsequently became the Barnses' was "dry farmed" by Jackson's friend Dow Barker from 2012-2013, and that there were no apparent active attempts to irrigate the property until it was purchased by the Barnes in 2014. (R. 260. Jackson Affidavit ¶ 29-35). The evidence is undisputed that there was not enough water in Spring Creek to irrigate Bloxham's entire property when it was unified, or

to fulfill the water rights he owned when the property was unified, 29-10420. (R. 117, Depo Kirk Jackson, p. 117, lines 13-19; R. 61, Bloxham Affidavit ¶ 19).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Can a water right be forfeited solely on an un-watered section of property that is subsequently partitioned, where all the available water assigned to the parent water right was fully put to beneficial use?

B. Did the fact of Bloxham's bankruptcy and the automatic stay provisions of 11.U.S.C. § 362(a)(3) toll the five-year statutory period required for forfeiture, so that the "clock" for forfeiture did not begin to run until the Jackson property was removed from bankruptcy?

C. Can an owner and beneficial user of a water right simultaneously forfeit the water right as the parent holder of the water right, and also assert a third-party claim of right to prevent the resumption of use of that same derivative water right?

D. Did the District Court err in denying the Barnses' motion for summary judgment, and in granting summary judgment in favor of the Jacksons.

III. STANDARD OF REVIEW

Jackson does not disagree with the Barnes' assertion of the appropriate standard of review. Jackson would add that under the summary judgment standard of review, I.R.C.P. Rule 56(a), a District Court "may grant summary judgment to a non-moving party even if the party has not filed its own motion with the court." *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d

612, 617 (2001); *See also Farmers Nat. Bank v. Green River Dairy, LLC*, 155 Idaho 853, 855, 318 P.3d 622, 624 (2014).

In denying or granting summary judgment in a water rights forfeiture case, this Court must also consider the burden of proof required on the ultimate issue. Because water right forfeitures are disfavored under Idaho law, the party asserting forfeiture must prove the forfeiture by clear and convincing evidence. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 836, 70 P.3d 669, 974 (2003) (*Sagewillow II*). Additionally, although the owner of a water right must raise an affirmative defense to statutory forfeiture, the burden of persuasion remains ont eh party claiming forfeiture, to disprove the defense. *Id.* Clear and convincing evidence is generally understood to be "evidence indicating that the thing to be proved is highly probable or reasonably certain." *In Re Delivery Call of A&B Irrigation Dist.*, 153 Idaho 500, 516, 284 P.3d 225, 241 (2012).

If the party asserting forfeiture cannot meet that burden of proof as a matter of law, summary judgment is properly granted against that party.

IV. ARGUMENT

A. THERE WAS NO FORFEITURE OF WATER RIGHTS, BECAUSE ALL WATER AVAILABLE TO THE PARENT PARCEL 29-10420 WAS PUT TO BENEFICIAL USE

The legal elements of a water right in Idaho are: source, priority date, amount (either in annual volume or rate of flow, or both), period of use, purpose of use, point of diversion, and

place of use. *Olsen v. IDWR*, 105 Idaho 98, 666 P.2d 188 (1983); Idaho Code § 42-1411.11. The purpose of use element correlates with the Idaho Constitutional requirement that all water rights be put to "beneficial use." Idaho Const. art. XV, § 3 (defining "beneficial uses" to include agricultural; domestic uses, manufacturing, mining and hydropower); See Jeffrey C. Ferreday et al., WATER LAW HANDBOOK, Givens Pursley LLP 2017, p. 22.

http://www.givenspursley.com/assets/publications/handbooks/handbook-waterlaw.pdf

The Idaho legislature requires "[t]he appropriation 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. "Beneficial use" for purpose of establishing or finding a water right has not been defined precisely by Idaho statute or case law, with some exception. Generally, in appropriating a water right, the State refers to very general or broad purposes of use, such as "irrigation," or "industrial," or "commercial." *Id.* at page 23. The concept of beneficial use itself arises from the general and well-grounded legal principle inherent in the appropriation doctrine: that in lands where water is scarce, water must not be wasted, and it must be put at all times to beneficial use. No one is entitled to more water than they can put to beneficial use at any given place or time. *Id.* at page 28, fn. 38.

Although the Idaho Constitution defines certain uses of water in Idaho as "beneficial," Idaho Const. art. XV, § 3, prior decisions of this Court, and the former Snake River Basin Adjudication court, explain that these definitions are not exclusive. *State of Idaho, Dep't of Parks v. IDWR*, 96 Idaho 440, 447, 530 P.2d 924, 931 (1974); *In re SRBA, Case No. 39576*,

Idaho Dist. Ct., Fifth Jud. Dist. (Basin-Wide Issue No. 00-91014, Amended Consent Decree, Feb. 25, 2009) ("Under Idaho law, any person may establish a diversionary water right, including to and from storage, for aesthetic, recreational or wildlife purposes").

The Idaho legislature has also defined some specific "beneficial uses" of water in Idaho. Idaho Code § 42-222 (municipalities holding water rights for anticipated future use is "beneficial use"); Idaho Code §§ 42-1501 to 42-1505 (certain instream uses are "beneficial uses").

These legal definitions of "beneficial use" in Idaho, the Idaho Constitution, Idaho case law, and Idaho statutes, refer to the way water is being used. None of these definitions refer to the separate element of a water right, place of use, as being intrinsically tied to or a requirement for determining whether or not a particular use of water is beneficial.

The "place of use" element of a water right refers to the requirement that a specific legal description be attached to the right, again with some specific statutory exceptions that do not apply to this case. It is a statutory requirement that the place of diversion where the water is being beneficially used is legally described. Idaho Code § 42-219. The place of use statutory definition in no way suggests that a determination of beneficial use is defined by the place of use. Rather, place of use is required to determine the land to which the right is appurtenant, and where the beneficial use will occur.

In 2004, the Idaho legislature amended the Idaho Code to provide that "consumptive use" is no longer considered an element of a water right in Idaho. Consumptive use is defined as the actual volume of water consumed in the course of use or otherwise made unavailable to other

users. Idaho Code § 42-202B(1). Changes in consumptive use within a water right do not require a transfer permit in Idaho. Effectively, this means that landowners are free to change their consumptive use within their place of use, and within their water rights generally, considering all the other elements.

Jackson does not deny herein and did not deny below the case law Barnes has cited for the proposition that if water rights are not put to beneficial use for five or more consecutive years, those rights may be lost to statutory forfeiture. Idaho Code § 42-422; *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997)(recognizing the concept of "partial forfeiture"). Forfeiture is the inexcusable failure to put full water rights to beneficial use. *Id.*

In *Hagerman*, this Court noted that partial forfeiture should be recognized by Idaho, because otherwise a water user could hold the water against all subsequent appropriators by using only a part of the *water*. *Hagerman*, 947 P.2d at 408 (emphasis added). "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." *Id.* (emphasis added). This Court in *Hagerman* was clearly and correctly focused on the nonuse of water as the correct measure of partial forfeiture. Similarly, in *Wood v. Troutt*, SRBA subcase no. 65-05663B (May 9, 2002) the SRBA court stated, "[i]n order for a water right to be forfeited water must be available to satisfy the water right during the alleged period of non-use."

There is no case law in Idaho, and none can be found in other jurisdictions, and none is cited in Barnes' brief to this Court or to the District Court, to support the assertion that if a landowner does not have enough water to satisfy his entire water rights, but he fully puts the water he gets to beneficial use, he has nonetheless forfeited his water rights because he did not water his entire place of use. In a land of scarce water resources, and particularly during drought seasons as Southeastern Idaho has experienced in recent years, such a rule of law makes no sense. As this Court has stated:

> The water of this arid state is an important resource. Not only farmers, but industry and residential users depend on it. Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.

Kunz v. Utah Power & Light Co., 117 Idaho 901, 904, 792 P.2d 926, 929 (1990).

The forfeiture rule Barnes would have this Court adopt flies in the face of this long-recognized water rights policy, because it ties the hands of Idaho water users by requiring them to spread all their water evenly among the entire acreage assigned as their place of use, regardless of whether this distribution of water secures maximum use and benefit of water resources.

Jackson does not deny the law cited by Barnes that states that water users are not permitted to "waste" water. Idaho Code § 42-220; *Hagerman*, 130 Idaho at 735, 947 P.2d at 408.

> It is 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).

This is indisputably the law of Idaho. This rule of law, however, is not at all applicable to the facts of this case. There is absolutely no evidence on this record that Bloxham "wasted" water when the property and water right were unified in 29-10420, and Barnes does not reference any evidence of water waste on this record. *See* Appellant's Brief p. 19. The evidence is undisputed that there was not *enough* water to satisfy Bloxham's rights to water his entire place of use under the parent rights 29-10420. There is no evidence that Bloxham used more water than was required to meet his beneficial use. Bloxham's decisions of where to use the water within his place of use, which indisputably was not enough to satisfy his entire water right, does not amount to a forfeiture of his water rights.

When water rights are first appropriated by the State, by necessity the State must consider the beneficial use to which the water will be put, and the number of irrigated acres that right will encompass. Idaho Code § 42-220. This of course is to help make sure that the water appropriated will be put to beneficial use, and water will not be wasted. It does not logically follow, however, that when there is not enough water in any given year, or for a number of years, a landowner will lose their water rights if they do not spread the water out in direct and precise proportion to that acreage. Water users in Idaho have the discretion and must have the discretion

to determine how and where they will use their water within their place of use, as is evidenced by the 2004 statutory elimination of the consumption of use element of a water right. If landowners do not use their entire water right allocated, or if they waste water, they may forfeit their rights under Idaho case law cited above. If, however, landowners must make hard choices about where and how to apply their water rights to beneficial use when water is scarce, and when the evidence is undisputed there was not enough water to irrigate the entire acreage assigned to their place of use, there is no logical or public policy reason to find statutory forfeiture.

Barnes is correct in noting that water rights are appurtenant to the land, and a division of land divides appurtenant water rights in direct proportion. *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911). This rule of law is exactly why the Idaho Department of Water Resources assigned Jackson approximately forty percent of the water rights inherited from the parent water right – because Jackson had purchased approximately forty percent of the original parcel that contained the parent water right. The water rights belonged to the entire parcel of land when it was unified. If Bloxham forfeited his rights, fully or partially, that forfeiture must also apply to the entire parcel that contained Water Right 29-10420. This becomes impossible to measure in the instant case, however, because a water right refers to beneficial use of the water, and not beneficial use of the land to which the water right is appurtenant. There is nothing at all in the legal definition of a water right by its elements, or in the legal definition of "beneficial use" in Idaho, that suggest otherwise. Bloxham fully used his water rights beneficially to irrigate his

land for crops within his place of use between the years 2004 and 2012. There was no forfeiture that can be measured.

In their Motion to Reconsider filed in the District Court, the Barnses relied heavily on this Court's decision in *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992). In that case, this Court affirmed the underlying decision of the Idaho Department of Water Resources. The water right at issue covered three different fields, totaling ninety-six (96) acres. The third field was six (6) acres. Dobson objected to a transfer of water rights, arguing that approving the transfer would result in an enlargement because part of the water right had been forfeited for nonuse. The Director concluded that the *consumptive use* appurtenant to the six-acre field had been forfeited by nonuse, but the Director did not reduce the amount which had historically been diverted for the fields, concluding that the transfer would not change the amount of use authorized by the water right. The District Court concluded, and this Court agreed, that the Director's determination was supported by substantial and competent evidence. As this Court noted in *Hagerman*, 947 P.2d at 404, this Court's decision in the Dovel case was fact specific, and did not turn on any interpretation of forfeiture law.

Dovel was decided before the Idaho legislature removed consumptive use of water as a consideration in determining whether a water right exists. Idaho Code § 42-202B(1). This is significant. If *Dovel* applies at all to this forfeiture analysis, the case now stands for the proposition that prior to 2004, lack of consumptive use on acreage could give rise to a forfeiture

claim made when those rights were being transferred. Since consumptive use can no longer be considered in determining whether a water right exists, *Dovel* really stands for the proposition that no forfeiture can occur today based on lack of consumptive use on only a portion of the property.

Finally, it should be noted that water rights lost through forfeiture are supposed to revert to the state as unappropriated water. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). As the Idaho Water Law Handbook explains:

> This does not mean that, say, a forfeited 1871-priority water right can be picked up and diverted under that priority by another water user. Rather, by eliminating this right from the priority line, more junior rights effectively "move up the ladder" or become that much more reliable because they have fewer senior rights in front of them.

Ferreday et al., WATER LAW HANDBOOK, page 39.

There are no policy arguments for the forfeiture rule that support Barnes' interpretation. The reasons for the forteiture rule have been described as follows: 1) to "clear" the water rights queue; 2) to promote economic development as junior rights move up the queue; 3) conservation of resources; 4) incentivizing participation in desirable water use practices, such as water banking. *See* Anderson & Kraft, *Why Does Idaho's Water Law Regime Provide for Forfeiture of Water Rights*, 48 Idaho L. Rev. 419, 440-446 (2012). Under the Barnes' view of this case, Bloxham had the right to concentrate his water rights onto one part of his place of use by changing his consumptive use, and then partition the un-watered portion of his place of use, but

still keep the "forfeited" water as a "third party in interest" or junior water rights holder *to his own water right.* No one benefits from this interpretation of Idaho water law except for Bloxham, and his successor in interest, the Barnses, as their property values are enhanced by more concentrated water rights on a smaller acreage than was originally appropriated, at the expense of Jackson's property which is devalued due to the loss of water rights.

B. THE AUTOMATIC STAY PROVISIONS OF THE UNITED STATES BANKRUPTCY CODE TOLLED THE STATUTORY PERIOD OF FORFEITURE, AND THE CLOCK DID NOT RUN ON FORFEITURE WHILE THE JACKSON PROPERTY WAS IN BANKRUPTCY

Although the District Court did not decide the case on this issue, this Court can affirm the granting of summary judgment in favor of Jackson on the alternative grounds raised below, because there is no dispute of material facts on this issue. When a debtor files a bankruptcy petition, an automatic stay immediately arises. 11 U.S.C. § 362(a). The stay provisions, 11 U.S.C. § 362(3), prohibit "any act to obtain possession of property of the state or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(c)(1) provides that property continues to be protected by the state so long as the property remains in the bankruptcy estate. The stay "is designed to effect an immediate freeze of the status quo by precluding and nullifying post-petition actions, judicial or non-judicial, in nonbanrkuptcy forums against ...or affecting the property of the estate." *In Re Hillis Motors*, 997 F.2d 581, 585 (9th

Cir. 1993). "Accordingly, section 362 is extremely broad in scope and should apply to almost any type of formal or informal action against...the property of the estate." *Delpit v. Commissioner*, 18 F.3d 768, 771 (9th Cir. 1994).

The Barnses object to this Court allowing the bankruptcy stay to toll the forfeiture statutory period, stating that tolling of a statute is not an "act" that can be stayed by the federal statutes. The Barnses mischaracterize the application of the stay provisions. It is not the Idaho statute that is being stayed by federal bankruptcy law; it is Bloxham's actions of alleged forfeiture that are being stayed. While the property was in bankruptcy, Bloxham was not entitled to take any actions that could affect the property value or disposition. This includes, by the Barnses' theory, choosing to water or not to water the property that would subsequently become the Jackson's property. Any actions or willful inactions Bloxham took while the property was in bankruptcy should not be counted under Idaho's foreclosure statute under these federal bankruptcy provisions.

The Barnses next object that because the bankruptcy code contains its own tolling statute, 11.U.S.C. § 108(b), the federal tolling statute controls. 11 U.S.C. § 108(b) is inapplicable. That tolling statute applies to nonbankruptcy laws that fix a time for a debtor to cure a default or "any other similar act." Forfeiture of water rights is not curing default or a similar act.

Next, the Barnses object that the bankruptcy code excepts the automatic state 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 or regulatory power." 11

U.S.C. § 362(b)(4). This statute does not on its face apply to this forfeiture proceeding, which was not brought by any governmental unit. It was brought by private parties, the Barnses.

As noted by the District Court, Bloxham was still the property title owner throughout the pendency of the bankruptcy, and he was also by operation of law the holder of the appurtenant water right. Bloxham was stayed from taking any action that could affect the property during the pendency of the bankruptcy, which would include deciding whether to water any part of his land. Idaho's forfeiture statutory period was tolled by operation of bankruptcy law. This Court can affirm the dismissal of Barnses' case and affirm the award of summary judgment to Jackson on this basis.

Finally, the Barnses complaint that application of the automatic stay provisions of the bankruptcy code would "enlarge or create" substantive property rights as defined by state law. Appellant's Brief, page 28. Applying the bankruptcy stay to toll the Idaho forfeiture statute does not enlarge or create substantive property rights. It prevents the property values from being manipulated through non-use of water rights or concentrated use of water rights to cause a forfeiture of valuable property rights. This is the very reason for the bankruptcy code stay: to prevent the judgement debtor or anyone else from taking action that could affect the value of property to be distributed in bankruptcy.

C. THE FACTS ARE UNDISPUTED THAT JACKSON RESUMED FULL USE OF HIS WATER RIGHT BY APRIL OF 2013

The District Court found there was no dispute that Jackson partially resumed the water use on his property in 2012, and that he fully resumed the water use on his property in 2013. The Barnses attempt to create a material dispute of fact on this issue when none exists. The District Court found there was no dispute on this issue. Jackson testified that he diverted forty percent of the available water from Spring Creek and he pumped that water to irrigate his orchard and other crops. Although Bloxham and another neighbor testified they did not "see" Jackson irrigating his property, there was no testimony offered to contradict Jackson's diversion and beneficial use testimony. It should be noted that given Bloxham's open hostility to the Jackson's water rights from the beginning, his credibility is questionable. Jackson has additionally explained that his neighbor Henderson's view of the Jackson property is obstructed by a berm, and he would not know whether Jackson was irrigating his property.

On appeal, the Barnses ask this Court to speculate from the volume of water they are estimating was diverted that this did not represent forty percent of the available water from Spring Creek. Appellant's Brief p. 39. In support the Barnses reference an interrogatory response that succinctly summarizes Jackson's water use in 2013, but ignores the fuller deposition and affidavit testimony that fully explained it. (R.) This is not a material fact in dispute.

D. AS THE HOLDER OF THE PARENT WATER RIGHT, BLOXHAM COULD NOT BE BOTH THE "OWNER" OF THE PROPERTY ABLE TO PARTIALLY FORFEIT WATER RIGHTS ON HIS PROPERTY, AND SIMULTANEOUSLY BE THE THIRD PARTY IN INTEREST/JUNIOR WATER RIGHTS HOLDER ABLE TO PREVENT RESUMPTION OF WATER RIGHTS WHEN HE PARTITIONED THE SAME PROPERTY

Bloxham relies on *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003) ("*Sagewillow II*) to assert that he was a third party in interest using the water that he had forfeited by not watering what subsequently became the Jackson property. Bloxham claims that he was both the owner to the entire parcel able to forfeit the water right, and that by the same conduct of using that "forfeited" water on what subsequently became the Barnes' property, when he partitioned his own property for sale through bankruptcy, he became a third party to his own forfeiture. This circular logic makes no sense, and it is not supported by any previous holdings of this Court.

In *Sagewillow II*, this Court recognized a possibility that junior water rights holders who begin using water when senior rights are forfeited could prevent a resumption of use argument and preserve the forfeiture. In that case, a landowner applied to the Department to change the place of use of numerous ground and surface water rights that originally had been authorized for irrigation of up to 2,390 acres in the Little Lost River Basin. Two of the ground water rights appurtenant to approximately 640 acres had been appropriated in the 1960s to facilitate obtaining

federal desert land entry ("DLE") patents, and thereafter had been abandoned. Between the late 1960s and 1989, no more than 1,412 acres had ever been irrigated under the remaining rights by Sagewillow's predecessor in interest. In 1989, Sagewillow purchased the property and immediately began redeveloping the irrigation system. By 1994, Sagewillow had brought approximately 2,390 acres back under irrigation, and then sought to change the place of use of the rights to reflect how they were then being used. The Department held that the two ground water rights appurtenant to 640 DLE acres had been forfeited in their entirety and that the portions of the remaining rights appurtenant to anything more than 1,412 acres also had been forfeited. The Department approved the transfer on condition that Sagewillow could irrigate no more than 1,412 acres. On appeal, the primary issue was whether Sagewillow had lawfully resumed the water rights and thereby avoided forfeiture.

This Court held that common law resumption remains a valid defense to forfeiture that can be defeated by a showing that a third party has made a "claim of right" to the water prior to the senior's resumption of use. A third party has made a claim of right to the water if he 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; or 3) used the water pursuant to an existing right. This Court also held that the resumption need not be made by the original appropriator, but must be upon the lands to which the water right originally was appurtenant. This Court additionally held that resuming the use of only a portion of the forfeited or

abandoned right will not prevent a loss of the non-resumed portion. *Sagewillow II*, 138 Idaho at 842, 70 P.3d at 680.

This Court remanded the case to the Department for further proceedings, to determine if there were any junior water rights holders who were relying on the forfeited water rights and could be affected by Sagewillow's application. *Id.*

This Court has held that only property owners, and not the beneficial users, of water rights are able to forfeit those water rights through nonuse. *Aberdeen Springfield Canal Co. v. Peiper*, 133 Idaho 87, 982 P.2d 917 (1999). The *Peiper* rule has been broadened and codified by Idaho Code § 42-223(7), but the common law rule has not been changed legislatively.

In the instant case, Bloxham urges this Court to treat him as the owner of the water right able to forfeit the right under the *Peiper* rule, but to also treat him as a junior water right holder in relationship to Jackson under the *Sagewillow II* rule, so that he could prevent Jackson's resumption of use. He asked to be treated by the law as two different parties to the same transaction, even though it is the very same conduct he is alleging that created both the forfeiture, and which should also prevent the resumption of use: Bloxham chose not to water the part of his parcel that became the Jackson parcel, and he chose to use all of his water on the part of his parcel that became the Barnses' property. Bloxham believes that he "automatically" became a third party in interest to the entire forfeiture as soon as he became severed from the Jackson property when he transferred that parcel to the bankruptcy court for sale. This argument misreads the entire reason for the *Sagewillow II* rule of law. The *Sagewillow II* rule is intended

to protect *junior* water rights users who have begun using the water previously forfeited by senior water rights users. This is consistent with the idea that when senior water rights are forfeited, they revert to the State so they can be re-appropriated to junior users for beneficial use. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

Bloxham was not a junior water rights user to Jackson, and he was not a senior water rights user to Jackson. His water rights were identical in priority at all times to Jackson, because Jackson's water rights derived from Bloxham's. The priority date for all three of the rights in question, 29-10420 (the parent right), 29-14032 (Jackson's right), and 29-14115 (Barnses' right), was March 22, 2004. (R. 288-293; 308). Bloxham was not a junior water rights holder who could protect his water use based on forfeiture under *Sagewillow II*. *Sagewillow II* is inapposite. The Barnses cannot use their predecessor in interest's reliance on an alleged water rights forfeiture *of his own water right* to prevent resumption of use by an equal successor of that same water right.

E. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF JACKSON

The District Court properly denied summary judgment for the Barnses and granted summary judgment for Jackson. There are no material facts in dispute on the issues decided by the District Court. There are disputes of fact related to whether Bloxham irrigated the property that became the Barnes' and to what extent he irrigated that property. There are disputes of fact related to whether Bloxham irrigated the property that became the Jackson's. These disputes of

fact do not prevent the granting of summary judgment, however, because even assuming the facts as the Barnses have stated, for all the reasons set forth above, their arguments fail as a matter of law.

V. CONCLUSION

This Court should affirm the District Court's grant of summary judgment in Jackson's favor. This Court should affirm the findings that there was no forfeiture on Bloxham's unified parcel, regardless of where he put his water to beneficial use, because the evidence is undisputed there was not enough water to satisfy his full water right for the place of use. Idaho law and rulings of the SRBA consistently hold it is use of the water, and not use of the land, which control the forfeiture analysis.

This Court can affirm the District Court's grant of summary judgment on the alternative ground that while the property was in bankruptcy, Bloxham could not take any act to forfeit the water rights on that property because of the automatic stay provisions of the bankruptcy code, which are intended to protect the value of assets in bankruptcy. The Barnses have offered no legitimate argument to the contrary.

Even if this Court found a forfeiture occurred, because Jackson fully resumed water use on his property consistent with his water right in April 2013, and because the Barnses did not file their forfeiture action until August 2014, their action must be dismissed. There is no genuine dispute of material fact on this issue.

This Court must reject the Barnses' attempt to conflate their predecessor in interests' roles in the alleged forfeiture of water rights, to permit a rule where the owner of a water right can simultaneously forfeit that right and rely on that forfeiture as a "junior user" to their own water right. Such a rule of law is illogical, and it does not advance any legitimate water rights law policy. This Court must reject the legal gymnastics Barnes is asking this Court to engage in, because it is not consistent with the larger policy concerns of Idaho water rights law. Landowners should not be permitted unilaterally to concentrate their water rights on smaller acreage than was appropriated in order to increase property values, or for any other reason. They should not be permitted to foreclose the opportunity for resumption of use of the alleged forfeiture of water simply by portioning their un-watered land. Landowners should be permitted to make decisions within their points of use regarding the most efficient and beneficial use of their water when there is insufficient water to satisfy their rights. For all the reasons previously discussed, the rule of law advocated by the Barnes would lead to illogical results inconsistent with the broader policies of Idaho water rights law, of preserving water rights for beneficial use on the land to which it was appropriated.

The District Court correctly recognized the logical flaws of the Barnses' legal analysis, and the logical inconsistency of their arguments, and the inconsistency with established water rights law in Idaho. This Court should affirm the dismissal of the Barnses' claims on summary judgment.

Dated this 25th day of July, 2017.

MERRILL AND MERRILL CHARTERED

By Mary E Shea
Mary E. Shea

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

Dated and certified this 25th day of July, 2017.

Mary E. Shea

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2017, two true and correct copies of Respondent's Brief were served by email and mailed, postage prepaid, on the following:

Robert E. Harris
D. Andrew Rawlings
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Email: rharris@holdenlegal.com
arawlings@holdenlegal.com

Dated and certified this 25th day of July, 2017.

Mary E. Shea

ADDENDUM

In accordance with Idaho Appellate Rule 35(g), Jackson submits the following maps which depict the place of use of Water Right 29-10420 in 2004, 2006, and 2009 (R. at 267-269).

2004 Imagery

Legend

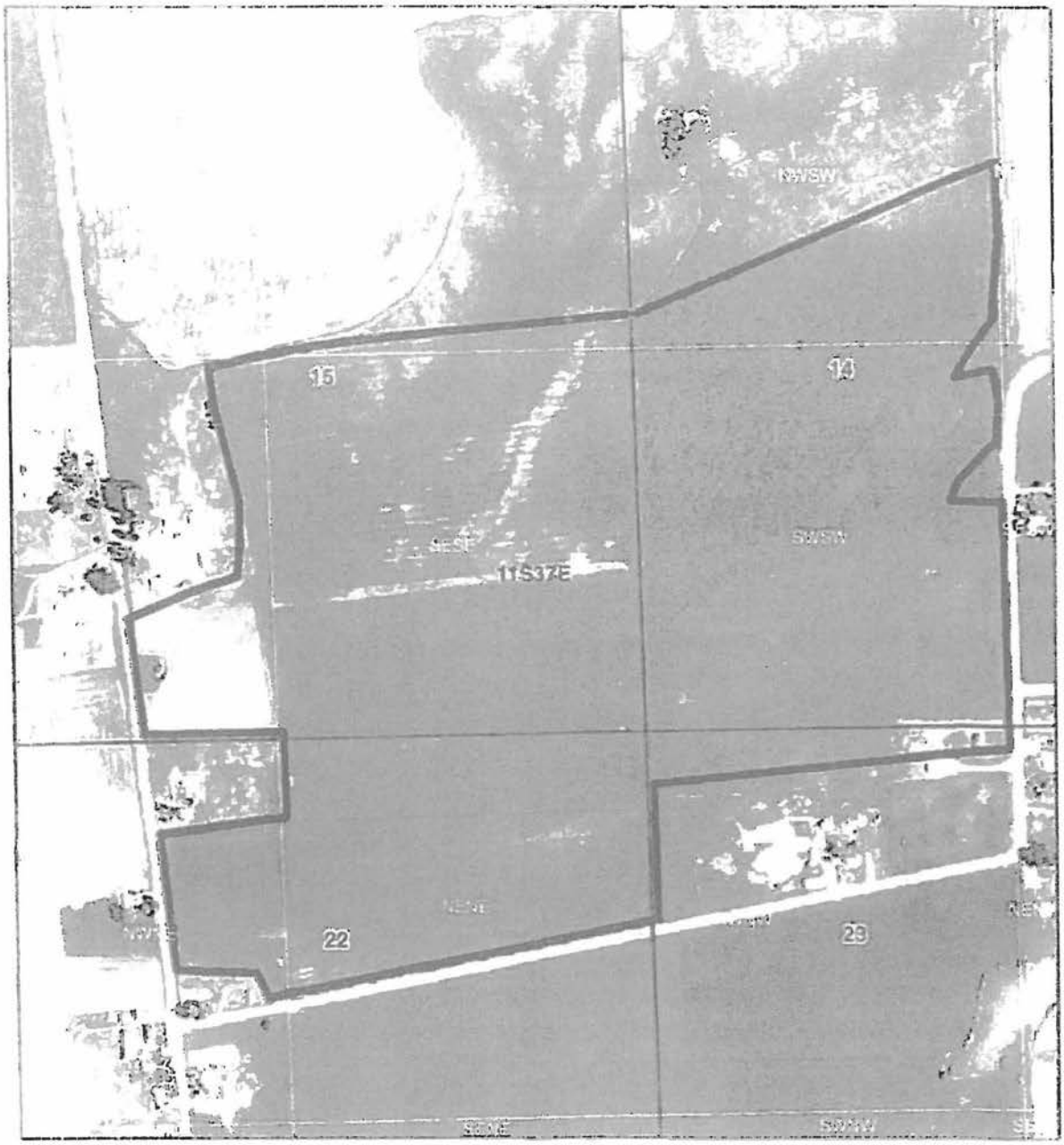
- Original Place of Use 29-10419 & 29-10420
- Township/Range
- Sections
- QQ

200 Imagery

Legend

- Original Place of Use 29-10419 & 29-10420
- Township/Range
- Sections
- QQ

2009 Imagery



Legend

- Original Place of Use 29-10419 & 29-10420
- Township/Range
- Sections
- QQ