8-14-2017

Barnes v. Jackson Appellant's Reply 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' REPLY 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' Reply Brief*. For the sake of clarity and brevity, the Barneses will use terms as defined in *Appellants' Brief*.

I. INTRODUCTION.

When water is available for diversion under a valid water right, and no water is diverted and used on a parcel for more than five years, the water right is forfeited. A former property owner, who keeps irrigating other portions of his property as he did before selling off the non-irrigated parcel, can assert a claim of right against the new owner of the former parcel after the parcel is sold to the new owner. This case can be distilled down to this simple statement of law and facts. However, Jackson's five-page-long summary of the case suggests complication and nuance that is simply not present. *See Respondent's Br*. at 1-6.

When Bloxham owned both the Jackson Property and the Barnes Property, water was available to him under a single water right and he irrigated the Barnes Property but not the Jackson Property. This went on for more than five years from 2004, when the water right was decreed. This was done because Bloxham did not have an existing irrigation system to irrigate the Jackson Property, so he concentrated his available water supply on what would eventually become the Barnes Property. The Jackson Property was purchased by Jackson in 2012. After that sale, Bloxham's status was that of a third party relative to the Jackson Property and his continued irrigation of the Barnes Property constitutes a claim of right that bars any resumption of use by Jackson.

Jackson's contentions in opposition to a finding of water right forfeiture center on the availability of water, the automatic stay of the Bankruptcy Code, and Bloxham's status as a third party. None of these contentions are persuasive. Water was always available to irrigate the property owned by Bloxham, either (1) 40% of the water in Spring Creek always available for irrigation use, or (2) virtually 100% of the water in Spring Creek when water was not needed for irrigation purposes on the Barnes Property (*e.g.*, such as when alfalfa was cut and drying on the Barnes Property) because there are only three water rights authorized for diversion of water from Spring Creek. The period of nonuse on the Jackson Property effects a water right forfeiture. The automatic stay does not prevent the operation of Idaho's water right forfeiture statute. And Bloxham cannot be anything but a third party after Jackson bought the Jackson Property. This Court must reverse the District Court and declare the forfeiture of any water right appurtenant to the Jackson Property.

II. STANDARD OF REVIEW.

The standard of review in a matter such as this is well-established and largely agreed to by the parties. However, Jackson takes it a step further, contending that, based on Idaho Rule of Civil Procedure 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.'" *Respondent's Br.* at 13 (quoting *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001)) (further citations omitted). However, *Harwood* and the rest of the precedent cited by Jackson ultimately go back to the former wording of Idaho Rule of Civil Procedure 56(c) that once provided that summary judgment, "when appropriate, may by rendered for or against any party to the action." Idaho Rule of Civil Procedure

56(c) (2015). But since July 1, 2016, Rule 56 has not contained this provision, instead stating that "[t]he 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 Rule of Civil Procedure 56(a) (emphasis added). Since the 2016 rule change, there is no basis for the entry of summary judgment in favor of a non-moving party. On that basis alone, this Court may reverse the District Court's grant of summary judgment in favor of Jackson, the non-moving party.

III. ARGUMENT.

In analyzing water right forfeiture, past cases from Idaho courts engage in a three-part analysis: (A) whether there was nonuse for at least five consecutive years, Idaho Code § 42-222(2); (B) whether any applicable exception or defense to forfeiture applies, Idaho Code § 42-223; and (C) whether use of the water right was resumed before a third party had made a claim of right to the forfeited water, *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003). Here, Jackson's brief lacks adequate discussion of the actual forfeiture analysis. Jackson provides two arguments why 14032 has not been forfeited: "because all water available to [10420] was put to beneficial use" and the "automatic stay [] of the United States Bankruptcy Code tolled [the] statutory period of forfeiture." *Respondent's Br.* at 14, 23 (capitalization modified, emphasis omitted)). However, Jackson does not explain where those arguments fit in the forfeiture analysis. While Jackson's brief does not cite Idaho Code §42-223(6)—the only statutory basis he has ever asserted as a defense to forfeiture, R. at 194—these arguments must fit in the second part of the forfeiture analysis, although they are not availing.

Forfeiture is a necessary doctrine to extinguish unused, relic water rights and facilitate the maximum beneficial use of water in this State, where water is a scarce and precious resource. Jackson gives three core reasons for this Court to hollow out the forfeiture doctrine and affirm the District Court, claiming that forfeiture has never been measured "by examining how the water was applied to the land," that water rights cannot be "forfeited when there was not enough water to fulfill the right," and that the parent water right at issue here was "always fully put to beneficial use." *Respondent's Br.* at 2. However, none of these positions are valid reasons to eviscerate Idaho's forfeiture laws as Jackson proposes. First, forfeiture is defined by the failure to put water to beneficial use, which (for an agricultural irrigation water right, as is at issue here) is measured by the number of acres actually irrigated. Second, where the Jackson Property was always entitled to 40% of the water available because of its shared priority date with the Barnes Property water right,[1] there was always some water available for use thereon—certainly at least one time over a five-year period,[2] which would stave off any forfeiture and reset the forfeiture clock. Third, what Jackson calls the full use of a water right to irrigate just a portion of the authorized irrigated acres[3]

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[1] It is noteworthy that Jackson appears to attack this proposition at one point, *Respondent's Br.* at 18, yet relies on it later when it is to his benefit, *Respondent's Br.* at 3, 26 (claiming that he fully resumed use of 14032 in 2013 by using 40% of the available water, which was his proportional entitlement). These contradictory arguments demonstrate the flaw in Jackson's position and are discussed further below.

[2] The certainty of this statement comes from the fact that the source of Spring Creek (the common source of all the water rights at issues in this case) is not mountain runoff (which increases and decreases) but a spring (which provides a more regular flow of water). R. at 59 (describing the "spring that feeds Spring Creek"); R. at 61 (same); R. at 176-77(Jackson's deposition, p. 116, l. 20–p. 117, l. 3, where Jackson describes the flows of Spring Creek a consistent, noting that "you can't see a difference in it, spring, fall, year to year. It has not changed in five years").

[3] Jackson's focus on the place of use element of a water right, and distinguishing it from the other elements, *Respondent's Br.* at 14-16, is inapposite. A water right may have an authorized place of use that includes a certain number of acres, yet it may only allow the irrigation of some of those acres.

would subvert the entire concept of the duty of water and IDAPA 37.03.02.35.03.a., unless (partial) forfeiture applies—and *Sagewillow* makes clear that it does. None of these over-arching reasons are availing, nor are Jackson's arguments, all of which depart from the proper forfeiture analysis.

Applying the forfeiture analysis to the facts of this case demonstrates that 29-14032, 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) the lack of any applicable exception that extends the 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. Bloxham's bankruptcy does not complicate the forfeiture analysis, but only introduces one more fact by causing the split of 29-10420 (the parent right) into multiple water rights with identical priority dates and by alienating Bloxham from the Jackson Property (**thereafter** making him a third party relative to the Jackson Property and its appurtenant water right, 29-14032). Every forfeiture decision is "highly fact driven and [will] sometimes have unintended or unfortunate consequences." *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). The unique facts of this case do not affect the forfeiture analysis itself, nor do they provide any basis for the entry of summary judgment on Jackson's behalf. The District Court erred in doing so and, therefore, must be reversed by this Court.

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.

The starting point of any forfeiture analysis must begin with Idaho Code § 42-222(2). *Dovel v. Dobson*, 122 Idaho 59, 62, 831 P.2d 527, 530 (1992) ("Forfeiture of water rights are governed by I.C. § 42-222(2)"). That statutes provides:

> 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). This "doctrine of forfeiture is predicated upon a statutory declaration that all rights to use water may be lost where an appropriator failure 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).

Both the District Court and Jackson have repeated that it is the diversion of water, not the irrigation of land, that must be considered in forfeiture. *See* R. at 356. However, upon a plain reading of the applicable statute, it is the **beneficial use of the water diverted under the water right** that must be considered. Idaho Code § 42-222(2). Jackson points out that beneficial use "refer[s] to the way water is being used" and not "to the separate element[s] of a water right." *Respondent's Br*. at 16. However, under Idaho forfeiture law, this is not at all helpful. A water right is defined by a number of elements that define the parameters of the water right, none of which exclusively describes the beneficial use of the right. Beneficial use depends on several elements of the water right including the purpose of use, the place of use, and the authorized

amount of use (*e.g.*, volume limitations and authorized acres of an irrigation right such as those at issue here). Once water is diverted pursuant to a water right, it is the failure to apply the diverted water to a beneficial use that effects a forfeiture. *Dovel*, 122 Idaho at 62, 831 P.2d at 530. And the failure to apply the diverted water to full beneficial use, at least once every five years, effects a partial forfeiture. *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680.

Jackson admits that "water rights are appurtenant to the land." *Respondent's Br.* at 20. Nevertheless, while articulating this correct statement of the law, Jackson does not appear to appreciate what that means. By its application to beneficial use on land, a "water right becomes an appurtenance to such land." *Koon v. Empey*, 40 Idaho 6, ___, 231 P. 1097, 1099 (1924) (citation omitted). For almost a century, "there [has been] no question that **a water right becomes appurtenant to the land <u>to which it has been applied and upon which the water has been used for irrigation</u>**." *Id.*, at __, 231 P. at 1098 (citation omitted, emphasis added). An appurtenance is "[s]omething that belongs or is attached to something else." BLACK'S LAW DICTIONARY 118 (9th ed. 2009). An agricultural irrigation water right is appurtenant (or attached) to the irrigated acres on which it may be used. A useful metaphor is considering the land as a table and the water right as a tablecloth. If a portion of the water right is not used for five (or more) years on one corner of the property, it is as though the table cloth is removed from that portion of the table. When that portion is conveyed, the purchaser gains the table (the land), but it is not covered by a tablecloth (the water right). Even though the analysis must consider defenses, resumption of use, and claims of right, this analogy aptly describes what it means for a water right to be an appurtenance to land.

In his arguments to this Court, Jackson confuses the forfeiture issue by parading a host of terms that have no applicability to this proceeding, for example: waste (*Respondent's Br.* at 19), consumptive use (*Respondent's Br.* at 16-17), and a hyperbolic overstatement that the Barneses proposes a "forfeiture rule … requiring [water users] 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," *Respondent's Br.* at 18. We will address each of these in turn.

No one wasted water in this case, nor has it been alleged to have occurred.[4]

Second, consumptive use plays absolutely no role in the Barneses' forfeiture argument. Consumptive use is not even considered an element of a water right. *See* Idaho Code § 42-202B(1) ("Consumptive use is not an element of a water right"). Jackson's claim that "landowners are free to change their consumptive use within their place of use," *Respondent's Br.* at 17, is generally correct, but in the context of a forfeiture analysis, such an argument implies that a landowner can engage in no irrigation (resulting in no consumptive use of water) and be shielded from forfeiture. This argument is entirely misplaced. The relevant point is that a landowner cannot fail to make beneficial use of a water right, leaving a portion unused (*i.e.*, non-irrigated for an agricultural

[4] While waste has never been alleged by the Barneses in this matter, the Barneses made brief mention of waste to point out that allowing the concentration of a water right by a water user, which is the logical conclusion of the District Court's determination in this case, would facilitate waste. *See Appellants' Br.* at 19. Facilitating waste runs counter to Idaho water law policy. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). Further, allowing a water user to unilaterally concentrate water overthrows the notions of the duty of water and subverts IDWR's role in administering water rights. *See, e.g.*, 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)).

irrigation water right) for at least five consecutive years, without facing the consequence of forfeiture, which is admittedly a harsh doctrine, but a valid and necessary doctrine in Idaho nonetheless because of Idaho's arid climate and well-established policy to make maximum beneficial use of its water resources.

Finally, Jackson again argues against the Barneses' articulation of irrigated acres as the measure of beneficial use as an expansion of the forfeiture doctrine. Jackson argues that any time there is not enough water available for diversion of the full amount due under a water right, rights are either forfeited or a user must always irrigate all of their authorized acres. *Respondent's Br.* at 18. However, the Barneses' position is supported by Idaho law and arguments against it ignore the forfeiture statutes and cases adopting partial forfeiture in Idaho. A water right, or a portion of a water right, must not be exercised for five years in order for it to be forfeited, meaning water is not applied to beneficial use under the water right for five years even though water is available for diversion and use. Idaho Code § 42-222(2). A water user can establish a rotation to irrigate his property that will stave off forfeiture indefinitely. Going back to the table and tablecloth analogy; nothing is forfeited if a different portion of the tablecloth is used each night. It is only when the same place is exclusively used (and other portions go unused) for an extended period of time that partial forfeiture steps in. *See Sagewillow*, 138 Idaho at 842, 70 P.3d at 680. Again, the Barneses are not trying to persuade this Court to adopt new law here because forfeiture law is well-established—pursuant to Idaho Code § 42-222(2), "an appropriator who fails to apply the water right beneficially for a period of five (5) consecutive years loses all rights to use such water, regardless of intent." *Dovel*, 122 Idaho at 62, 831 P.2d at 530 (citations omitted).

And it is the same with partial forfeiture of a water right. The Idaho Supreme Court, in affording deference to IDWR, has determined that "partial forfeiture is provided for by I.C. § 42-222(2)." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). In other words, the part of a water right appurtenant to any portion of property is forfeited, regardless of intent, when the water right is not beneficially used on that portion. See *Id.*; *see also Sagewillow*, 138 Idaho at 842, 70 P.3d at 680 (describing "a partial forfeiture of water rights by nonuse for five years" and the corollary that any "resumption of use must also be upon land to which the water right is appurtenant" (citations omitted)).

Here, there is absolutely no dispute that 29-10420 (the parent right) was not used on the Jackson Property for five or more consecutive years after 29-10420 was decreed in 2004. First, Jackson presented no evidence of irrigation on the property from 2004 through 2009—indeed, Jackson did not even view the property until 2011. The Barneses' affirmative assertion of forfeiture is fully supported by Bloxham's testimony, paired with the confirmation of Roy Calvin Henderson (the adjacent landowner to the Jackson Property), regarding the timeframe from 2004-2009—which is not controverted by Jackson—provides clear and convincing evidence of the five-year-long forfeiture period. R. at 60-61, 139-40. **Jackson's lack of evidence of irrigation, and the Barneses' affirmative evidence of non-irrigation, is sufficient to satisfy the first part of the forfeiture analysis**. Issues relating to exceptions or defenses (such as circumstances beyond the water users control and the availability of water argument made by Jackson) are addressed in the second part of the analysis. *See* Section III.B., *infra*. Further, any issues of resumption (*i.e.*,

any use of water on the Jackson property after 2009) and claims of right are assessed in the third part of the analysis. *See* Section III.C., *infra*.

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

There are certain defenses that can stop, or toll, the forfeiture clock. *See* Idaho Code § 42-223. These defenses only apply to the forfeiture period itself, which in this case is the period spanning 2004–2009. However, these defenses are not applicable to an attempted resumption of use or any time after the five-year forfeiture period has already run.

In the course of discovery in this case, the Barneses asked Jackson to "identify which exemptions provided in Idaho Code § 42-223 and common law you claim exempt 29-14032 from forfeiture." R. at 194. The only defense ever disclosed by Jackson is Idaho Code § 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). In other words, if—during the five consecutive years of nonuse (here, from 2004 to 2009)—the nonuse is caused by "circumstances over which the water right owner has no control," the forfeiture period is tolled. *Id*. Jackson disclosed only two bases for the application of this defense: (1) Bloxham's bankruptcy and (2) interference by Bloxham occurring in 2012. R. at 194. Jackson has abandoned the second basis, as it occurred in 2012 and, consequently, has no applicability to the period of nonuse in this case, 2004-2009. However,

Jackson has, without supplementing his discovery responses, belatedly raised[5] another basis to apply § 42-223(6): that Bloxham used all of the water available to him. *Respondent's Br.* at 18. 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.

In these proceedings, Jackson again contends that the automatic stay of bankruptcy, codified at 11 U.S.C. § 362(a), somehow prevents the forfeiture of 29-14032, the water right (or portion of the parent right, 29-10420) appurtenant to the Jackson Property, by tolling the operation of Idaho Code § 42-222(2). *Respondent's Br.* at 2 ("the Idaho forfeiture statute was tolled while the property in question was in bankruptcy"). The Barneses have previously dedicated significant effort to four arguments addressing Jackson's contention, which are incorporated herein by reference. R. at 326-41; *see also Appellants' Br.* at 24-29.

Against these arguments, Jackson cites authorities to support the (uncontested) proposition that the automatic stay "is extremely broad in scope." *Respondent's Br.* at 24 (quoting *Delpit v. Comm'r*, 18 F.3d 768, 770 (9th Cir. 1994)). However, in addressing each of the Barneses' four arguments against the contention that the automatic stay applies as Jackson believes, Jackson cites **absolutely no authority of any kind** beyond quoting some of the statutory provisions that form the basis of the Barneses' four arguments. *See Respondent's Br.* at 24-25. By rule, a respondent's brief "shall contain the contentions of the respondent with respect to the issues presented on appeal,

[5] Again, the Barneses invite this Court to apply Idaho Rule of Civil Procedure 26(e)(3) and exclude this extra basis asserted by Jackson to apparently apply Idaho Code § 42-223(6). *See Appellants' Br.* at 23-24, n. 6.

the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon." Idaho Appellate Rule 35(b)(6). This is the same rule for both appellants and respondents. *See* Idaho Appellate Rule 35(a)(6); *compare* Idaho Appellate Rule 35(b)(6); *see also Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 90, 996 P.2d 303, 309 (2000). By failing to provide any citation to authority, the issue is waived. *Shea v. Kevic Corp.*, 156 Idaho 540, 548, 328 P.3d 520, 528 (2014); *Bach v. Bagley*, 148 Idaho 784, 790-91, 229 P.3d 1146, 1152-53 (2010). Thus, Jackson has waived any challenge to the four arguments provided by the Barneses against the application of the automatic stay to prevent the forfeiture of 29-14032.

Nevertheless, even considered on their merits, Jackson's positions cannot be availing. The facts of Bloxham's bankruptcy merit discussion, and while involved, they are not overly-complicated. He apparently believed he had transferred any interest he had in the Jackson Property (and other property) to either Eagle Eyes, Ltd. or the Bloxham family trust. *Respondent's Br.* at 7-9. Despite filing bankruptcy on October 12, 2005, the status of the Jackson Property was not settled until 2012, whereupon the bankruptcy trustee quickly sold the Jackson Property to Jackson. R. at 271-74, 281-83. The District Court was faced with Jackson's argument regarding the automatic stay and correctly found that "the Bankruptcy [sic] proceedings, and any stay associated with such, are not related to this litigation and therefore will not be discussed." R. at 360. For the same four reasons presented by the Barneses to the District Court, this Court should also find Bloxham's bankruptcy and the automatic stay not applicable to this matter.

First, the automatic stay only prevents affirmative actions affecting the bankruptcy estate. 11 U.S.C. § 362(a)(3) (barring "any **act** to obtain possession of property of the estate" (emphasis

added)); *see also* H.R. Rep. 95-595, 340-41, 1978 U.S.C.C.A.N. 5963, 6297-98 (stating Congress's intention that 11 U.S.C. § 362(a) would stay "[a]ll **proceedings** … including arbitration, license revocation, administrative, and judicial **proceedings** … [including] civil actions … and **all proceedings** even if they are not before governmental tribunals" (emphasis added)). "The mere running of time on contractual rights is not an act of a creditor within the meaning of Section 362(a)." *In re Pridham*, 31 B.R. 497, 499 (Bankr. E.D. Cal. 1983); *see also In re Petersen*, 42 B.R. 39, 40 (Bankr. Or. 1984) (concluding that the passage of time, which extinguishes a right of redemption after a foreclosure is not within the scope of the automatic stay). Jackson, however, contends (without citation) that "[i]t 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." *Respondent's Br.* at 24. This point is contradicted by Jackson himself within this same brief. *See Respondent's Br.* at 2 ("the Idaho forfeiture statute was tolled while the property in question was in bankruptcy"). It is also nonsensical. Bloxham's "actions of alleged forfeiture" are his **nonuse** of the water right appurtenant to the Jackson Property. The automatic stay prevents "any act" affecting the property in the bankruptcy estate, 11 U.S.C. § 362(a)(3), and not "any act or nonaction" or the passage of time.

Second, the Bankruptcy Code contains a tolling statute—11 U.S.C. § 108—that is applicable to this situation, instead of the automatic stay. This tolls the time for a bankruptcy trustee to "cure a default, or perform any other similar act." 11 U.S.C. § 108(b). It extends the time to the later of (1) the normal expiration of the timeframe or (2) sixty days "after the order for

relief." *Id.*; *see also* 11 U.S.C. § 301(b) (defining the "order for relief" described in option (2) as "[t]he commencement of a voluntary case" under the Bankruptcy Code). Jackson contends that this does not apply because "[f]orfeiture of water rights is not curing default or a similar act." *Respondent's Br.* at 24. However, curing a forfeiture (*i.e.*, beneficially using a water right that is in the midst of the forfeiture period) is exactly an act meant to "cure a default, or perform any other similar act" that is addressed by 11 U.S.C. § 108(b). Because the Bankruptcy Code is a cohesive scheme, "where one section of the 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). Thus, the tolling statute and not the automatic stay should apply to this matter. The effect of this is that, at latest, forfeiture was tolled to May 21, 2009 (60 days after March 22, 2009, when the five year forfeiture period was completed from March 22, 2004, the day that 29-10420 was decreed by the SRBA Court). There is no evidence of any resumption of use of 29-14032 by May 21, 2009, meaning that any § 42-223(6) defense based on the bankruptcy automatic stay is ineffective.

Third, the automatic stay itself contains an exception to allowing the functioning of governmental action "to enforce such governmental unit's or organization's police and regulatory power." 11 U.S.C. § 362(b)(4). To whatever extent the automatic stay of § 362(a) applies here, the action being stayed must be an action of the State of Idaho (via Idaho Code § 42-222(2)), which is allowed by § 362(b)(4). The operation of the forfeiture statute is an exercise of the police and regulatory power of the State of Idaho, under any test imposed by the federal courts. See R. at 328-30. However, Jackson contends that "[t]his 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 Barneses." *Respondent's Br.* at 25. This confuses the issue and incorrectly equates this proceeding to declare the forfeiture of 29-14032 with the actions that caused that forfeiture under Idaho Code § 42-222(2). The stay has no application to this proceeding because the Jackson Property is not in the bankruptcy estate any longer. Jackson's contention must be that the automatic stay somehow affected the operation of Idaho Code § 42-222(2) at some point between 2004 and 2009. Jackson's contention that the automatic stay bars this action—instituted in 2014—is misplaced.

Finally, unless there is a direct and unavoidable conflict, the Bankruptcy Code cannot enlarge or create substantive property rights, which are defined by state law. *Butner v. U.S.*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). Jackson contends that his position does not use the Bankruptcy Code to enlarge or create a substantive property right, but "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." *Respondent's Br.* at 25. This prevention of changing property values or forfeiting property rights is a **definitional example** of enlarging or creating a substantive property right. Idaho law provides for the forfeiture of a water right after five years of nonuse. Idaho Code § 42-222(2). The Bankruptcy Code can only affect that outcome to the extent explicitly required by its text. For that reason, the automatic stay does not utterly prevent forfeiture of a water right for the duration of a bankruptcy case; instead, the

tolling statute, 11 U.S.C. § 108, provides the trustee or debtor-in-possession with sufficient time to take any actions[6] to cure a pending water right forfeiture.

Ultimately, Jackson contends that the purpose of the automatic stay is "to prevent the judgment debtor or anyone else from taking action that could affect the value of property to be distributed in bankruptcy." *Respondent's Br.* at 25. This is a repackaging of the "status quo" argument previously asserted by Jackson. R. at 251-52. This was incorrect when posed to the District Court and it remains incorrect now. When faced with this kind of argument, the Eighth Circuit was not persuaded, stating:

> 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 v. First Nat. Bank of Montevideo, Minn., 719 F.2d 270, 277 (8th Cir. 1983) (emphasis added). Jackson seeks an application of the automatic stay that is "unjustified by the language of § 362(a) and [] unintended by Congress." *Id.* For that reason, Bloxham's bankruptcy does not prevent the forfeiture of 29-14032.

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[6] For instance, a trustee or debtor-in-possession could apply for an extension of the five-year forfeiture period. Idaho Code § 42-222(3)–(4). A trustee or debtor-in-possession could also apply the water to beneficial use (either proportionately or by rotation, thus preventing forfeiture.

2. 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 summarizes the Barneses' position in this matter as asking "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." *Respondent's Br.* at 1. This is a correct summary of partial forfeiture law in Idaho as applied to this matter, which is the basis of the position asserted by the Barneses in this matter.[7] However, there are important facts to consider when considering the application of partial forfeiture law to this matter. Specifically, the fact that the entire property—including the Jackson Property—was always entitled to the use of water, which is to say that **approximately 40% of the water in Spring Creek was always legally available for Bloxham to beneficially use on the Jackson Property**. Additionally, it is also evident that virtually 100% of the water in Spring

[7] The Barneses are not alone in understanding partial forfeiture this way. Consider this example:

> For example, consider the situation where a farmer has a 4 cfs water right to irrigate 200 acres, but then takes 50 acres out of irrigation for use as a processing facility, a housing development, or some other non-irrigated use. The "forfeiture clock" would begin running as to a portion of the water right. After five years, one-fourth of the water right, or 1 cfs, would be subject to a ruling that it had been forfeited. Such a result is hardly surprising, given that the foundational principles of the prior appropriation doctrine are beneficial use, the avoidance of waste, and maximum use of the resource. Of course, the farmer could avoid forfeiting this portion of the right by transferring it to some other use or placing it in a "water bank" or "rental pool" established pursuant to state law.

Jeffrey C. Fereday et al., WATER LAW HANDBOOK 43 (Givens Pursley LLP, January 2, 2017) (http://www.givenspursley.com/assets/publications/handbooks/_handbook-waterlaw.pdf); *see also* R. at 323 (providing this same example to the District Court).

Creek was available for the Jackson Property when water was not needed for irrigation purposes on the Barnes Property (*e.g.*, such as when alfalfa was cut and drying on the Barnes Property).

This fact is extremely significant and Jackson's doubletalk first ignores it to assert that water was not available to be used on the Jackson Property, *Respondent's Br.* at 18, just to later use this fact to claim that Jackson "resumed full use of water on [the Jackson Property] in April 2013" by using "forty percent of the available water from Spring Creek" to irrigate some 10 acres of the Jackson Property. *Respondent's Br.* at 3, 26. However, the inconsistent application of the law to the facts leads to an incorrect result.

In Idaho, "an appropriator who fails to apply the water right beneficially for a period of five (5) consecutive years loses all rights to use such water, **regardless of intent**." *Dovel*, 122 Idaho at 62, 831 P.2d at 530 (citations omitted, emphasis added). It is the duty of this Court to "apply the statute as written. If the statute is unwise, the power to correct it resides with the legislature, not the judiciary." *A&B Irr. Dist. v. Idaho Dep't of Water Res.*, 154 Idaho 652, 656, 301 P.3d 1270, 1274 (2012) (citation and internal quotation marks omitted). Thus, "rights to the use of water … 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." Idaho Code § 42-222(2). This Court has determined that "water rights cannot be forfeited by nonuse if the water was not available." *Sagewillow*, 138 Idaho at 843, 70 P.3d at 681.

Jackson seizes on this phrase and centers his argument on availability, echoing now-Justice Burdick's analysis in *Wood v. Troutt*. *Respondent's Br.* at 17-18 (citing *In re SRBA, Case No. 39576, Subcase 65-05663B (Wood v. Troutt)*, Memorandum Decision and Order on Challenge;

and Order of Partial Decree, pp. 32-33 (dated May 9, 2002)). However, this issue revolves around exactly what is meant by "availability." Jackson contends that when water is not available to fully satisfy a water right, it is legally impossible to forfeit any portion of that water right; it is the actual or physical availability of (all the) water that is determinative of nonuse. *Respondent's Br.* at 1. The Barneses argue that if a water right is in priority, the failure to put any portion of that water right to beneficial use for five consecutive years or more forfeits that portion; it is the legal availability of the water right that is determinative of nonuse.

In resolving between these two proposed meanings of availability, the definitions are instructive. In a legal sense, available means "[l]egally valid." BLACK'S LAW DICTIONARY 155 (9th ed. 2009). This fits with the applicable standard definitions of available, which are: "**1** that one can avail oneself of; that can be used; usable" and "**2** that can be gotten, had, or reached; handy; accessible." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 98 (5th ed. 2014) (bold emphasis in original). Thus, when a water right is in priority, there is a legal entitlement to water. In other words, the water right is legally exercisable, and the water user can avail itself of the water, which is usable and can be gotten. It is the legal availability of water that controls.

This is supported by the context of the statement in *Sagewillow*. In full, the paragraph relating to availability reads:

> 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 (emphasis added). In other words, the water rights in question were junior in priority to other water rights and could only be delivered during "high water flows," making them unavailable (out of priority) under normal conditions. *Id.* Again, it is the legal availability of water that was significant to the *Sagewillow* Court.

Despite this logic, Jackson ignores *Sagewillow* and other Idaho law and asserts that "[t]here is no case law in Idaho … to support the assertion that if a landowner does not have enough water to satisfy his entire water rights [sic], 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." *Respondent's Br.* at 18. However, Sagewillow and other Idaho case law on this issue exists and is extremely persuasive. This Court has explained that where a case "is controlling precedent in Idaho[,] the rule of stare decisis dictates that we follow it, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990).

Contrary to Jackson's representation that no such cases exists, and in addition to *Sagewillow*, there is an Idaho case that remains valid law, where **this Court affirmed the forfeiture of a water right** even though the evidence showed that the water user "was not able to

irrigate the entire property due to a combination of there **not being enough water** and because the equipment for irrigation was not in working order." *McCray v. Rosenkrance*, 135 Idaho 509, 512, 20 P.3d 693, 696 (2001) (emphasis added).

In *McCray*, the SRBA special master and the SRBA court concluded that "the water rights on the eastern portion of the property had been abandoned" but that "the water rights for the entire property had been forfeited due to nonuse" with the exception of a single 25-acre portion that had been irrigated. *Id.* at 513, 20 P.3d at 697. The water user raised the defense, now codified in Idaho Code § 42-223(6), that the nonuse was caused by "factors beyond his control." *Id.* at 516, 20 P.3d at 700. Specifically, the facts showed that the water user "tried to irrigate more than the 25 acres in 1990, but was prevented from doing so because of drought and/or the wrongful actions of the watermaster." *Id.* Additionally—and critically—there was also evidence that no irrigation system was in place to irrigate the water right's entire place of use, this Court affirmed the finding of forfeiture based on evidence showing that "even if [the watermaster] had not terminated the flow [of water] to the property, the property still could not have been irrigated because of the lack of ability to water the property." *Id.* at 517, 20 P.3d at 701. Thus, the lack of adequate water and the lack of an irrigation system—circumstances that were asserted to be beyond the control of the water right holder—were not adequate bases to prevent forfeiture. *Id.*

Here, as a matter of law, 40% of the water in Spring Creek was always available to the Jackson Property (and at times, 100% would have been available) because of the water right appurtenant to the property. That appurtenance existed before and after the Jackson Property was sold to Jackson. The fact that Jackson contends that his use of 40% of the Spring Creek flows is

a full resumption of his right is a tacit acknowledgement of that fact. If, in Jackson's view, using 40% of the water now constitutes a full use of the appurtenant water right, why is the failure to use 40% of the water by Bloxham on the Jackson Property anything other than a partial forfeiture? Bloxham's (and/or the bankruptcy trustee's) use of the water for the Jackson Property could have taken many forms: *e.g.*, spreading the water over the full acreage of the property, using the water right to irrigate portions of the Jackson Property one section at a time every five years, or applying to IDWR for an extension of the forfeiture period. *See* Idaho Code § 42-222(4) (explaining that upon a showing of reasonable cause, the Director may grant one extension of five years in which to resume use of a water right). Bloxham took none of these actions, and thus forfeited the portion of 29-10420 appurtenant to the Jackson Property (which is now numbered as 29-14032).

Further, to whatever extent actual availability is significant, *McCray* is both instructive and controlling. *McCray* has not proved unjust or unwise in the past 16 years. It remains binding on this Court and should not be overruled now. The Jackson Property was not irrigated during the five-year period from 2004-2009. R. at 60-61, 139-40. While the evidence shows that there were times when there was not enough water to fully supply 29-10420's authorized diversion rate during that time period, R. at 61, the evidence also shows that the Jackson Property "still could not have been irrigated because of the **lack of ability to water the property**." *McCray*, 119 Idaho at 517, 20 P.3d at 701 (emphasis added). The infrastructure to water the Jackson Property—which was absolutely in the water user's control—did not exist to irrigate the Jackson Property. R. at 60. Otherwise, there would be no need for Jackson to construct his own irrigation system, with the partial funding assistance of the Natural Resources Conservation Service (the "NRCS"), a division

of the United States Department of Agriculture. R. at 210. Thus, while the actual availability of water did not fully supply 29-10420, Bloxham had no way to irrigate the Jackson Property regardless of the water level. As in *McCray*, the lack of infrastructure is within the water user's control and means that a water right can be forfeited regardless of the actual availability of water. That should be the result here.

The rule that should come out of this case is in keeping with *Sagewillow* and *McCray*. When water that is available—*i.e.*, is in priority and may be diverted to irrigate the appurtenant acres—to a water right holder, who leaves the water unused for five or more consecutive years, the water right is forfeited (subject to resumption of use and claims of right, discussed below). Jackson proposes a rule that for as long as water is not fully available for diversion under a water right is not fully satisfied—no matter how small in magnitude—absolutely no portion of that water right can be forfeited. This does nothing to encourage the efficient use of water, which is a key purpose of allowing forfeiture to extinguish unused water rights or relic water rights. *Hagerman Water Right Owners*, 130 Idaho at 735, 947 P.2d at 408 ("The water of this arid state is an important resource. … Idahoans must make the most efficient use of this limited resource. The policy of the law of this [s]tate is to secure the maximum use and benefit … of its water resources. … Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. … Partial forfeiture make possible allocation of water consistent with beneficial use concepts"). Allowing forfeiture when legally available water goes unused for five consecutive years furthers the overall maximum use and benefit of water.

As to any exception or forfeiture defense raise by Jackson, 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.

The final part of the forfeiture analysis relates to whether Jackson resumed (partial or complete) use of 29-14032 prior to a claim of right made 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)). This Court has explained:

> 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.

Here, there are issues relating to (1) whether Bloxham's use of his water right to irrigate the Barnes Property constitutes a claim of right by a third party; and (2) if Bloxham's use was not

a claim of right, the amount of Jackson's resumption of use of 29-14032 prior to the institution of this action in August 2014.

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

Jackson claims that it is "circular logic" for the Barneses to assert that Bloxham could partially forfeit the water right appurtenant to the Jackson Property by nonuse and could later be a third party able to assert a claim of right against that forfeited water right. *Respondent's Br.* at 27. It appears that the concept that one person—Bloxham—could fill more than one role over the course of a forfeiture has stymied Jackson. *Respondent's Br.* at 29 (the Barneses "urge[] this Court to treat [Bloxham] as the owner of the water right able to forfeit the right … but to also treat him as a junior water right holder in relationship to Jackson … so that he could prevent Jackson's resumption of use"); *Respondent's Br.* at 30 (focusing on the status of being "junior" or "senior" and concluding that *Sagewillow* cannot apply). Jackson goes so far as to call this "legal tap dancing" and "legal gymnastics." *Respondent's Br.* at 4.

The Barneses detailed and thoughtful analysis is not tap dancing or gymnastics. This Court should not be persuaded by Jackson's oversimplification and confusion. There is, actually, no contradiction or need for confusion. Two principles clarify Jackson's misperception.

First, when dealing with property matters, it is not uncommon for a single party to be in various roles **over the course of time**. Jackson points out that "Bloxham could not be a third party in interest to his own property." *Respondent's Br.* at 4. This is true—Bloxham cannot own the property and be a third party while we owned the property. However, once Bloxham no longer

owned the Jackson Property, then by definition he is a third party relative to the Jackson Property. Thus, through the passage of time, Bloxham was, first, an owner of the Jackson Property able to forfeit the thereunto appurtenant water right by nonuse and then, second (after the Jackson Property was no longer Bloxham's), a third party relative to the Jackson property able to assert a claim of right against the forfeited water right. The key point in time is April 26, 2012, when Jackson bought the Jackson Property. Before then, Bloxham was the owner of the Jackson Property (subject to the control of the bankruptcy trustee during the bankruptcy) and forfeited the appurtenant water right. After then, Bloxham was no longer the owner of the Jackson Property, but was a third party capable of asserting a claim of right sufficient to bar Jackson's resumption of use.

To use another analogy, these facts are like watching someone throw a ball in the air and then catch it. Jackson's under-analyzed view is like taking a photograph and not understanding how the same person can both throw and catch the ball. The better approach is to watch a video that will show how one person can perform two seemingly contradictory actions over the course of time.

Second, as to the issues regarding junior and senior water rights, the answer is simply that both policies are addressed by the fact that 29-14032 is neither junior nor senior to the rest of the rights descending from 29-10420—they all have an identical priority dates and each is affected by the operation of the others. While Jackson recognizes the identical priority dates, he uses it to contend that because "Bloxham was not a junior water rights holder" to Jackson, he was not able to "protect his water use based on forfeiture under [*Sagewillow*]" (*i.e.*, by making a claim of right).

Respondent's Br. at 30. This ignores the obvious corollary that the exercise of one water right with an identical priority date affects the availability of water as to other water rights with the same priority date. This Court explained:

> once a water user's rights have been forfeited by nonuse, allowing the water right to be reinstated through a transfer proceeding would harm junior appropriators because **once there was a forfeiture the junior appropriators moved up the ladder in priority**. As this Court stated in *Jenkins*, "Priority in time is an essential part of western water law and **to diminish one's priority works an undeniable injury to that water right holder**." 103 Idaho at 388, 647 P.2d at 1260.

Sagewillow, 138 Idaho at 837, 70 P.3d at 675 (emphasis added). While this statement, like Jackson's argument, is couched in terms of junior and senior, the broader principle is that a diminishment of a water right's priority "works an undeniable injury to that water right holder." *Id.* (quoting *Jenkins*, 103 Idaho at 388, 647 P.2d at 1260). Sharing an equal priority date with another water right (and apportioning water on a pro rata basis) is clearly inferior to holding a priority date alone upon the forfeiture of the other water right. In other words, in this situation, being the only water right on a given ladder rung is superior to sharing a rung.

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.

By April 26, 2012, when Jackson purchased the Jackson Property, Bloxham (the Barneses' predecessor-in-interest on the Barnes Property) was a third party relative to the Jackson Property. 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 upon by Barnes and other users that have water rights on Spring Creek? A. Yep."); *see* R. at 60-61 (*Bloxham Affidavit*, ¶¶ 17-19). Thus, during the irrigation season of 2012, when Bloxham continued irrigating the Barnes Property with as much water as was available to him in Spring Creek,[8] Bloxham asserted a claim of right to the water forfeited from the Jackson Property. Bloxham's claim of right forecloses any of Jackson's attempts to resume use of 29-14032.

[8] Jackson claims, without any citation to the record, that "[t]here are disputes of fact related to whether Bloxham irrigated the property that became the Barnes' [sic] and to what extend he irrigated that property." *Respondent's Br.* at 30. This appears to relate to Jackson's counterclaim, which was dismissed by the District Court, R. at 361, 363, and not appealed by Jackson. Thus, this point is a non-issue, and is a distraction from the relevant matter of the forfeiture analysis.

2. 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.

In the event that the Court, for any reason, does not consider Bloxham to have asserted a claim of right against 29-14032 in 2012, 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 (which includes all of Jackson's irrigation in 2014), is ineffective. R. at 7.

For that reason, Jackson claims that he "partially resumed the water use on [the Jackson Property] in 2012, and that he fully resumed the water use on [the Jackson Property] in 2013," and even ascribes this finding to the District Court—without any citation to the record. *Respondent's Br.* at 26. It is important to note that the District Court did not find that Jackson fully resumed use of 29-14032 in 2013, but based its decision on the notion that the forfeiture period "could not have begun until Jackson bought the property in 2012" and that Jackson "used his right in 2012 prior to [the Barneses] filing this litigation." R. at 360. This conclusion was not disturbed on reconsideration. *See* R. at 466-68. The District Court did not consider partial resumption of use, but erroneously considered any resumption (even the mere 3% of what would typically irrigate one acre of farmland Jackson used in 2012, *Appellants' Br.* at 38) to be a full resumption of use. This Court can correct that error of law.

In 2012, Jackson used at most a total of 0.092 acre feet on the Jackson Property. *Appellants' Br.* at 38. Such an unappreciable amount of use is *de minimis* and cannot constitute even a valid partial resumption of use of 29-14032.

In 2013, Jackson claims he irrigated some 10 acres of the Jackson Property. R. at 194. However, Jackson attacks this summary with only an incomplete citation to the record, claiming that the Barneses "ignore[] the fuller deposition and affidavit testimony that fully explained it. (R.) [sic]." *Respondent's Br.* at 26. Simply, there is no context that provides further relevant explanation.

These are facts viewed in the light most favorable to Jackson, as is appropriate for consideration on a motion for summary judgment. However, they are not uncontested. The Barneses have provided testimony from two individuals—Bloxham, R. at 60-61, and Roy Calvin Henderson, R. at 139-40—that Jackson had not used 29-14032 to irrigate any portion of the Jackson Property through 2014. Jackson claims he has done so and also challenges the credibility of Bloxham. *Respondent's Br.* at 26. Further, Jackson attempts, without citation to the record, to introduce a new fact, claiming that Henderson's view of the Jackson Property is obstructed. *Respondent's Br.* at 26.

The Barneses believe it is improper to consider witness credibility at summary judgment and to introduce new facts on appeal. If the Court reaches this point of the analysis and finds that Bloxham's 2012 use of water does not constitute a claim of right, these conflicts of material fact likely require denial of summary judgment and further proceedings to determine the facts of this case. However, the Barneses invite this Court to consider that Jackson's personal testimony—the only evidence he has provided of his 2012 and 2013 water use (which is contradicted by the statements of Bloxham and Henderson) is self-serving, uncorroborated, unsupported, and amounts to nothing more than a "scintilla of evidence" that is "insufficient to create a genuine issue of

material fact." *Bollinger v. Fall River Rural Elec. Co-op, Inc.*, 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012) (citation omitted). On that basis, this Court may reverse the District Court and grant summary judgment to the Barneses.

IV. CONCLUSION.

The key issues in this case turn on what "available" means and whether a former owner of property can assert a claim of right against the property's appurtenant water right. While the District Court made some other errors that warrant correction—*e.g.*, considering irrigated acres as the measure of beneficial use of an agricultural irrigation water right, and distinguishing between partial and full resumption of use—the Court's guidance in relation to forfeiture will be useful for water users, landowners, and IDWR. Forfeiture will continue to be a rising issue as the SRBA fades into history, as water users participate in real estate transactions, and as water users deal with diminishing water supplies to meet current and future water demands—particularly on the Eastern Snake Plain Aquifer. While in concept forfeiture may initially be viewed as harsh and even distasteful, it is necessary as it allows for the extinguishment of relic and/or unused water rights, the resurrection of which will disrupt the historic and reasonable expectations of water users on a particular water source. The fine-tuned water distribution that users have come to expect and rely upon will always be under threat if a relic water right holder can assert years later that his use should resume again, despite reliance on the unused water by others.

The examples of pivot corners and real estate development are two frequent instances where forfeiture will be an issue. A circle pivot for a full 160-acre section, with a standard diversion rate of 3.2 cfs, will not (by itself) irrigate 28 acres of the 160—being 7 acres at each

corner. The question frequently arises: if a farmer takes no action to water these pivot corners, are they forfeited? What if only 2.64 cfs (just enough to irrigate 132 acres (160 minus 28) at a standard duty of water, being .02 cfs per acre) were available to the farmer? The farmer working with a developer poses another common situation. If a farmer has a full 40 acre quarter section, and decides to sell the 10 acres that he has not irrigated for many years because of difficulties in getting water there, is there any protection for his remaining rights on the 30 acres? Is the farmer unable to assert a claim of right against the 10 acre parcel's (forfeited) water right?

These situations are sure to occur, and reconfirmation from this Court of the principles of water right forfeiture law that remain in place will aid the water user community moving forward. The errors committed by the District Court in this case, and advocated by Jackson, require this Court's correction and provide an opportunity for this Court to give guidance on the forfeiture doctrine.

RESPECTFULLY SUBMITTED this 14th day of August, 2017.

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CERTIFICATE OF MAILING

I hereby certify that on this 14th day of August, 2017, two true and correct copies of *Appellants' Brief* were served via Email and Federal Express, on the following:

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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 address(es):

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