

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

BIG WILLOW RANCH, LLC, an Idaho
limited liability company,

Petitioner,

v.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV01-24-09674

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

PETITIONER'S REPLY BRIEF

Judicial Review from Idaho Department of Water Resources
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Petitioner Big Willow Ranch, LLC (“Big Willow”), by and through its counsel of record, Givens Pursley LLP, pursuant to Idaho Rule of Civil Procedure 84(p) and Idaho Appellate Rule 34, files this brief in reply to *Respondent IDWR’s Brief* (“*Respondent’s Brief*”) filed by the Idaho Department of Water Resources (“IDWR”) on October 28, 2024.

ARGUMENT

I. IDWR’s textual arguments are not persuasive.

IDWR’s main argument in the *Respondent’s Brief* is dedicated to interpreting the language of Idaho Code § 42-201(7). *Respondent’s Brief* at 5-12. IDWR states that the statute is unambiguous, and that its plain language should be applied. *Id.* at 6. But then IDWR strains the plain meanings of the statute’s words and their definitions in support of their contention that Section 42-201(7) gives IDWR “exclusive authority” only over the process of obtaining a water right.

First, IDWR contends that subsections (1) and (7) of Section 42-201 should be read together to limit the term “appropriation” to the process of obtaining a water right. *Respondent’s Brief* at 6-8. But reading the subsections together in fact supports Big Willow’s interpretation that IDWR has general (and exclusive) authority to determine forfeiture under Idaho Code § 42-222(2).

Subsection (1) begins “[a]ll rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise,” and later says “[s]uch appropriation shall be perfected only by means of the application, permit, and license procedure as provided in this title” I.C. § 42-201(1). Contrary to IDWR’s interpretation, if the term “appropriation” is defined by Subsection (1)’s statement of “all rights to divert and use the waters of this state for beneficial purposes,” then

Subsection (7) says that IDWR has “exclusive authority over [all rights to divert and use the waters of this state for beneficial purposes],” which logically would include not only the establishment of a water right but also determining whether a water right may still be diverted and used or has been forfeited. Further, Subsection (1)’s statement that “[s]uch appropriation shall be perfected only by means of the application, permit, and license procedure as provided in this title” is merely a statement about how an appropriation may be perfected under the law. It does not limit the meaning of the term “appropriation” to the mere act of establishing a water right.

IDWR further argues that the word “appropriation,” as used in Section 42-201(7), is defined as “taking possession or control over property typically without permission.” *Respondent’s Brief* at 8. But the definitions IDWR cites in support of this definition do not clearly limit the term “appropriation” to “taking” possession or control. While two of the cited definitions use the term “take,” the quoted definition of “appropriation” from Black’s Law Dictionary describes it as “[t]he exercise of control over property” *Respondent’s Brief* at 8 n. 3 (emphasis added). Using this definition, Section 42-201(7) would say that “[t]his title delegates to the department of water resources exclusive authority over [the exercise of control over] the public surface and ground waters of the state.” Again, such authority logically would include all aspects of the exercise of control over the state’s waters, including whether the right to exercise control over the state’s waters has been lost through forfeiture.

Reading Section 42-201(7)’s first sentence as giving IDWR general (and exclusive) authority to determine forfeiture would give effect to its second sentence, which prohibits all other instrumentalities of the state from prohibiting, restricting, or regulating water rights. A forfeiture determination is quintessentially a prohibition, restriction, and regulation of the right to use the state’s public waters. IDWR’s position that it only has exclusive jurisdiction over

“taking possession or control” of the state’s public waters severely undercuts the meaning of the second sentence by giving other state instrumentalities the ability to determine that a water right granted by IDWR is no longer valid.

Citing various dictionary definitions, IDWR attempts to distinguish forfeiture from the terms “prohibit, restrict or regulate” in Section 42-201(7)’s second sentence. *Respondent’s Brief* at 10-11 (“The definitions of prohibit, restrict or regulate do not align with the definition of forfeiture.”). But this interpretation leads to the absurd result that while other instrumentalities cannot prohibit, restrict or regulate water right appropriations, they can declare a water right forfeited. The Legislature could not have intended to prohibit other instrumentalities from prohibiting, restricting, or regulating water right appropriations while still allowing them to determine water rights forfeited, which arguably is the most prohibitive and restrictive water right action under Idaho law.

II. The Legislative history does not clearly support IDWR’s position.

IDWR relies on the Statement of Purpose relevant to the Legislature’s enactment of Section 42-201(7). But IDWR’s arguments concerning the meaning of the Statement of Purpose are persuasive only if one agrees with the cribbed definition of “appropriation” solely as the act of obtaining a water right. Big Willow addressed the Statement of Purpose in its opening brief, and incorporates those arguments here rather than restating them. *See Petitioner’s Opening Brief* at 6-8. In short, the Statement of Purpose “provides at least as much support for Big Willow’s position as it does IDWR’s.” *Petitioner’s Opening Brief* at 8.

IDWR also relies on testimony provided to the Senate Resources and Environment Committee when Section 42-201(7) was enacted. *Respondent’s Brief* at 14-15. However, as with the Statement of Purpose, this testimony provides at least as much support for Big Willow’s position as it does IDWR’s. The full quote of the testimony is provided on page 14 of

Respondent's Brief, which tellingly states that “[i]n some cases there is confusion about jurisdiction. IDWR is responsible for water resources in the state” It is difficult to imagine a clearer statement that IDWR’s exclusive authority over the state’s water resources is intended to encompass all aspects of administering water rights, including not only the authority to approve water rights but also to determine when such water rights are no longer valid (*i.e.*, are forfeited).

III. The Idaho Supreme Court has not decided the question presented here.

IDWR cites *Barnes v. Jackson*, 163 Idaho 194, 408 P.3d 1266 (2018), in support of its position that district courts are the proper venue for determining water right forfeiture under Idaho Code § 42-222(2). *Respondent's Brief* at 17. While *Barnes* indeed addressed water right forfeiture and resumption-of-use doctrines, it did not address the question presented in this case—whether district courts or IDWR have authority to declare forfeiture. This question evidently was not raised by any party in *Barnes*, and the *Barnes* Court did not address or answer it. Simply put, the *Barnes* Court did not decide whether IDWR or a district court has authority to determine water right forfeiture. To be clear, no Idaho Supreme Court decision has decided the scope of IDWR’s exclusive authority under Section 42-201(7).

IV. The district court cases cited by Big Willow are in conflict.

IDWR asserts that the district court in *Henderson v. Madlen*, Case No. CV-02-000003 (Adams County Dist. Ct. Idaho Feb. 23, 2023), actually “did not decide whether the court was the appropriate venue to determine forfeiture because the main issue in the case was a trespass issue.” *Respondent's Brief* at 19. This is not correct.

The *Henderson* court addressed a number of issues in its summary judgment ruling, ultimately denying the parties’ cross-motions for summary judgment. *Petitioner's Opening Brief*, Ex. B at 4-10. The parties had “moved for summary judgment on all claims and

counterclaims.” *Id.* at 4. Plaintiff’s complaint involved trespass issues, as well as a request that the court determine the Defendant’s water rights forfeited. *Id.* at 9 (“Plaintiff is not suing as a claimant to the use of water, but, rather, as servient estate owner with an irrigation delivery system on his property who doesn’t want the Defendant to enter his property. . . . Plaintiff’s Count III, paragraph 39 . . . [asks that the] court proclaim that Plaintiff is entitled to declaratory judgment on forfeiture/validity of Defendant’s water rights.”).

Citing IDWR’s exclusive authority under Section 42-201(7), the court ruled that it was “unable to decide whether a water right was abandoned or forfeited nor whether a point of diversion listed in the water right adjudicatory decree is illegal.” *Id.* at 8. But the court further ruled that it “believes it can decide easement/ditch right issues which are separate interests from water rights. Idaho Department of Water Resources’ exclusive authority over appropriation of the public surface and ground waters of the State doesn’t preclude this Court from declaring separate easement or ditch rights.” *Id.* at 10. Thus, the court declined to decide the forfeiture allegations raised by the Plaintiff because of IDWR’s exclusive authority under Section 42-201(7), but proceeded to determine the separate easement and ditch right issues that did not invade IDWR’s exclusive authority.

By contrast, the district court in *Big Willow Ranch, LLC, v. A. L. Cattle, Inc.*, Case No. CV23-24-0042 (Gem County Dist. Ct. Idaho July 22, 2024) did determine the water rights in this matter to be forfeited. *See Petitioner’s Opening Brief*, Ex. A.

Big Willow asks this Court to clarify who has authority to determine forfeiture in light of these conflicting district court rulings.

CONCLUSION

Big Willow respectfully requests that this Court determine whether IDWR has authority to render a water right forfeited under its “exclusive authority” over the appropriation of water pursuant to Idaho Code § 42-201(7), or otherwise.

DATED November 18, 2024.

GIVENS PURSLEY LLP



By: _____
Michael P. Lawrence

Certificate of Service

I HEREBY CERTIFY that on the 18th day of November, 2024, the foregoing was filed, served, and copied as set out below.

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