

Michael P. Lawrence [ISB # 7288]
Taylor J Barton [ISB # 11259]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
mpl@givenspursley.com
tjb@givenspursley.com
18385262; 12611-12

*Attorneys for Plaintiff
Big Willow Ranch, LLC*

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.

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

CV01-24-09674

Case No. _____

Fee Category L.3.a – \$221.00

**PETITION FOR JUDICIAL
REVIEW AND DECLARATORY
JUDGMENT**

Petitioner Big Willow Ranch, LLC (“Petitioner”), by and through its attorneys of record Givens Pursley LLP, hereby files this petition (“*Petition*”) seeking judicial review of a final agency action by the Idaho Department of Water Resources (“IDWR” or “Department”) pursuant to Idaho Code §§ 67-5270 through 67-5279 and Rule 84 of the Idaho Rules of Civil Procedure, and for an order declaring that the Department has authority to determine forfeiture of decreed

water rights as requested in Petitioner’s *Petition for Forfeiture* filed with IDWR on September 5, 2023.

STATEMENT OF THE ISSUES AND CASE

1. This *Petition* seeks judicial review of the Director of IDWR’s May 9, 2024 *Order on Exceptions; Final Order Denying Petition for Forfeiture* (“*Order*”), which adopted the findings and conclusions in the hearing officer’s February 1, 2024 *Preliminary Order Denying Petition for Forfeiture* (“*Preliminary Order*”) in the matter of *A.L. Cattle, Inc.’s Water Right Nos. 65-1985, 65-3124X, and 65-10537*. True and correct copies of the *Order* and *Preliminary Order* are attached hereto as Exhibits A and B, respectively.

2. The issue in this matter is whether IDWR correctly or incorrectly determined in the *Order* and *Preliminary Order* that it lacks authority to determine whether A.L. Cattle, Inc.’s decreed water right nos. 65-1985, 65-3124X, and 65-10537 (collectively, the “Water Rights”) are forfeited. In this proceeding, Petitioner asks this Court to determine whether IDWR has authority to determine that the Water Rights are forfeited or whether forfeiture must be determined by a district court, as IDWR concluded.

3. Because it is unclear whether the authority to determine forfeiture of decreed water rights lies with IDWR or a district court,¹ Petitioner has filed an action with the district court of the Third Judicial District, County of Gem, which is the county in which the Water Rights’ points of diversion and places of use are located. The conundrum facing Petitioner is that it risks obtaining a judgment of forfeiture from a district court that does not have authority to

¹ As Petitioner notes in *Big Willow’s Exceptions to Preliminary Order Denying Petition for Forfeiture* (Feb. 15, 2024), Petitioner is aware of at least one Idaho district court has determined that it was unable to decide whether a water right was forfeited because Title 42 of the Idaho Code gives the Department exclusive authority over the appropriation of public waters. *Henderson v. Madlen*, No. CV02-21-000003, Idaho Dist. Ct., Adams County (Feb. 24, 2023) (oral ruling on the record).

determine forfeiture, and therefore would be invalid, if IDWR actually does have exclusive authority to determine forfeiture. Accordingly, Petitioner seeks this Court's determination of the proper forum to determine Petitioner's claim that the Water Rights are forfeited.

JURISDICTION AND VENUE

4. This *Petition* is authorized by Idaho Code §§ 67-5270 through 67-5279.

5. The *Order* is a final agency action subject to judicial review pursuant to Idaho Code §§ 42-1701A(4), 67-5246(1), and 67-5270(3).

6. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5270(3).

7. Venue lies in this Court pursuant to Idaho Code § 67-5272 and the Snake River Basin Adjudication ("SRBA") Court's December 3, 2020 *Administrative Order Regarding Transition to Electronic Filing System* ("SRBA Administrative Order"). IDWR's final action was taken in Ada County, Idaho.

8. Pursuant to the Idaho Supreme Court's December 9, 2009 *Administrative Order*, "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The *SRBA Administrative Order* instructs the clerk of the district court in which the petition is filed to reassign the case to the presiding judge of the SRBA Court.

9. This *Petition* is timely as it is filed within 28 days of the date of service of a final order. I.C. § 67-5273(2).

PARTIES

10. Petitioner is a limited liability company organized under the laws of the State of Idaho, including without limitation Title 30, Idaho Code, and its principal place of business is 1 Dixie Lane, Payette, Idaho 83661.

11. Respondent IDWR is an Idaho state agency with its main office located at 322 E. Front St., Boise, Idaho, 83702.

STATEMENT OF INITIAL ISSUES

12. Petitioner asserts the following issue on judicial review: whether IDWR has authority to determine that the Water Rights are forfeited or whether forfeiture must be determined by the district court in the county where the Water Rights are located.²

AGENCY RECORD

13. IDWR has compiled a documentary record in this matter. Because no hearing was held, there is no transcript and none is requested.

14. Petitioner requests that all documents in IDWR's files for water right nos. 65-1985, 65-3124X, and 65-10537 and in the matter of *A.L. Cattle, Inc.'s Water Right Nos. 65-1985, 65-3124X, and 65-10537* be included in the agency record.

15. The undersigned attorneys for Petitioner hereby certify that Petitioner has paid the clerk of the agency the estimated fee of \$20.00 for the preparation of the record.

SERVICE

16. The undersigned hereby certify that service of this *Petition* has been made on Respondent.

² Because IDWR did not make a determination on the merits of Petitioner's *Petition for Forfeiture*, Petitioner does not seek a determination on the merits of its claims of forfeiture in this judicial review, and would expect an order remanding the matter for a determination on the merits if the Court determines that IDWR has authority to determine forfeiture of the Water Rights.

I.R.C.P. 84(C) INFORMATION

17. **Name of Agency for Which Judicial Review is Sought:** Idaho Department of Water Resources, an executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701 et seq., with its state office located at 322 E. Front St., Boise, Ada County, Idaho 83702.

18. **Title of District Court to Which Petition is Taken:** In the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada.

19. **Case Caption and Action for Which Judicial Review is Sought:** The Director of IDWR's May 9, 2024 *Order on Exceptions; Final Order Denying Petition for Forfeiture*, which adopted the findings and conclusions in the hearing officer's February 1, 2024 *Preliminary Order Denying Petition for Forfeiture* ("Preliminary Order") in the matter of *A.L. Cattle, Inc.'s Water Right Nos. 65-1985, 65-3124X, and 65-10537*.

20. **Hearing Recording:** A hearing was not held in this matter. Accordingly, there is no hearing recording or reporting.

21. **Statement of Issues of Judicial Review:** As stated above in the section entitled "Statement of Initial Issues," the issues is whether IDWR has authority to determine that the Water Rights are forfeited or whether forfeiture must be determined by the district court in the county where the Water Rights are located.

22. **Designation of Whether a Transcript is Required:** A hearing transcript is not being requested and no hearing was held.

23. **Attorney Certification:** The undersigned counsel for Petitioner certifies the following: 1) service of this petition has been made upon the Department; and 2) that the clerk of the agency has been paid the estimated fee for the preparation of record after Petitioner's counsel

contacted Sarah Tschohl of the Department, who provided the estimate of \$20.00, which was then paid by mailing a check for the amount to the Department's state office, located at 322 E. Front St., Boise, Idaho 83702.

Respectfully submitted this 6th day of June, 2024.

GIVENS PURSLEY LLP

By: /s/Taylor J Barton
Michael P. Lawrence
Taylor J Barton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of June, 2024, the foregoing was filed, served, and copied as set out below.

DOCUMENT FILED:

Clerk of the District Court – Ada County
200 W. Front Street
Boise, ID 83702

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile
- E-mail/iCourt

SERVICE COPIES TO:

Idaho Department of Water Resources
The Idaho Water Center
322 E Front St, Ste. 648
Boise, ID 83702
E-file: file@idwr.idaho.gov

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile
- E-file

COURTESY COPIES TO:

Travis L. Thompson
Marten Law LLP
163 Second Ave. W
PO Box 63
Twin Falls, ID 83303-0063
tthompson@martenlaw.com
Attorneys for A.L. Cattle, Inc.

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile
- E-mail

By: /s/ Taylor J Barton
Taylor J Barton

EXHIBIT A

EXHIBIT A

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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

ORDER ON EXCEPTIONS; FINAL
ORDER DENYING PETITION FOR
FORFEITURE

BACKGROUND

On September 5, 2023, Big Willow Ranch, LLC (“Big Willow”), filed a *Petition for Forfeiture* (“*Petition*”) with the Idaho Department of Water Resources (“Department”) asking the Department to declare A.L. Cattle, Inc.’s Water Right Nos. 65-1985, 65-3124X, and 65-10537 (“Water Rights”) forfeited for non-use.

On September 15, 2023, A.L. Cattle submitted its notice of appearance in this matter.

On February 1, 2024, the Department’s Water Allocation Bureau Chief Angela Hansen issued a *Preliminary Order Denying Petition for Forfeiture* (“*Preliminary Order*”) concluding “the Department does not have the statutory authority to find A.L. Cattle’s Water Rights forfeited as a result of the *Petition*.” *Preliminary Order*, at 4.

On February 15, 2024, the Department received *Big Willow’s Exceptions to Preliminary Order Denying Petition for Forfeiture* (“*Exceptions*”) asking the Director “to determine that IDWR has authority to declare the Water Rights forfeited.” *Exceptions*, at 2. A.L. Cattle did not respond to the *Exceptions*.

EXCEPTIONS

After careful consideration of the record, the Director is not persuaded by Big Willow’s *Exceptions*. In this order, the Director discusses the various arguments raised in Big Willow’s *Exceptions* and concludes that Big Willow’s *Exceptions* are denied. The Director adopts the *Preliminary Order*’s findings and conclusions of law and supplements the analysis with the findings and conclusions set forth in this order.

Big Willow’s *Exceptions* relate primarily to the Department’s authority to render a forfeiture decision. *Exceptions*, at 2. First, Big Willow argues the Department has authority to declare A.L. Cattle’s Water Rights forfeited based on the Department’s exclusive authority over the appropriation of Idaho’s waters under Idaho Code § 42-201(7). *Exceptions*, at 2. Second, Big Willow argues the statutory provisions cited in the *Preliminary Order* do not support the *Preliminary Order*’s denial of forfeiture. *Exceptions*, at 5.

I. The Legislature did not enact Idaho Code § 42-201(7) for the purpose of granting the Department with exclusive authority to render a forfeiture decision.

In its *Exceptions*, Big Willow primarily argues that the Department’s statutory authority to render a forfeiture decision is prescribed in Idaho Code § 42-201(7). *See generally Exceptions*. Big Willow argues that § 42-201(7) is unambiguous, so the plain meaning of the statute applies. *Exceptions*, at 2. Section 42-201(7) states:

This title delegates to the department of water resources *exclusive* authority over the *appropriation* of the public surface and ground waters of the state. No other agency, department, county, city, municipal corporation or other *instrumentality* or political subdivision of the state shall enact any rule or ordinance or take any other action to *prohibit, restrict* or *regulate* the appropriation of the public surface or ground waters of the state, and any such action shall be null and void.

I.C. § 42-201(7) (emphasis added). First, Big Willow argues the Department’s “exclusive authority over the appropriation” of the state’s waters grants the Department with exclusive authority to render a forfeiture decision under the plain meaning of “appropriation.” *Exceptions*, at 2 (quoting I.C. § 42-201(7)). Second, Big Willow argues that district courts are instrumentalities of the state that do not have authority to render a forfeiture decision because, under § 42-201(7), no other instrumentality of the state may prohibit, restrict, or regulate the appropriation of the state’s waters. *Id.* at 3.

A. Idaho Code § 42-201(7) was enacted to grant the Department exclusive authority over the statutory application, permit, and license process.

Big Willow argues that Idaho Code § 42-201(7) is unambiguous, so the plain meaning of “appropriation” and “exclusive” empowers the Department with “exclusive authority over [the exercise of control] of the public surface and ground waters of the state.” *Exceptions*, at 3.

The Idaho Supreme Court has held that “courts give effect to the statute as written” when the “statute is plain and unambiguous” without engaging in tools of statutory construction. *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 582, 416 P.3d 951, 954 (2018) (quoting *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 398, 224 P.3d 458, 465 (2008)). However, if the language of the statute is considered ambiguous (i.e., “reasonable minds might differ or be uncertain as to its meaning”), then courts will apply rules of statutory construction to interpret the meaning of the statute. *Id.* (quoting *Payette River Prop. Owners Ass’n v. Bd. of Comm’rs of Valley Cnty.*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)). In applying the rules of statutory construction, the courts consider the state’s public policy and legislative history in enacting the statute. *Id.* at 583, 416 P.3d at 955 (citing *In re Adoption of Doe*, 156 Idaho 345, 349, 326 P.3d 347, 351 (2014)).

Big Willow is correct in arguing that § 42-201(7) is unambiguous. However, Big Willow cites a general definition of “appropriation,” which is a definition not used in a water rights context: “[t]he exercise of control over property, esp. without permission; a taking of possession.” *Exceptions*, at 3 (quoting *Appropriation*, *Black’s Law Dictionary* (11th ed. 2019)).

Big Willow has erred in its argument by not using the plain meaning of “appropriation” within the context of § 42-201(7), which pertains specifically to the appropriation of water rights. Because Chapter 2, Title 42, Idaho Code is explicitly titled “Appropriation of Water — Permits, Certificates, and Licenses — Survey,” and § 42-201 specifically formulates the process of obtaining a water right through “appropriation,” the meaning of “appropriation” must be understood within the context of establishing a legal right to divert water and apply it to beneficial use (in other words, establishing a water right). *See e.g., Appropriative Water Right, Black’s Law Dictionary* (11th ed. 2019) (defining “appropriative water right” as “a right to take or receive a specific volume of water for a particular use at a specified place and time”); *Appropriation, Black’s Law Dictionary* (5th ed. 1979) (defining “appropriation” as “[t]he act of appropriating or setting apart; prescribing the destination of a thing” and “appropriation of water” as “[a]n appropriation of water flowing on the public domain consists in the capture, impounding, or diversion of it from its natural course . . . and its actual application to some beneficial use”). In addition, the statutory process for obtaining a water right is distinct from the statutory process of determining whether a water right is forfeited. *Compare* I.C. § 42-203A, *with* I.C. § 42-224; *see also* I.C. § 42-222(2) (referring to the terms “forfeiture” and “appropriation” as separate processes—“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”) (emphasis added). Because “appropriation” within § 42-201(7) unambiguously refers to the process of obtaining a water right from the Department, the Department has exclusive authority over the legal process for establishing a water right, not the process for forfeiting an already established water right. Section 42-201(7) does not grant the Department exclusive authority to render forfeiture decisions under the plain meaning of “appropriation.”

Furthermore, if a court concludes that reasonable minds may differ as to the meaning of “appropriation,” the legislative history of § 42-201(7) clearly establishes that the statute was intended to give the Department authority over the process for obtaining a water right, not to vest the Department with exclusive authority to render forfeiture decisions. Legislative history provides context into the legislative intent and public policy reasons supporting the enactment of the subsection. *See City of Idaho Falls*, 163 Idaho at 582, 416 P.3d at 954.

According to its legislative history, § 42-201(7) was enacted in 2006 to:

Delegate[] comprehensive authority to the [IDWR] over the appropriation of the waters of the State . . . [to] preempt[] other agencies and political subdivisions from regulating the appropriation of the public waters of the State. This legislation further clarifies these principles to ensure that no other agency or political subdivision takes any action which impinges upon the [IDWR’s] exclusive jurisdiction over the appropriation of the waters of the state.

Statement of Purpose, S.B. 1353, 58th Leg., 2d Reg. Sess. (Idaho 2006). In addition, the Senate Resources and Environment Committee clarified that the purpose of § 42-201(7) was to ensure the Department had jurisdiction in issuing water right licenses via the statutory method of appropriation instead of allowing counties, cities, or other agencies to get involved in regulating the state’s waters. *See* Hearing on S.B. 1353 Before the S. Comm. on Res. & Env’t, 58th Leg., 2d

Reg. Sess. (Idaho 2006) (statement of Norm Semanko, Exec. Dir., Idaho Water Users Ass'n, Inc.). After enacting § 42-201(7), the Idaho Supreme Court even clarified that the purpose of adding the subsection was “to require compliance with the statutory application, permit, and license procedure in order to acquire new water rights.” *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007). Moreover, the general purpose of Idaho Code § 42-201 ensures the Department has jurisdiction over issuing permits or licenses in compliance with the statutory method of appropriation and establishes exceptions for emergency diversions. Nothing in the legislative history of § 42-201 discusses an exclusive authority of the Department to render a forfeiture decision.

The Director concludes the meaning of “appropriation” within § 42-201(7) is unambiguous as it pertains to the appropriation of water rights, and the legislative history supports the purpose of enacting § 42-201(7) was to grant the Department with exclusive jurisdiction over the appropriation of water rights and not to render a forfeiture decision.

B. Rendering a forfeiture decision is not within the list of enumerated actions delegated to the Department under Idaho Code § 42-201(7).

Big Willow argues that the second sentence of § 42-201(7) grants the Department with exclusive authority to determine forfeiture because no other state “instrumentality” may “take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the state” *Exceptions*, at 3. Specifically, Big Willow argues that parties may not file a civil action in district court to deem a water right forfeited because: (1) district courts are considered “instrumentalities;” and (2) rendering a forfeiture decision specifically falls under the Department’s jurisdiction as an “action to prohibit, restrict, or regulate the appropriation.” *Id.*

First, Big Willow argues that district courts may not hear forfeiture matters because district courts are considered an “instrumentality” of the state. *Id.* at 4 (defining “instrumentality” as “a thing used to achieve an end or purpose” or “[a] means or agency through which a function of another entity is accomplished, such as a governing body” (quoting *Instrumentality*, *Black’s Law Dictionary* (11th ed. 2019))). In addition, Big Willow cited a recent case where the district court judge dismissed a case because the court claimed it could not render a forfeiture decision over a water right. *Id.* at 4 n.3 (citing *Henderson v. Madlen*, No. CV02-21-000003 (Adams Cnty. Dist. Ct. Idaho Feb. 24, 2023) (oral ruling on the record)).¹ It is true that a district court would be considered an “instrumentality.” However, as argued in Section A above, the Legislature created the list of governing bodies in subsection 7 to ensure that various government agencies do not interfere with the Department’s jurisdiction in regulating and issuing water rights licenses, not to grant the Department exclusive authority to render a forfeiture decision.

In addition, Big Willow argues that district courts may only address certain water rights matters on judicial review under the Idaho Administrative Procedure Act (“IAPA”) (Chapter 52, Title 67, Idaho Code) and the adjudication of water rights (Chapter 14, Title 42, Idaho Code). *Exceptions*, at 5. In essence, Big Willow argues that because “there is no other statute expressly giving a branch of government other than IDWR authority to determine forfeiture of water rights,” § 42-201(7) is generally applicable and grants the Department with forfeiture decision-

¹ The Department was not a party to this case, so this decision is not binding on the Department.

making authority. *Id.* (claiming IAPA and the water rights adjudication statutes are specific statutes that would control in those contexts only opposed to a general statute).

However, as cited in the *Preliminary Order*, there are examples of specific statutes referencing the Department's and district court's forfeiture decision-making authority. *See Preliminary Order*, at 3. For example, Idaho Code § 42-224(12) specifically requires district courts to issue an order and judgment affirming the Department's forfeiture order of stockwater rights. If the Legislature wished to grant the Department with authority to render a forfeiture decision without judicial review by a district court, the Legislature would have explicitly granted the forfeiture decision-making authority to the Department. Thus, Idaho Code § 42-201(7) does not provide forfeiture decision-making authority to the Department, and the specific judicial review statutes do not limit a district court's discretion in issuing a forfeiture order.

Second, Big Willow argues that a forfeiture decision is considered an "action to prohibit, restrict, or regulate" the appropriation of water. *Exceptions*, at 3. If Big Willow desired to follow through with its plain meaning argument, it should have defined "prohibit," "restrict," "regulate," and "forfeiture" to help support whether rendering a forfeiture decision would be considered an "action to prohibit, restrict, or regulate" the appropriation of water.

"Restrict" is defined as confining, restraining, or limiting the use or enjoyment of property. *See Restrict*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/restrict> (last visited April 10, 2024) (defining "restrict" as "to confine within bounds: restrain" or "to place under restrictions as to use or distribution"); *Restriction*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/restriction> (last visited April 10, 2024) (defining "restriction" as "a regulation that restricts or restrains" or "a limitation on the use or enjoyment of property"). "Prohibit" is defined as "[t]o forbid by law" or "[t]o prevent, preclude, or severely hinder." *Prohibit*, *Black's Law Dictionary* (11th ed. 2019). "Regulate" is defined as "[t]o control (an activity or process) esp. through the implementation of rules." *Regulate*, *Black's Law Dictionary* (11th ed. 2019). "Forfeiture" is defined as "[t]he loss of a right, privilege, or property because of a . . . breach of obligation[] or neglect of duty. Title is instantaneously transferred to another, such as the government . . ." or "[a] judicial proceeding, the object of which is to effect a confiscation or divestiture." *Forfeiture*, *Black's Law Dictionary* (11th ed. 2019).

The definitions of "prohibit, restrict, or regulate" do not exactly align with the definition of "forfeiture." Although "restrict" is the most akin to "forfeiture," the two meanings are still different because "restrict" does not divest a right or a privilege while "forfeiture" divests a right or privilege and reverts the right or privilege back to the government. If the Legislature intended to include "forfeiture" as one of the Department's enumerated actions in § 42-201(7), the Legislature would have expressly included it within the provision itself because its use and meaning within Chapter 2, Title 42, Idaho Code, has a different meaning than the actions listed in the provision.

Therefore, the purpose of enacting § 42-201(7) was to grant the Department exclusive jurisdiction in issuing permits or licenses in compliance with the statutory method of appropriation as opposed to multiple governmental agencies or instrumentalities getting involved

in the process. In granting this authority to the Department, the Legislature did not grant the Department with exclusive authority to render forfeiture decisions.

II. The statutes cited in the *Preliminary Order* support the *Preliminary Order's* conclusion as providing specific examples of when the Department may render a forfeiture decision.

In its *Exceptions*, Big Willow argues that Idaho Code § 42-201(7) read in tandem with § 42-222(2) grants broad authority to the Department to render a forfeiture decision, and the statutory provisions cited in the *Preliminary Order* do not apply. See *Exceptions*, at 5–9. In her *Preliminary Order*, Ms. Hansen described examples of the limited circumstances in which the Department may render a forfeiture decision such as within a water rights transfer proceeding (§ 42-222(1)), a water rights adjudication (§ 42-1401B(1)), or forfeiture of stockwater rights (§ 42-224). *Preliminary Order*, at 3.

An administrative agency can only undertake actions authorized by the legislature. *In re Idaho Workers Compensation Bd.*, 167 Idaho 13, 20, 467 P.3d 377, 384 (2020). For example, § 42-222(1) authorizes the Director to approve or deny a transfer request “to change the point of diversion, place of use, period of use or nature of use of all or part of the water” based on the information and evidence presented to him. In *Jenkins*, the Idaho Supreme Court concluded the Director “has jurisdiction to determine the question of abandonment and forfeiture” in a transfer proceeding to “determine[e] whether or not the proposed transfer would injure other water rights” or enlarge an existing right. *Jenkins v. State, Dep’t of Water Res.*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). Pursuant to § 42-222(2),² the Court required the Director to conduct a forfeiture analysis to determine whether the party proposing the transfer has established sufficient clear and convincing evidence to support a finding of statutory forfeiture. *Id.* at 389–90, 647 P.2d at 1261–62. The purpose of finding statutory forfeiture is to ensure that once a forfeited water right becomes available for further appropriation, any subsequent appropriator will not be injured by the resumption of use of a forfeited water right. *Id.* at 388, 647 P.2d at 1260. Another example of the Director’s explicit authority to render a forfeiture decision is § 42-224 which explicitly authorizes the Director to determine forfeiture of stockwater rights.³

These statutes exemplify circumstances in which the Legislature expressly authorized the Director to render a forfeiture decision. Conversely, § 42-222(2) does not contain language expressly authorizing the Director to determine forfeiture. If Big Willow requested the Director to determine forfeiture pursuant to a transfer proceeding under § 42-222(1) or forfeiture of stockwater rights under § 42-224, then the Director may have been authorized to decide

² Idaho Code § 42-222(2) states: “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 The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.”

³ Idaho Code § 42-224 states: “Within thirty (30) days of receipt by the director of the department of water resources of a petition or other information that a stockwater right has not been put to beneficial use for a term of five (5) years, the director must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture pursuant to section 42-222(2), Idaho Code.”

forfeiture. However, because Big Willow did not request forfeiture under the limited circumstances in which the Director is authorized to determine forfeiture, Big Willow may file a civil action in district court to determine whether a water right has been forfeited as suggested in the *Preliminary Order. Preliminary Order*, at 4. Therefore, as explained above, the Department does not have express authority to render a forfeiture decision under Idaho Code §§ 42-201(7) or 42-222(2).

Based on the above discussion, the Director concludes the findings of fact and conclusions of law contained in the Water Allocation Bureau Chief's *Preliminary Order Denying Petition for Forfeiture* should be adopted as final incorporating the reasoning set forth in this order.

CONCLUSIONS OF LAW

Big Willow has not demonstrated that the Department has the express authority to render a forfeiture decision of A.L. Cattle's Water Rights. Specifically, Idaho Code § 42-201(7) grants the Department exclusive jurisdiction in issuing permits or licenses in compliance with the statutory method of appropriation and does not grant authority to render forfeiture decisions. In addition, while the Department has specific authority to render forfeiture decisions in limited circumstances, there are no statutes that expressly grant the Department the authority to render a forfeiture decision of A.L. Cattle's Water Rights. Therefore, the Director concludes Big Willow's *Exceptions* should be denied.

ORDER

IT IS HEREBY ORDERED that the Director adopts the *Preliminary Order's* findings and conclusions of law and supplements the analysis with the findings and conclusions set forth in this order.

IT IS FURTHER ORDERED that *Big Willow's Exceptions to Preliminary Order Denying Petition for Forfeiture* is DENIED.

DATED this 9th day of May 2024.



MATHEW WEAVER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>Michael P. Lawrence GIVENS PURSLEY LLP PO Box 2720 Boise, ID 83702 mpl@givenspursley.com</p> <p><i>Attorney for Big Willow Ranch, LLC</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Travis L Thompson Abby Bitzenburg MARTEN LAW LLP PO Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com abitzenburg@martenlaw.com</p> <p><i>Attorneys for A.L. Cattle, Inc.</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>


Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

EXHIBIT B

EXHIBIT B

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF A.L. CATTLE, INC.'S)	PRELIMINARY ORDER
WATER RIGHT NOS. 65-1985, 65-3124X,)	DENYING PETITION FOR
AND 65-10537)	FORFEITURE
_____)	

BACKGROUND

On September 5, 2023, the Idaho Department of Water Resources (“Department”) received a *Petition for Forfeiture in the Matter of A.L. Cattle, Inc.’s Water Right Nos. 65-1985, 65-3124X, and 65-10537* (“Petition”) filed by Michael P. Lawrence of Givens Pursley LLP on behalf of Big Willow Ranch, LLC (“Big Willow Ranch”).

The Petition requests the Department find water right nos. 65-1985, 65-3124X, and 65-10537 (together, “A.L. Cattle’s Water Rights”) forfeited based on the *Declaration of J.G. Schwartz* (“Schwartz Declaration”) and the *Declaration of Terry Scanlan, P.E., P.G.* (“Scanlan Declaration”) filed contemporaneously with the Petition. The Snake River Basin Adjudication (“SRBA”) issued a partial decree for water right no. 65-1985 in 1998. The SRBA issued a partial decree for water right nos. 65-3124X and 65-10537 in 2004. The Schwartz Declaration and Scanlan Declaration provide evidence supporting Big Willow Ranch’s assertion that A.L. Cattle’s Water Rights are now forfeited.

A.L. Cattle’s Water Rights are not included in any water right administrative action currently pending before the Department, such as an application for transfer or an application for extension of time to avoid forfeiture.

RELEVANT STATUTES AND AUTHORITIES

Idaho Code § 42-222(1) states, in pertinent part:

Any person, entitled to the use of water...who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change... The director of the department of water resources shall examine all the evidence and available information and shall approve the change... provided no other water rights are injured thereby...

Idaho Code § 42-222(2) states:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be

lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in 42-223, Idaho Code. The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.

Idaho Code § 42-222(3) states:

Upon proper showing before the director of the department of water resources of good and sufficient reason for nonapplication to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such water for a period not to exceed five (5) additional years.

Idaho Code § 42-223 states, in pertinent part:

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

Idaho Code § 42-1401B(1) states, in pertinent part:

The director's role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law...

Idaho Code § 42-224 establishes the procedure for a petition to find a stockwater water right forfeited. Idaho Code § 42-224(1) mandates that, upon receiving a petition that a stockwater water right has not been used for a term of five (5) years, the Director of the Department determines whether the petition or other information presents a prima facie case that the stockwater water right has been forfeited. If the Director determines the petition or other evidence establishes prima facie evidence, Idaho Code § 42-224(2) states, the Director must issue a show cause order why the stockwater water right has not been lost through forfeiture. Idaho Code §§ 42-224(7) and 42-224(8) state the Director must ultimately issue an order determining whether the stockwater water right has been forfeited. Idaho Code § 42-224(10) states once the Director issues an order finding a stockwater water right has been forfeited, "the state of Idaho, by and through the office of the attorney general, must initiate a civil action by electronically filing in the district court for the fifth judicial district, Twin Falls County... a complaint requesting a declaration that the stockwater right is forfeited..." Idaho Code § 42-224(12) states, in pertinent part, "[a]t the conclusion of the action, the district court shall issue an order determining whether the stockwater right has been forfeited pursuant to section 42-222, Idaho Code."

ANALYSIS

The Department has the authority to consider forfeiture only in certain limited circumstances. When an application for transfer is filed requesting to change the point of diversion or other element of a water right, Idaho Code § 42-222(1) requires that the Department evaluate, based on all the available evidence, whether the proposed change will injure other water rights. In *Jenkins v. State, Dep't of Water Res.*, the Idaho Supreme Court found that “evidence which demonstrates that the right sought to be transferred has been abandoned or forfeited, is probative as to whether that transfer would injure other water rights.” *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). Thus, when a water right is sought to be transferred, the Department does have statutory authority as part of the injury analysis to consider whether a water right has been forfeited.

A.L. Cattle's Water Rights are not currently included in any transfer proceedings before the Department. Therefore, the Department does not have the opportunity to limit use under these water rights to avoid injury that may result from any proposed change to the water rights' elements.

Pursuant to Idaho Code § 42-1401B(1), the Department serves as the technical expert for the district court in the adjudication of water rights. In this capacity, the Department evaluates the extent of beneficial use occurring under a water right in its water right recommendations to the court. If the Department finds that a water right has not been used in the five (5) years prior to the claim being filed, and there is no qualifying defense to forfeiture under Idaho Code § 42-223 or approved extension of time to avoid forfeiture under Idaho Code § 42-222(3), the Department will recommend the water right as forfeited to the court. If the court agrees with the Department's recommendation, the court will decree the water right forfeited.

As stated in the Petition, in 1998 and 2004, the SRBA Court decreed A.L. Cattle's Water Rights as valid water rights. A.L. Cattle's Water Rights are not currently pending recommendation before the SRBA Court. Therefore, the Department does not have the opportunity to recommend the SRBA decree A.L. Cattle's Water Rights forfeited.

Idaho Code § 42-224 directs the Department to issue an order determining a stockwater water right has been forfeited after it receives a petition, if that petition or other information contains prima facie evidence that the stockwater water right has been lost to forfeiture pursuant to Idaho Code § 42-222(2). While the statute requires the Department to issue an order determining forfeiture, ultimately the State of Idaho Attorney General's Office must file a civil action with the fifth judicial district court at the conclusion of which the district court will issue a judgement that the stockwater water right has been forfeited. Idaho Code § 42-224(12). Even though Idaho Code § 42-224 grants the Department the authority to issue an order determining a stockwater water right has been forfeited, it expressly mandates that the district court must confirm the Department's order by issuing its own order and judgement that the stockwater water right has been forfeited.

Idaho Code § 42-222(2) does not grant the Department the express authority to find a water right forfeited under the statute. Idaho Code § 42-222(2) does afford any party the opportunity to file a civil action in district court to find that a water right has been forfeited.

While Idaho Code grants the Department authority to evaluate and determine forfeiture in some specific circumstances, there are no statutes expressly granting the Department authority to evaluate the evidence presented in the Petition and make a determination regarding forfeiture of A.L. Cattle's Water Rights in this matter. Big Willow Ranch may file a civil action in district court if it wants A.L. Cattle's Water Rights declared forfeited.


CONCLUSIONS OF LAW

The Department should issue an order denying the Petition given the Department does not have the statutory authority to find A.L. Cattle's Water Rights forfeited as a result of the Petition.

ORDER

IT IS HEREBY ORDERED the Petition for Forfeiture is DENIED.

Dated this 1st day of February, 2024


Angela M. Hansen
Water Allocation Bureau Chief

CERTIFICATE OF SERVICE

I certify that on the 1st day of February 2024, I served or caused to be served the Preliminary Order Denying Petition for Forfeiture to the parties by the following method(s):

MICHAEL P LAWRENCE
GIVENS PURSLEY LLP
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83702
(208)338-1294
Attorney for Petitioner

- U.S. Mail, Certified, postage prepaid
- U.S. Mail, postage prepaid
- Overnight Mail
- Email

BIG WILLOW RANCH, LLC
C/O JG SCHWARTZ
1 DIXIE LN
PAYETTE, ID 83661-5030
Petitioner

- U.S. Mail, Certified, postage prepaid
- U.S. Mail, postage prepaid
- Overnight Mail
- Email

TRAVIS L THOMPSON
MARTEN LAW LLP
163 SECOND AVE W
PO BOX 63
TWIN FALLS, ID 83303-0063
(208)334-4141
IDWR record attorney for A.L. Cattle, Inc.

- U.S. Mail, Certified, postage prepaid
- U.S. Mail, postage prepaid
- Overnight Mail
- Email

A L CATTLE CO INC
C/O AGNES BRAILSFORD
PO BOX 180
HAGERMAN, ID 83332
Water right 65-3124X owner of record

- U.S. Mail, Certified, postage prepaid
- U.S. Mail, postage prepaid
- Overnight Mail
- Email

A.L. CATTLE CO
C/O GARY MALLORY (FOREMAN)
PO BOX 608
EMMETT, ID 83617
(208)365-5658
Water right 65-1985 and 65-10537 owner of record

- U.S. Mail, Certified, postage prepaid
- U.S. Mail, postage prepaid
- Overnight Mail
- Email



Jean Hersley
Technical Records Specialist II

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.