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July 1, 2021

James Cefalo
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Idaho Department of Water Resources
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RE: Application for Transfer No. 84171 (WR 34-7226C) Filed By Butte County.

Dear James:

Holden Kidwell Hahn & Crapo, P.L.L.C. has been asked to represent Butte County (the "County") in the above-referenced transfer. This transfer proposes to change the place of use and point of diversion for a portion of WR 34-7226C to be used for purposes associated with a proposed public recreational facility, a facility that has widespread local public support as evidenced by the absence of any protests to the transfer. It is my understanding that you have raised forfeiture concerns WR 34-7226C, and the purpose of this letter to summarize the issues associated with exercise of this right and provide my opinion on the question of forfeiture. While I know you are familiar with forfeiture law in Idaho based on prior actions where I have appeared before you as an IDWR hearing officer, I believe it is beneficial for County officials and others that are interested in the approval of this transfer to summarize the law and standards associated with water right forfeiture in this letter.

Water right forfeiture is not contained in Idaho's Constitution. Rather, its basis in law is statutory and is found in Idaho Code § 42-222:

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 section 42-223, Idaho Code.

Idaho Code § 42-222(2) (emphasis added).

The Idaho Supreme Court has held that “forfeitures are disfavored under Idaho law” and that disfavor is evident by the fact that “there are defenses and exceptions to forfeiture.” *Barnes v. Jackson*, 163 Idaho 194, 198, 408 P.3d 1266, 1270 (2018) (citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999)). Because a determination of water right forfeiture takes away a property right¹, the evidentiary standard for proving a water right forfeiture is high: “The party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by **clear and convincing evidence.**” *Sagewillow, Inc. v. Idaho Dep’t of Water Res.*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2003) (citing *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944)) (emphasis added). More on the clear and convincing evidentiary standard is provided below.

Idaho Code § 42-223—cited to in Idaho Code § 42-222(2)—sets forth statutory defenses to forfeiture and describes its own application as follows:

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

Idaho Code § 42-223 (emphasis added). Thus, if the “failure to apply the water to beneficial use” for five years is caused by any of the “conditions specified in any subsection of” § 42-223, the water user has a viable defense to forfeiture. *Id.* Idaho Code § 42-223, in its entirety, provides:

42-223. EXCEPTIONS OR DEFENSES TO FORFEITURE. 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. The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not recognize the existence or

¹ A water right is real property. Idaho Code § 55-101; *see also Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). A water right is a “complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied.” Idaho Code § 42-101. This is a longstanding principle of Idaho water law. *See Koon v. Empey*, 40 Idaho 6, ___, 231 P. 1097, 1098 (1924) (“there can be no question that a water right becomes appurtenant to the land to which it has been applied and upon which the water has been used for irrigation.”).

validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.

(1) A water right appurtenant to land contracted in a federal cropland set-aside program shall not be lost or forfeited for nonuse during the contracted period. The running of any five (5) year period of nonuse for forfeiture of a water right shall be tolled during the time that the land remains in the cropland set-aside program.

(2) A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

(3) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes including, but not limited to, discharge from dairy lagoons used in combination with or substituted for water diverted under the water right.

(4) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the reason for the nonuse of the water is to comply with the provisions of a ground water management plan approved by the director of the department of water resources pursuant to section [42-233a](#) or [42-233b](#), Idaho Code.

(5) A water right shall not be lost or forfeited by a failure of the owner of the right to divert and apply the water to beneficial use while the water right is placed in the water supply bank or is retained in or rented from the water supply bank pursuant to sections [42-1761](#) through [42-1765A](#), Idaho Code, or while the water right is leased pursuant to sections [43-335](#) through [43-342](#), Idaho Code, or sections [42-2501](#) through [42-2509](#), Idaho Code, or while use of the water is made under any other provision of law authorizing the rental or lease of water rights.

(6) 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.

(7) No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such

entity.

(8) No portion of a water right held by an irrigation district shall be lost, forfeited or subject to forfeiture as a result of the exclusion of land from the district pursuant to [chapter 11, title 43](#), Idaho Code, so long as any five (5) year period of nonuse following the exclusion does not result from circumstances over which the district has control.

(9) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right, as defined in section [42-250](#), Idaho Code.

(10) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from the water right being used for mitigation purposes approved by the director of the department of water resources including as a condition of approval for a new water right appropriation approved pursuant to section [42-203A](#), Idaho Code, a water right transfer approved pursuant to section [42-222](#), Idaho Code, a water exchange approved pursuant to section [42-240](#), Idaho Code, or a mitigation plan approved in accordance with rules promulgated pursuant to section [42-603](#), Idaho Code.

(11) No portion of any water right with a beneficial use related to mining, mineral processing or milling shall be lost or forfeited for nonuse, so long as the nonuse results from a closure, suspension or reduced production of the mine, processing facility or mill due in whole or in part to mineral prices, if the mining property has a valuable mineral, as defined in section [47-1205](#), Idaho Code, and the water right owner has maintained the property and mineral rights for potential future mineral production.

(12) No portion of any water right shall be lost or forfeited for nonuse if, after the five (5) year period of nonuse, use of the water is resumed prior to a claim of right by a third party. A third party has made a claim of right if the party has:

- (a) Instituted proceedings to declare a forfeiture;
- (b) Obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use; or
- (c) Used the water made available by nonuse pursuant to an existing water right.

Based upon a prior Idaho Supreme Court case, the Department has jurisdiction to evaluate water right forfeiture as part of its review of a transfer application:

[T]he director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary

step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights. . . . The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right, and 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 Resources, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). More recently, the Idaho Supreme Court has held that “[a]ny claim that the water right had been abandoned or forfeited in whole or in part by nonuse would be an issue raised either by the Department or a third party. Ordinarily, issues of forfeiture or abandonment are not adjudicated in a transfer proceeding, although they can be.” *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003).

Additionally, just like the Department’s obligation to protect against injury, enlargement, etc., described in Idaho Code § 42-222—even if those issues are not specifically raised by protestants—the Department is required to consider defenses to forfeiture in a contested case. Based on the above-described statutory provisions—and the common-law recognized “resumption of use” doctrine—a three-step analysis is required to determine whether a water right has been forfeited:

- (1) whether there has been five years of non-use of the water right, Idaho Code § 42-222(2);
- (2) whether a statutory exception applies to prevent the forfeiture, Idaho Code § 42-223.
- (3) whether any common law defense to forfeiture applies. One of Idaho’s long-standing common law defenses is now described specifically in Idaho Code § 42-223 (12) (if use of the water right was resumed before a third party asserted a claim of right to the forfeited water, *Sagewillow*, 138 Idaho at 836, 70 P.3d at 674).

Although Idaho Code § 42-222 does not explicitly provide for partial forfeiture, the Idaho Supreme Court has explained that “partial forfeiture is provided for by [Idaho Code] § 42-222(2).” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). Accordingly, the three-part forfeiture analysis described herein applies identically to both complete forfeiture and partial forfeiture. *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680.

In a legal proceeding, the “concept of a burden of persuasion ordinarily applies to questions of fact, and ordinarily is expressed in one of three ways: (1) preponderance of the evidence; (2) clear and convincing evidence; and (3) proof beyond a reasonable doubt.” 29 AM. JUR. 2D

Evidence § 170. “Clear and convincing evidence refers to a degree of proof greater than a mere preponderance.” *Idaho State Barr v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed).

As described above, “the party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by **clear and convincing evidence**.” *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680 (emphasis added) (citing *Carrington*, 65 Idaho 525, 147 P.2d 1009). Similarly, the **absence** of a defense or exception to forfeiture must be proven by clear and convincing evidence by the proponents of forfeiture, who in this matter are either the protestants or the Department:

Although the owner of the water right has the burden of raising defenses to statutory forfeiture, *Jenkins v. State, Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982), **the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense**. *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) (the party asserting there was a forfeiture of a senior water right had the burden of persuasion on issue that there was no resumption of use of the senior water right before the party’s appropriation). See also *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (parties alleging forfeiture of water right have burden of proof).

Sagewillow, 138 Idaho at 842, 70 P.3d at 680 (emphasis added). Accordingly, the law is clear that a proponent of forfeiture—either the protestants or the Department in this matter—must disprove forfeiture defenses to a standard of clear and convincing.

“Clear and convincing evidence is generally understood to be ‘evidence indicating that the thing to be proved is highly probable or reasonably certain.’” *State v. Kimball*, 145 Idaho 542, 181 P.3d 468, 472 (2008) (citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006)). “It is not a burden of convincing one that the facts which are asserted are certainly true or that they are almost certainly true, but it is greater than a burden of convincing one that the facts are more probably true than not true.” 29 AM. JUR. 2D EVIDENCE § 170. The Idaho Civil Jury Instructions describe clear and convincing evidence as follows:

IDJI 1.20.2 – Burden of proof – clear and convincing evidence

INSTRUCTION NO. _____

When I say a party has the burden of proof on a proposition by clear and convincing evidence, I mean you must be persuaded that it is highly probable that such proposition is true. This is a higher burden than the general burden that the proposition is more probably true than not true.

This is different than the preponderance of the evidence standard, which the Idaho Civil Jury Instructions describes as follows:

IDJI 1.20.1 – Burden of proof – preponderance of evidence

INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression “if you find” or “if you decide,” I mean you must be persuaded that the proposition is more probably true than not true.

Relative to these evidentiary standards, the Idaho Civil Jury Instructions therefore embody the following principle: “If we are to give meaning to the phrase ‘clear and convincing proof,’ it must mean that the proponent must show that the facts which he asserts are **more than merely probably true; that the probabilities that they are great that they are true.**” Bryan M. Bennett, *Evidence: Clear and Convincing Proof: Appellate Review*, California Law Review Vol. 32, Issue 1, at 76-77 (1944) (emphasis added).

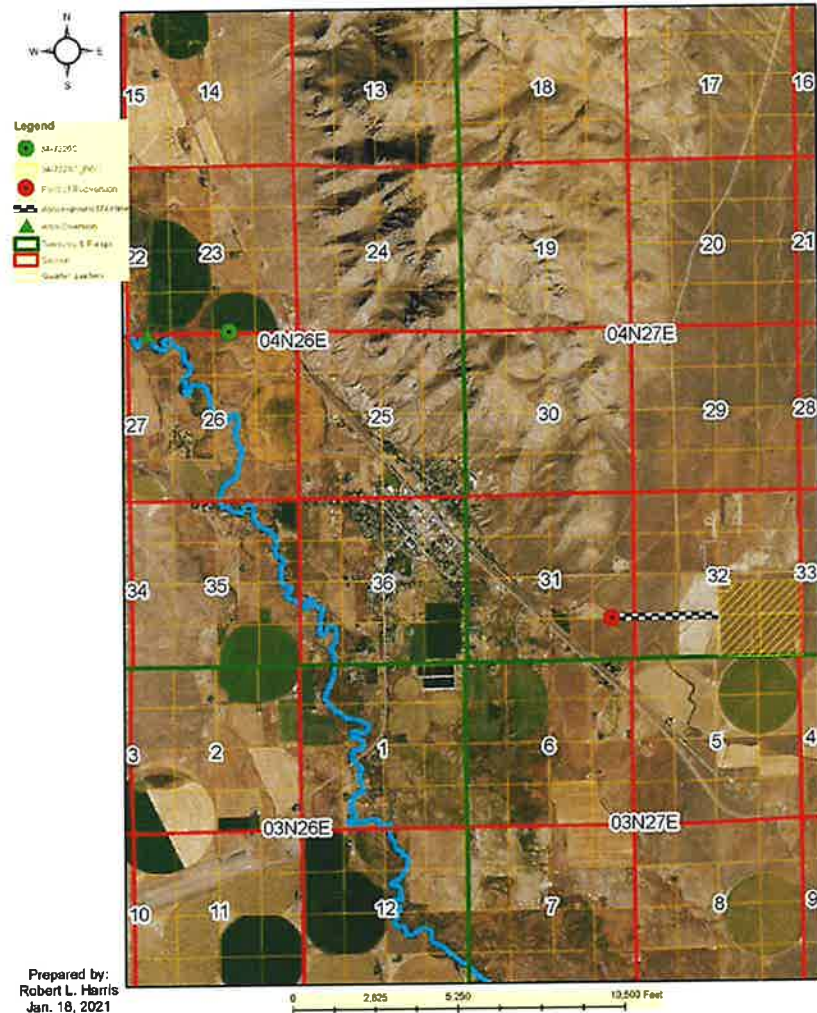
Accordingly, the law is well-defined that a proponent of forfeiture—either the protestants or the Department in this case—must disprove the defense to a standard of clear and convincing evidence, which means that in disproving the defense, the forfeiture proponent must prove that it is highly probable (or great) that the defense does not apply. This is a difficult standard, one that is just below that of the “beyond a reasonable doubt” standard applied in criminal proceedings.

There are no cases or other legal authority which provides that the Department must establish evidence to a lesser evidentiary standard than that of clear and convincing evidence—the Department can examine the “question of abandonment and forfeiture” (*Jenkins, v. State, Dep’t of Resources*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982)), but it must do so to a clear and convincing evidence standard.

ANALYSIS

WR 34-7226C is authorized to be diverted from a well located in the SWSWSE of Section 23, T. 04N, R. 38E., Boise Meridian (the “Well”). There are two other water rights also authorized to divert from this same well (WR 34-7226B and 34-7226D) that are owned by other water users. A map of the well location, the point of injection into the Arco Canal system, the point of rediversion from the Arco Canal, and the approximately location of where the above-ground mainline transported water to the current place of use is set forth here:

BUTTE COUNTY 34-7226C



As you are aware, the Arco Canal is a facility of the Big Lost River Irrigation District (“BLRID”) and is not owned or controlled by the County.

Those that use water from the Well report that the well is not productive, and because of gravel present in the water when the Well is operated, the bowls wear out quickly. The only user of the Well is Standlee Family Limited Partnership (WR 34-7226B), even though water rights owned by the County and Danny Waddoups are also associated with this well. In conversations with Jason Stanger of Standlee, his entity has been the only user of the Well as long as he can remember because of its poor production. Jason is not aware of a well use agreement or other

written historical arrangement for allocation of water diverted from the Well. Based on conversations with the County, it agrees that there is no formal written well use agreement of which it is aware but given the poor production of the Well and the County's use of the place of use as a landfill, the County always prioritized water being first used by the other agricultural owners of the Well. Accordingly, those other users also entirely paid for operation and maintenance of the Well. A few years ago, Standlee invested money and other resources in the Well, and it did produce better for 3 or 4 days, but unfortunately, the Well's performance thereafter regressed back to its prior poor production. According to Jason, it has significant sand and gravel problems that eat up the pump bowls, and this is what happened even after the recent Well work. As further evidence of the Well's poor production, Danny Waddoups (another local farmer and owner of WR 34-7226D that is authorized to be diverted from the Well) filed temporary transfers in 2020. This approval is in the water right backfiles for WR 34-7226D. It is my understanding that Waddoups is in the process of filing another temporary transfer application for 2021 as well. Accordingly, the County's nonuse of water from the Well was primarily because the Well cannot produce enough water to supply the farmers who also have water rights in the Well.

Further, the County has historically had difficulty getting water to its point of redirection on the Arco Canal because of high conveyance losses associated with this BLRID system. As you are aware from a recent contested case where you were the hearing officer, conveyance losses associated with water delivered through the Arco Canal system often exceeds 50%. Relative to WR 34-7226C, which is a ground water right, the County is allowed to use the canal through a transport agreement for delivery of this ground water through BLRID's system. There is no Idaho statute or other law of which we are aware where a water user who uses the canal system by permission or agreement can force BLRID to improve its canal system.

Overall, given the County's decision to use the place of use for WR 34-7226C as a landfill, the Well's poor production evidenced by its inability to produce enough water to satisfy all water rights authorized to divert from the Well, the priority of water allocation to the farmers who have other water rights associated with the Well, and the conveyance losses associated with the Arco Canal system, there is a valid defense to forfeiture for WR 34-7226C under Idaho Code § 42-223, specifically subsection (6). Based on this information, we request that the Department approve Application for Transfer No. 84171. If you have any questions, please do not hesitate to give me a call. Thank you for your attention to this matter.

Best regards,



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Enclosures

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