

LODGED

DISTRICT COURT - CFPRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
SEP 08 2026
By _____ Clerk
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CFPRBA)
Case No. 69576)
_____)

Subcase: 97-9502
NOTICE of AMENDED CLAIM TO A WATER
RIGHT and CLAIM AMENDMENT, with
SUPPLEMENTAL POSITION BRIEF
IN SUPPORT OF CLAIM

NOTICE IS HEREBY GIVEN that Claimant K & P Big Rock Trust [dtd: 12-4-2008] hereby Amends its Notice of Claim to a Water Right dated June 28, 2022 ("Notice of Claim"), to address claim Form limitation on purpose choices for water use, in that the Form provided did not include a comprehensive list of use choices, not listing type of use involved in this claim - a general Form limitation that was pointed out to us in a recent Zoom Hearing meeting on this matter.

AMENDMENT TO WATER RIGHT CLAIM

Amendment to Notice of Claim is hereby made to add to Form, section 9, chosen "Domestic Use" category, the use category of "Recreational [and related business] Use". The real property subject of this claim is Priest Lake Idaho waterfront land.

This Amendment is not intended as an expansion of the original Notice of Claim. It is intended as an accurate reflection of Claimant's overall situation and land position; it is noted that Claimant's land is zoned *recreational*, the category unchanged from when Claimant's parents owned Paul Jones Beach Resort property circa 1948-9 to 1951.

CLAIMANT SUPPLEMENTAL POSITION BRIEF IN SUPPORT OF CLAIM

Claimant's Supplemental Position Brief In Support of Claim [9-3-2026], with attached documents, follows the next, Certificate of Service, page.

Respectfully submitted.

September 3, 2026

K & P Big Rock Trust
by: Christopher W. Patterson
Christopher W. Patterson, Trustee
by: Pennie L. Patterson
Pennie L. Patterson, trustee

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September 2026, I caused a copy of the K & P Big Rock Trust's NOTICE OF & AMENDMENT TO NOTICE OF CLAIM TO A WATER RIGHT, and SUPPLEMENTAL POSITION BRIEF IN SUPPORT OF CLAIM in CFPBRA case 69576, Subcase 97-9502 to be served by the following method to:

Clerk of the District Court
Clark Fork-Pend Oreille River Basin
Adjudication
253 3rd Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

Original, by Overnight Mail

IDWR Document Depository
322 East Front Street
P. O. Box 83720
Boise, ID 83720-0098

Copy, by Overnight Mail

Scott Luvaas,
Adjudication Section Manager
Idaho Department of Water Resources
322 E. Front Street, Suite 648
P. O. Box 83720
Boise, ID 83720-0098

Copy, by Overnight Mail

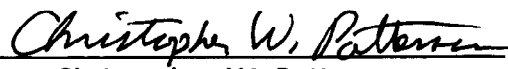
United States of America
Environmental and Natural Resources
Division
P. O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611

Copy, by Overnight Mail

State of Idaho
Chief Energy and Natural Resources
Division
Office of the Attorney General
P. O. Box 83720
Boise, ID 83720-0010

Copy, by Overnight Mail

Signature of the person mailing this document


Christopher W. Patterson

CLAIMANT SUPPLEMENT POSITION BRIEF September 3, 2026 re

Notice of Claim to Water Right in
Idaho Fifth Judicial District
In Re CFPRBA Case No. 69576

Subcase: 97-09502

Claimant: K & P Big Rock Trust (co-trustees Christopher W. Patterson, Pennie L. Patterson)

Property: .220ac Priest Lake lakefront **lot** [RP 59N04W103500 A (near Coolin, ID)*]

Priority Date: late 1948 - Parents owned/gifted **lot** in 1988 to claimant owner(s).

* **Lot** was retained portion of Paul Jones Beach property [48 acres] in sale by Parents in 1951.

Background

A. We have been seeking to resolve this matter without formal adjudication. Some recent points have come up and issues remain, sought to be addressed here as to our water right claim on a single parcel, assigned #97-09502. Our water claim on **lot** is asserted use of Priest Lake, water and ice, is now asserted for: 1) domestic use, and 2) with amendment to our water right claim, recreational [with related business] use.

Our Position and Asssertions

It is understood the "resumption of use" position is recognized but not effectively applied because IDWR has asserted:

1. Specific water right must be on transfer deed. That is not the law. Water right passes with ownership unless specifically reserved by seller. See statute law 42-617 and 42-1402 information attached. Additionally, transfer deeds to parents, and to us (now in our trust) do specifically transfer water rights.

2. Water right must have been used on our **lot**. That is not the law. The water right used must be on the "land", withing parcel or lot boundaries. That it was in a structure previously is not relevant; it is land connected. See Water Law handbook pages (underlined for emphasis) attached.

3. Water right may not be enlarged. We would not be enlarging to resume use. From my personal knowledge, there were 16 cabins, an owners' cabin/boathouse, a washing machine shed, and a general store - on the one property. Our lot was part of property, with contiguous boundary and, when rotated, our **lot** actually largely was part of the large parcel. 4 of the structures were since removed. Water was drawn largely from lake, and ice from lake. We assert no use enlargement would occur from our future water use for all purposes asserted, and given large water source, the lake, no possible third party claim, past, present, or future.

WARRANTY DEED

For Value Received

RICHARD F. PATTERSON and
FRANCES PATTERSON, husband and wife

The grantor s, do hereby grant, bargain, sell and convey unto
CHRISTOPHER W. PATTERSON and
PENNIE LEE PATTERSON, husband and wife, as joint tenants,
the grantee s, whose current address is
4296 Laurelhurst Road, Moorpark, CA 93021
the following described premises, in Bonner County Idaho, to-wit:

A parcel of land in Government Lot 1, Sec. 10, T59N,
R4W, B.M., Idaho more specifically described as follows:

Beginning at the Southeast corner of Lot 4, Block Two,
First Addition to Duncan's Subdivision as shown on the
recorded plat in the Bonner County Recorder's office
in Sandpoint; Thence S61°34'W, 252.68 feet to an iron
pin; Thence N41°35'W, 52.29 feet to an iron pin on the
centerline of the Existing Private Access Roadway, said
point being the True-Point-of-Beginning for this
description;

Thence N41°35'W, 185.52 feet to an iron pin; Thence
N63°03'W, 17.05 feet to the Big Rock on the shore of
Priest Lake, said Big Rock being 150.0 feet, S83°35'W,
and 109.89 feet, S66°10'W of the Northwest corner of
Lot 2, Block Two of said First Addition of Duncan's
Subdivision; Thence N66°10'E along the shore of Priest
Lake, 109.89 feet to an iron pin;

Description continued on pages 2 through 3 of this document.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantees their,
successors, heirs and assigns forever. And the said Grantor s do hereby covenant to and
with the said Grantees, that they are the owners in fee simple of said premises; that they are free
from all incumbrances except as described in this Deed, and taxes and
assessments as may exist for said premises.

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: November 4, 1988

Richard F. Patterson
RICHARD F. PATTERSON

Frances Patterson
FRANCES PATTERSON

STATE OF ~~IDAHO~~ ^{California} COUNTY OF SANTA BARBARA
On this ~~4th~~ ^{10th} day of NOVEMBER, 1988.

STATE OF IDAHO, COUNTY OF
I hereby certify that this Instrument was filed for record at the

11/04/88

Thence S41°35'E, 157.36 feet to an iron pin on the centerline of said Existing Private Access Roadway; Thence S42°21'W along said centerline of the Existing Private Access Roadway, 99.06 feet to the True-Point-of Beginning.

Excepting therefrom the following described portion of said parcel:

Beginning at the southeast corner of Lot 4, Block 2, First Addition to Duncan's Subdivision as shown on the recorded plat in the Bonner County Recorder's office in Sandpoint; thence South 61°34' West, 252.68 feet to an iron pin; thence North 41°35' West 52.29 feet to an iron pin on the centerline of the existing private access roadway; thence North 42°21' East 49.53 feet which is the midpoint along a line on said bearing and said point being the true-point-of-beginning for this description;

Thence North 42°21' East 49.53 feet to an iron pin, thence North 41°35' West 157.36 feet to an iron pin on the shore of Priest Lake, thence South 66°10' West, 50.00 feet along the shore of Priest Lake, thence in a direct line back to the True-Point-of-Beginning.

The above described premises being subject to the use by the adjacent property owners of the Existing Private Access Roadway:

EXISTING PRIVATE ACCESS ROADWAY:

A strip of land 18.0 feet wide being an existing private access roadway in Government Lot 1, Sec. 10, T59N, R4W, B.M., Idaho, the centerline of which is specifically described as follows:

Beginning at the SE corner of Lot 4, Block Two, First Addition to Duncan's Subdivision as shown on the recorded plat in the Bonner County Recorder's Office in Sandpoint; Thence S61°34'W, 252.68 feet to an iron pin; thence S30°29'W, 101.71 feet to a point at the intersection of the centerline of said private access road with the N.W. line of the existing public road R/W, said point being the Point-of-Beginning for the centerline of this private road access-way.

Thence N2°19'E, 84.33 feet; Thence N18°22'E, 39.05 feet, Thence N42°21'E, 112.95 feet to a point which is the Terminal Point for the Centerline of this private road accessway.

The existing private road easement is also subject to the perpetual use for ingress and egress by Joyce Duncan Lee, Ted E. Duncan and James E. Duncan, their heirs and assigns to the portion of the following described real property still owned by the above parties.

the right of joint access and usage with the Grantees herein, their successors, heirs, and assigns, to the Coolin Sewer District septic tank installed originally for Grantors' above described parcel and located generally on or near the line which divides the described premises and excepted portion of said parcel. Such access and usage is subject to the rights of the Coolin Sewer District as per standard agreement signed between Grantors and said District, including electrical pump and switch layout provided for partnership septic tank situations. Grantors expressly and exclusively grant to Grantees, their successors, heirs and assigns, all of Grantors' right, title and interest in and to Grantors' prepaid sewer hookup fees previously paid to the Coolin Sewer District, and the buyers of the excepted portion of said parcel have no rights as to such prepaid hookup fees.

The above described premises also being subject to Easements and/or rights-of-way of record as of this date.

It is the intention of the Grantors to convey to the Grantees all riparian and littoral rights of the Grantors in the described premises between the sidelines extended Northwesterly which the Grantors may have received by that certain deed conveying to Grantors dated: October 31, 1973, Document No. 155127.

Together with all and singular the tenements, hereditaments and appurtenances thereunto appertaining.

END OF DESCRIPTION

WARRANTY DEED

155127

LOT
ROTATION

THIS INDENTURE, made and entered into this 3rd day of October, 1973, by and between JOYCE DUNCAN LEE, TED E. DUNCAN and JAMES E. DUNCAN, parties of the first part, and RICHARD F. PATTERSON and FRANCES PATTERSON, husband and wife, parties of the second part, whose address is 6912 Wish Avenue, Van Nuys, California, 91408, WITNESSETH:

That the said parties of the first part, for and in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration to them in hand paid, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the parties of the second part, the following described property situate in Bonner County, State of Idaho, to-wit:

A parcel of land in Government Lot 1, Sec. 10, T59N, R4W, B. M., Idaho more specifically described as follows:

Beginning at the Southeast corner of Lot 4, Block Two, First Addition to Duncan's Subdivision as shown on the recorded plat in the Bonner County Recorder's office in Sandpoint; Thence S81°34'W, 252.68 feet to an iron pin; Thence N41°35'W, 32.29 feet to an iron pin on the centerline of the Existing Private Access Roadway, said point being the True-Point-of-Beginning for this description;

Thence N41°35'W, 165.52 feet to an iron pin; Thence N83°03'W, 17.05 feet to the Big Rock on the shore of Priest Lake, said Big Rock being 150.0 feet, S83°35'W, and 109.89 feet, S65°10'W of the Northwest corner of Lot 2, Block Two of said First Addition of Duncan's Subdivision; Thence N88°10'E along the shore of Priest Lake, 109.89 feet to an iron pin;

Thence S41°38'E, 167.36 feet to an iron pin on the centerline of said Existing Private Access Roadway; Thence S42°21'W along said centerline of the Existing Private Access Roadway, 95.55 feet to the True-Point-of-Beginning.

The above described parcel being subject to to the use by the adjacent property owners of the Existing Private Access Roadway:

EXISTING PRIVATE ACCESS ROADWAY:

A strip of land 18.0 feet wide being an existing private access roadway in Government Lot 1, Sec. 10, T59N, R4W, B. M., Idaho, the centerline of which is specifically described as follows:

This deed was recorded on 10-22-1973 in the County of Bonner, Idaho, and is a true and correct copy of the original as filed for record.

Beginning at the SE corner of Lot 4, Block Two, First Addition to Duncan's Subdivision as shown on the recorded plat in the Bonner County Recorder's Office in Sandpoint; Thence S81°34'W, 252.68 feet to an iron pin; thence S30°29'W, 101.71 feet to a point at the intersection of the centerline of said private access road with the N. W. line of the existing public road R/W, said point being the Point-of-Beginning for the centerline of this private road access-way.

Thence N2°19'E, 84.33 feet; Thence N15°22'E, 39.05 feet Thence N42°21'E, 112.95 feet to a point which is the Terminal Point for the Centerline of this private road access-way.

The existing private road easement is also subject to the perpetual use for ingress and egress by Joyce Duncan Lee, Ted E. Duncan and James E. Duncan, their heirs and assigns to the portion of the following described real property still owned by the above parties:

Sec. 10-59-4W. That part of Government Lot lying North and West of the County road less plats and Tax Nos. 2, 3, and 5. Misc. 28, page 426, Bonner County, Idaho.

The above described parcel also being subject to Easements and/or rights-of-way of record as of this date.

It is the intention of the Grantors to convey to the Grantees all riparian and littoral rights of the Grantors between the side-lines extended Northwesterly which the Grantors may have received by that certain deed dated 7 Oct. 18, 1973 from the Grantees to the Grantors.

Together with all and singular the tenements, hereditaments and appurtenances thereunto appertaining.

TO HAVE AND TO HOLD the same unto the said parties of the second part, their successors and assigns forever.

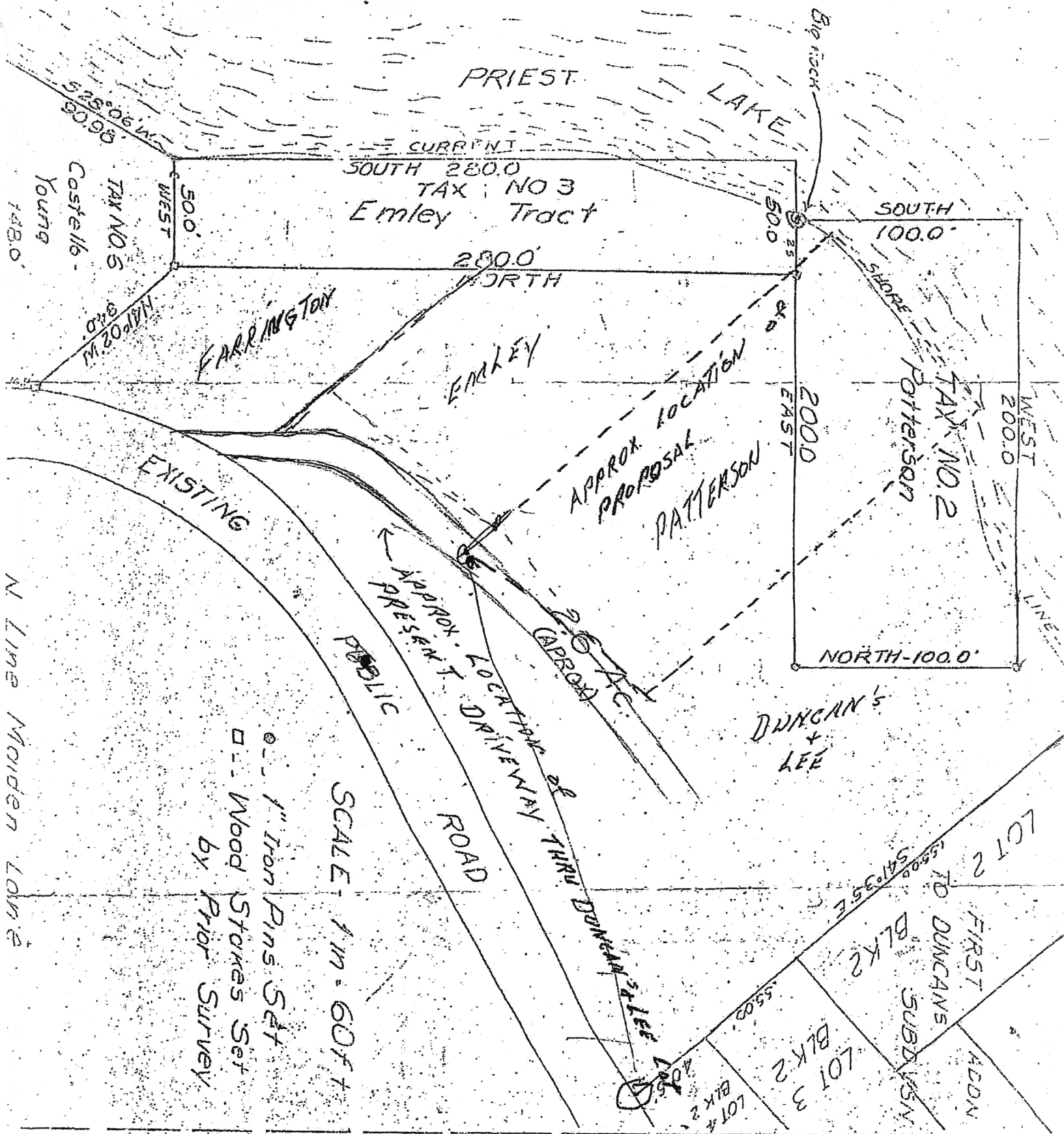
The parties of the first part warrant the title to said property and that the same is free and clear of all encumbrances.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year in this instrument first above written.

Joyce Duncan Lee
Joyce Duncan Lee

Ted E. Duncan
Ted E. Duncan

James E. Duncan
James E. Duncan



#2

Dear Mr Patterson,

If you would agree to change the location of your lot, as indicated on this sketch, we would sell the ground behind Farrington & Emly to them, and make a trade with you for Lake front gained by this change. The town of us would share all survey & legal costs. The planned driveway would serve as access for all.

Yours Truly

Fred Duncan

116508 Normandie

Spokane, W. 99208

55-617. APPURTENANT WATER RIGHTS AND WATER ENTITLEMENTS AND OBLIGATIONS PASS WITH PROPERTY.

(1) A transfer of real property passes appurtenant water rights decreed by court order pursuant to chapter 14, title 42, Idaho Code, **permitted or licensed** by the department of water resources pursuant to chapter 2, title 42, Idaho Code, **or established by** the constitutional method of **appropriation**, and that are owned by the seller and are **not** reserved by the seller in the instrument of conveyance.

(2) A transfer of real property included in an irrigation district that operates pursuant to title 43, Idaho Code, to which the district has apportioned the right to receive water from the district's water rights, passes the statutory rights and obligations of the property relative to the district's distribution of water and assessments.

(3) A transfer of real property included in a city irrigation system that operates pursuant to chapter 18, title 50, Idaho Code, to which the city has apportioned the right to receive water from the city's water rights, passes the statutory rights and obligations of the property relative to the distribution of water and assessments.

(4) A transfer of real property included in a ground water district that operates pursuant to chapter 52, title 42, Idaho Code, to which the district has levied assessments or apportioned mitigation plan obligations, passes the statutory rights and obligations of the property relative to such assessments and obligations.

(5) A transfer of real property that is entitled to receive water from the water rights of a canal company, ditch company, association, or other water delivery entity, passes the rights and obligations of the property relative to the entity's distribution of water and assessments as evidenced by stock ownership, or other evidence of an entitlement to receive water, subject to the bylaws of the water delivery entity.

(6) A transfer of real property does not pass water rights or water entitlements and obligations that are not appurtenant to the real property.

History: [(55-617) 55-616, added 2022, ch. 267, sec. 1, p. 857; am. and redesign. 2023, ch. 218, sec. 20, p. 643.]



Idaho Statutes

Idaho Statutes are updated to the website July 1 following the legislative session.

TITLE 42

IRRIGATION AND DRAINAGE – WATER RIGHTS AND RECLAMATION

CHAPTER 14

ADJUDICATION OF WATER RIGHTS

42-1402. DECREEED RIGHTS APPURTENANT TO LAND – WATER RIGHTS ESTABLISHED UNDER FEDERAL LAW EXCEPTED. In allotting the waters of any water system by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, except where water rights established under federal law are involved, in which case the allotment shall be made in accordance with federal law. The right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land on which the water is used, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such water shall become so appurtenant. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed, or in the case of a water right established under federal law, in excess of that amount determined by federal law.

History:

[(42-1402) 1903, p. 223, sec. 38; reen. R.C., sec. 4621; am. 1913, ch. 35, sec. 1, p. 133; C.L., sec. 4621; C.S., sec. 7033; I.C.A., sec. 41-1302; am. 1969, ch. 279, sec. 2, p. 822; am. 1986, ch. 220, sec. 4, p. 561; am. 1994, ch. 454, sec. 5, p. 1447.]

How current is this law?

Idaho Water Law Handbook

The Acquisition, Use, Transfer, Administration, and Management Of Water Rights in Idaho

By

Christopher H. Meyer

Co-authors of prior editions (now retired):

Jeffrey C. Fereday

Michael C. Creamer

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August 7, 2026

This handbook is updated regularly.
You may download the latest version free of charge at
<https://www.givenspursley.com/publications>.

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B. The elements of a water right

Every water right is described by seven specific “elements” that define and limit its use.¹¹ Those elements are: source, quantity (either in annual volume or rate of flow, or both), priority date, point(s) of diversion, purpose(s) of use, period of use, and place of use. See *City of Blackfoot v. Spackman*, 162 Idaho 302 (2017) (Burdick, C.J.); *Olsen v. IDWR*, 105 Idaho 98, 666 P.2d 188 (1983).

Most elements may be changed, subject to administrative approval. A few elements, however, may not be changed. For instance, a water right user may not change the source of a water right, increase its quantity, or make its priority date earlier. For those elements that are changeable, a water right holder has the legal right to change them, but only where injury to other water users is avoided and other legal standards are met. Any change to an element of a water right requires the approval of the Idaho Department of Water Resources (“Department” or “IDWR”) in a transfer proceeding. (See discussion in section 15 at page 223.).

(1) Source

The source of the water supply simply identifies the body of water from which the water is to be appropriated or diverted. In the case of a surface right, the particular stream, spring, or lake is named. In the case of ground water, the source is typically simply labeled “ground water.”

Generally, the larger the water source the more secure the right because it will be more likely to provide water during periods of extended drought. Availability of water to satisfy a particular water right is dependent, as well, upon the number and size of any senior water rights from the same source.

Ordinarily the water user may not change the source of a water right, but must instead obtain a new water right in the new source. However, the Department will allow a change in one tributary to another tributary of the same source, if doing so does not result in injury.

¹¹ The various elements of a water right are identified in various locations of Idaho’s water code (Title 42, Idaho Code) dealing with appropriation and transfer of water rights. E.g., Idaho Code §§ 42-203A, 42-217, 42-219 and 42-222. The elements are also set out in the a relatively modern statute describing the Director’s Report to be submitted on each water right to the SRBA. Idaho Code § 42-1411(2). Note that the SRBA statutes originally called for quantification of the “consumptive use” as an element of a water right. This requirement was repealed in 1997. 1997 Idaho Sess. Laws, ch. 374. In addition to the elements listed above, Idaho Code § 42-1411(2) lists (1) the name and address of the claimant, (2) conditions, and (3) remarks. Although important, these are not generally understood to constitute “elements” of the water right.

All waters of the state when flowing in their natural channels, including springs, lakes and ground water are available for appropriation.¹² However, the Idaho Department of Water Resources is prohibited from issuing a permit to appropriate the water of any lake not exceeding five acres in surface area or any pond, pool or spring located entirely on the lands of a single owner except to the landowner, or if to another, with the acknowledged written permission of the landowner. These are inaccurately referred to as “private waters.”

(2) Point of diversion

The point (or points) of diversion refers to a legal description of the location where the water is diverted from a stream, an aquifer, a lake or other water source. Any change in point of diversion requires approval of a transfer application by the Department.

For an instream flow water right, the beginning and ending points of the stream reach are described.

(3) Priority

Early water users are referred to as “senior,” while those who come later are called “junior.” A senior water right holder is entitled to have his right filled completely before any junior right holder is entitled to divert at all. (See Appropriation Example 1 below.) This is the principle of “first in time is first in right” that is set forth in Article XV, § 3 of the Idaho Constitution.¹³

The date on which a person (or his predecessor) first began to use the water is known as the user’s priority date. Priority, as well as amount, is confirmed in license or a decree. During drought conditions, only senior users on a particular stream (say, with priority dates of 1890 or earlier) might be allowed to divert. Thus, the more senior the priority date, the more secure the water right, regardless of where the user is located on the stream.

When a water right is sold or changed, it ordinarily keeps its original priority date (so long as no other water user is injured). This is one of the most valuable aspects of its existence.

Note that when water rights are obtained by an irrigation delivery entity, such as a canal company or irrigation district, water rights are typically acquired for the project in a single block. Thus within the irrigation entity, all users who have obtained water rights out of that supply hold the same priority date, even if some settlers arrived earlier on the

¹² Idaho Code §§ 42-101, 42-226.

¹³ See also Idaho Code § 42-106.

project than others.¹⁴ Of course, if the project subsequently obtains an additional water right or rights, those subsequent acquisitions would have their own priority dates.

A senior water right holder may obtain the state's help in enforcing his or her priority. If a water user is not able to obtain water to achieve his or her beneficial use under the user's entitlement and believes that junior users are diverting water that he or she is entitled to divert, the senior may place a "delivery call" (aka "priority call" or simply "call") on the water source. In such a case, the state will require junior appropriators to reduce or cease their diversions to supply the senior. The curtailment of junior water rights by action of the state to enforce priorities is referred to as "administration" of the rights. On surface streams where the rights have been adjudicated, administration occurs in a routine and organized fashion through a state agent known as a watermaster: When the river flow drops to a pre-determined level, the watermaster closes a certain group of junior headgates; when it drops further, he or she closes the next group, and so forth. Where rights have not been adjudicated, or where both ground and surface water rights are to be administered together, administration often is more complicated, or requires additional processes. These and other issues pertaining to the administration of water rights are discussed in section 14.D(1) at page 215.

(4) Nature of use

The nature of use identifies the particular use that is made of the water under a water right. An appropriation must be for a useful or beneficial purpose.

Most descriptions of the nature of use are quite broad. For instance, an irrigation rights is simply described as "irrigation" without specifying, for instance, the particular crop.¹⁵ Likewise, an industrial facility's water right is typically described generically as "industrial" or, perhaps, "commercial." In some instances, however, it might be described more specifically such as, for instance, a "food production facility." The Department does not have a fixed practice regarding how much specificity is required. From the holder's perspective, the more general the description, the better, to provide maximum flexibility in the future.

(5) Quantity: rate of diversion and annual volume

All water rights must be quantified in some way to determine the amount of the right. Very early irrigation water rights were quantified simply by reference to the lands

¹⁴ *Faris v. Blaine Cnty. Inv. Co.*, 3 F. Supp. 381 (D. Idaho 1983).

¹⁵ *Muir v. Allison*, 33 Idaho 146, 191 P. 206 (1920); see note: "Changes in consumptive use do not require a transfer pursuant to section 42-222." Idaho Code § 42-202B(1) (as amended in 2004).

the switch to sprinklers a partial forfeiture), while holding to the longstanding rule looking to historical beneficial use--or even in some cases historical consumptive use--when it comes to deciding what diversion to allow in a water right transfer.

The quantification of a water right can pose a challenge for a growing company. If an industrial user is still growing the business at the time a water right is licensed, the right will be quantified based on the best year of production during the proof period. There is no cushion for future growth. A growing enterprise must apply for (or acquire by purchase) a new water right to cover the expansion.

(6) Period of use (aka season of use)

The period of use (or season of use²¹) identifies the time of the year when water is authorized to be diverted and used. For example, a water right for irrigation may be used only during the irrigation season.²²

Designation of the period of use is important because different water users often hold rights to the use of water from the same source but during different periods of the year. The period of use also reflects an implicit quantity limit on the water right. For instance, the holder of a year-round hydropower right on a stream may be concerned that irrigators not begin diverting upstream surface diversions too early in the Spring or too late in the Fall.

Older water rights often failed to expressly state the period of use, or simply describe it as, say, “the irrigation season.” This creates difficulties in administration, and usually requires the Department or a court to determine the actual period of use based on actual dates, such as April 15-November 15 for irrigation. Current Idaho statutes require that in decreeing water rights the court shall designate the period of the year when water may be used for the authorized purpose.²³ Likewise, the Idaho Supreme Court has ruled that the irrigation season must be defined by specific beginning and ending dates. *A&B Irr. Dist. v. Idaho Conservation League (aka Basin-Wide Issue 5) (“ICL III”)*, 131 Idaho 411, 424, 958 P.2d 568, 581 (1998) (McDevitt, J.).²⁴

²¹ The terms period of use and season of use are interchangeable, although it is possible that a particular period of use might correspond to something other than a season.

²² The irrigation season in Idaho ranges from six to nine months, depending upon the geographic area. A map designating the applicable irrigation season for each area of the state is set out in Appendix B to IDAPA 37.03.08.

²³ Idaho Code §§ 42-1411(2)(g), 42-1412(6).

²⁴ In *ICL III*, the Director of IDWR included various general provisions (addressing administrative issues broadly applicable to all water rights) in the Director’s Reports for three test basins. A&B Irrigation District and others moved the SRBA Court to designate a basinwide

(7) Place of use

Place of use of course refers to where the water diverted under the right is being beneficially used. A statute provides that for irrigation purposes, a license shall give a description, by legal subdivisions, of the land irrigated.²⁵ Similarly, rights for industrial and commercial uses will carry a specific description of the place of use.

There are two broad examples where a more general description is acceptable. The first is for municipal purposes. (See discussion of the flexible “municipal service area” in section 23.D(6) at page 404.)

The second exception is for certain irrigation water delivery organizations, such as canal companies and irrigation districts. They may receive a generalized place of use description within which water diverted under the entity’s water rights may be moved freely from one irrigated parcel to another, both when they are obtaining licensed rights and when their rights are being adjudicated. Idaho Code § 42-219 applies in the licensing context. Idaho Code § 42-1411(2)(h) requires IDWR during an adjudication to determine “a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219.” (emphasis added).

The referenced exceptions are as follows:

issue to consider the appropriateness of the general provisions. The SRBA Court struck the general provisions as unnecessary to define or efficiently administer water rights. The Idaho Supreme Court (opinion by Justice McDevitt) reversed as to the provision on firefighting (holding that was an appropriate general provision), but upheld the District Court in striking the general provisions for stock watering and excess water. On reconsideration (opinion by Justice Walters), the Court remanded for further proceedings concerning general provisions on the season of use and conjunctive management.

In *A&B Irr. Dist. v Idaho Conservation League* (“*ICL II*”), 131 Idaho 329, 955 P.2d 1108 (1998) (Silak, J.), the Court addressed a general provision dealing with excess water included on water rights within the previously decreed Reynolds Creek Basin. In contrast to the “generic” excess water general provision in *ICL III*, this was a stipulated general provision setting out a specific administrative formula for administering the delivery of water during high flow periods. The SRBA District Court struck the provision, and various parties appealed. The Idaho Supreme Court upheld the general provision as necessary for the efficient administration of water rights, noting that it “describe[d] a long-standing system of allowing those who otherwise have water rights in the Reynolds Creek Basin to use excess water when it is available.” *ICL II*, 131 Idaho at 334, 955 P.2d at 113. However, the Court also held that the provision did not establish a water right in the excess water because “General Provision 2 does not set forth a priority date, quantity, legal description of the place of use, nor any of the other elements of a water right.” *ICL II*, 131 Idaho at 333, 955 P.2d at 112.

²⁵ Idaho Code § 42-219.

(5) For irrigation projects where the canals constructed cover an area of twenty-five thousand (25,000) acres or more, or within irrigation districts organized and existing as such under the laws of the state of IdahoIt shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient.

(6) For an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for the beneficial use by more than five (5) water users in an area of less than twenty-five thousand (25,000) acres, the license issued shall be issued to the permit holder. For the place of use description in the license issued for the irrigation project, it shall be sufficient to provide a general description of the area within which the total number of acres developed under the permit are located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights.²⁶

(8) **Consumptive use quantity is not an element**

Another important dimension of water quantification is consumptive use, that is, the volume of water consumed in the course of use or otherwise made unavailable to other users.²⁷ (Consumptive use is typically expressed as an annual volume: acre-feet per annum.) Early in the SRBA process, the Legislature mandated that consumptive use be quantified as part of the adjudication of each right. This requirement was repealed in 1997.²⁸

²⁶ Idaho Code § 42-219(5) and (6) (emphasis added).

²⁷ The water code defines “consumptive use” and “authorized consumptive use” as follows: “‘Consumptive use’ means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. ‘Authorized consumptive use’ means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code.” Idaho Code § 42-202B(1).

²⁸ 1997 Idaho Sess. Laws, ch. 374.

In 2004, the Legislature amended the water code to declare: “Consumptive use is not an element of a water right. . . . Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code.”²⁹ This declaration reinforces the right of a water right holder to modify his or her use of the right (within the bounds of the water right) in a manner that increases the consumptive use. (See discussion in section 15.E(4) at page 232.) The declaration that consumptive use is not an element of a water right does not mean that consumptive use is never considered, however. It remains a vital part of measuring a water right in the transfer process—where water is transferred to a new use, consumptive use, typically, is the measure of the quantity of water that may be transferred without injury to others. Idaho Code § 42-222(1). (See discussion of consumptive use in section 15.E(5) at page 233 and discussion of enlargement in section 15.I on page 270.)

(9) Facility volume is not an element

Note: See also discussion in section 15.I(4) (Enlargement in a non-irrigation context) at page 282.

Earlier in the SRBA process, the Department took the position that water rights for fish farms should include a specification of facility volume in the “remarks” section, describing the number and size of the ponds, raceways, settlement basins and the like that could be served by the licensed or decreed diversion rate (rate being the amount of flow per second, potentially on a 24-hour basis). In other words, the facility volume was a statement of the maximum existing capacity of the operation, even though a larger capacity holding a larger volume of water could be served with the authorized diversion rate. The Department did not view facility volume as a separate element, but rather as part of the specification of the elements of quantity, nature of use and place of use.

SRBA District Court Judge Barry Wood rejected this approach in 1999, declaring that facility volume is not an element of a water right.³⁰ The court’s opinion was based on statutory construction of section 42-1411(2), which lists each of the elements of a water right that the Director is to describe in his report to the SRBA Court. Because it does not list “facility volume,” the court reasoned that it is not an element of a water right that will be decreed in the SRBA. Moreover, the court rejected the Department’s contention that a description of facility volume is necessary to a complete description of the quantity, nature of use and place of use elements. The effect of this ruling was to

²⁹ H.B. 636, 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)).

³⁰ *In re SRBA Case No. 39576, Subcase Nos. 36-02708 et al, Order On Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue*, Idaho Dist. Ct., Fifth Judicial Dist. (Dec. 29, 1999) (“*Facility Volume Case*”) (Barry Wood, J.).

required to obtain a new water right when she expands the size of her home, when a farmer switches crops or seed varieties to produce more or higher valued product that consumes more water, or when a hydropower user adds additional generating capacity to an existing water flow.³³

The court did not mention other industrial or hydropower uses, but the implication of his decision is apparent there too. Thus, a description of the internal workings of an industrial facility is not part of a water right. Consequently, for instance, a microchip producer might upgrade its facilities, enabling it to produce twice the quantity of product with the same amount of water, without changing its water right.³⁴

C. Diversion requirement

The rule as traditionally stated is that a water right requires a “*diversion* to a beneficial use.”³⁵ That is, it is necessary to artificially remove (or impound) water to obtain a legally protected right to its use. However, Idaho’s Supreme Court has ruled that the state Constitution does not require a diversion where none is necessary to accomplish the beneficial use. It is as yet unclear whether instream flow rights can be established in Idaho outside of Idaho’s rather restrictive minimum stream flow statute.³⁶

³³ IDWR’s *Transfer Memo* captures this as follows: “Intensified Use of Water. An application for transfer is not required to increase production under an authorized use of water, unless the proposed change would also result in a change to one or more of the elements of the water right(s) as licensed or decreed. For example, an application for transfer is not required to increase the number or volume of raceways in a fish propagation facility, increase the number of cows at a dairy, change irrigation to a more water consumptive crop, or increase the generating capacity of hydroelectric generators, so long as none of the elements of the associated water rights are changed.” *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) at 7 (Dec. 21, 2009). Thus, for example, adding electric generating capacity is permissible so long as the right holder does not increase the amount of water diverted through the penstocks. However, an increase that requires a higher rate of flow presumably would not be allowed without obtaining a new water right.

³⁴ The court also did not address the situation where the expansion could entail an increase in annual diverted volume and potentially cause injury. This could happen, for example, where a 2 cfs diversion (a well, for example, or a pump in a stream) historically was used an average of 14 hours per day for a particular commercial enterprise, but after facility enlargement it was used at this rate for 20 hours per day.

³⁵ The diversion requirement is explored more fully in the Section on instream flows, see part 23.E beginning on page 439.

³⁶ Idaho’s instream flow law is codified at Idaho Code §§ 42-1501 to 1505. (See discussion in section 24.C at page 495.)

D. Beneficial use - generally

Under Idaho's Constitution, an appropriation of water must be for a "beneficial use."³⁷ It is often recited that beneficial use is "the basis, the measure and the limit" of any water right. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 111, 157 P.3d 600, 605 (2007) (Schroeder, C.J.). Indeed, Congress included this statement of the rule in the federal reclamation law.³⁸ The concept arises from the fact that a water right is not a right to the water itself, but rather is a right to *use* water owned by the people of the state.³⁹ In legal parlance, a water right is a "usufructuary" right. Thus, regardless of what the right holder may believe his right to be, and regardless of what the right's license, decree or other documentation proclaims, the extent of the right is limited to that amount which has actually been placed to beneficial use,⁴⁰ and the extent to which a prior right may be enforced as against a subsequent right is limited to the amount that actually is required by the senior.⁴¹ Thus, "paper" water rights in Idaho are subject to challenge, and likely cannot be changed or transferred to a new place of diversion or use, because they are not

³⁷ Idaho Const. art. XV, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied...."). The Legislature has declared: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." Idaho Code § 42-104.

³⁸ This phrase appears in various places in western water law, and is perhaps the best succinct statement of the fundamentals of the prior appropriation doctrine. Congress included it as an express directive in section 8 of the Reclamation Act of 1902, 32 Stat. 388, 390. See Wells A. Hutchins, *Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 39 (1968) (an appropriator is held to the quantity of water he is able to apply to a beneficial use at a particular time, within the limit of his appropriation); 3 *Kinney on Irrigation*, § 1579 (2d ed. 1912) (no one is entitled to have a priority adjudged for more water than he has actually appropriated, nor for more than he actually needs); 2 *Waters and Water Rights* § 17.03(b) (1991); Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 Wyo. L. J. 1 (1956) (actual beneficial use is the measure of the right, and the right is not protected from loss by wasteful over-application); Golzé, *Reclamation in the United States* 95 (1961) (an essential part of the appropriation doctrine is the requirement that water be put to beneficial use, and if beneficial use lags, the right may be lost); Meyers, Tarlock, Corbridge & Getches, *Water Resource Management* 282 (3rd ed. 1988) (the concept that beneficial use is the basis, measure and limit of an appropriative right is recognized by state constitutions, statutes and judicial decisions throughout the Western states).

³⁹ *Coulsen v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-24, 227 P.29 (1924).

⁴⁰ See e.g., *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1943); *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418 (1924) (decree is evidence of beneficial use of the right only as of the date of the decree).

⁴¹ *American Falls Reservoir District No. 2 v. IDWR ("AFRD")*, 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

being put to beneficial use.⁴² , Quite simply, to the extent of non-use they are not water rights.

Idaho's Constitution, like those of most Western states, names only a few beneficial uses for which water may be appropriated: agriculture, domestic uses, manufacturing, mining and hydropower.⁴³ However, the Idaho Supreme Court has ruled that this is not an exclusive list.

With the exception of those uses elevated to beneficial status by Article 15, § 3, of the Constitution, the concept of what is or is not a beneficial use must necessarily change with conditions. . . . The notion of beneficiality must include a requirement of reasonableness.

State of Idaho, Dep't of Parks v. IDWR, 96 Idaho 440, 447, 530 P.2d 924, 931 (1974) (Bakes, J. concurring).

While it is well established in western water law that an appropriation of water must be made for a 'beneficial use,' nevertheless in Idaho at least the generic term 'beneficial use' has never been judicially or statutorily defined.

Dep't of Parks, 96 Idaho at 443, 530 P.2d at 927.

Recent Idaho statutes have defined a few specific uses as beneficial.⁴⁴ However, the generic term has never been statutorily defined.

The case law has filled in the constitutional and statutory gaps. For example, Idaho Supreme Court decisions and water right licenses issued by the Idaho Department of Water Resources have approved fish and wildlife habitat, aesthetics, recreation and similar purposes as beneficial uses in Idaho.⁴⁵ Today, the idea that only certain types of

⁴² See e.g., *Hillman v. Hardwick*, 3 Idaho 255, 28 P. 438 (1891).

⁴³ Idaho Const. art. XV, § 3.

⁴⁴ For instance, Idaho's Ground Water Recharge Act expressly states that "the appropriation and underground storage of water . . . for purposes of ground water recharge shall constitute a beneficial use." Idaho Code §§ 42-4201(2), 42-4201A(2) (repealed in 2009); see also, Idaho Code § 42-234(2). In a similar vein, in 1996, the Legislature addressed the issue in the context of municipal water rights. Municipal Water Rights Act of 1996, Idaho Code § 42-222 ("A water right held by municipal provider to meet reasonably anticipated future needs shall be deemed to constitute a beneficial use . . ."). In a third example, the Legislature has declared certain instream uses to be beneficial. Idaho Code §§ 42-1501 to 42-1505.

⁴⁵ Judge Melanson, then of the SRBA Court, issued a ruling in a basin-wide issue confirming: "Under Idaho law, any person may establish a diversionary water right, including to

6. FORFEITURE AND ABANDONMENT

A. Overview

Because beneficial use is the basis for a water right, the failure to use a right, or a part of it, can result in its loss. Note how different this is from other forms of property. One does not forfeit ownership of a piece of land simply because he lets it sit vacant. But this is exactly what can happen to an unused water right; again, it is a right whose very existence is based on beneficial use. In other words, under the prior appropriation doctrine forfeiture is the other side of the beneficial use coin.

Water rights may be lost in several ways, the primary methods being forfeiture (an objective statutory rule) and abandonment (a common law doctrine based on subjective intent). Both rules operate throughout the West. Water rights lost through either abandonment or forfeiture revert to the state as unappropriated water and are either subject to further appropriation or serve to satisfy the rights of existing junior appropriators from the same water source. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). This does not mean that, a forfeited senior-priority water right can be picked up and diverted under that priority by another water user. Rather, by eliminating this right from the priority line, more junior rights effectively “move up the ladder” or become that much more reliable because they have fewer senior rights in front of them.

There has been a trend in Idaho, as in some other Western states, to avoid strict enforcement of the forfeiture statute, and several exceptions have been enacted in recent years. This is an interesting development given the increasing demands for water. Nevertheless, statutes and case law have increasingly provided the means by which an appropriator who has no present need for water, and no present ability to place it to beneficial use, still may retain the water right. On the other hand, any transfer of a water right, or any attempt to curtail other rights to serve it, still must answer to its actual beneficial use. See, e.g., *American Falls Reservoir District No. 2 v. IDWR* (“AFRD”), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

A detailed discussion of forfeiture in Idaho is found in Peter R. Anderson, *Why Does Idaho's Water Law Regime Provide for Forfeiture of Water Rights?*, 48 Idaho L. Rev. 419 (2012).

B. Common law abandonment

Abandonment is a common law principle long recognized by western courts. Abandonment of a water right requires (1) an intent to give up the right, and (2) an actual relinquishment or surrender of the right. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982); *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981); and *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976).

The “actual relinquishment or surrender” does not require a declaration other affirmative act. Rather it refers to the relinquishment of possession, i.e., the physical act (or non-action) of not using the water.

As Samuel Wiel put it:

To constitute abandonment, properly speaking, there must be a concurrence of act and intent, the relinquishment of possession, and the intent not to resume it for a beneficial use, so that abandonment is always voluntary, and a question of fact.

It has been said: “To constitute an abandonment of a water-right, there must be a concurrence of the intention to abandon it and the actual failure in its use.”

Samuel C. Wiel, 1 Water Rights in the Western State § 567 (1911) (cited as authority in *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976)).

The standard of proof is high. “Intent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere non-use of a water right, standing alone, is not sufficient for a per se abandonment.” *Jenkins v. State Dep’t of Water Resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). “Such intent may be evidenced by non-use for a substantial period of time, but mere non-use is not a per se abandonment.” *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976).

The “abandonment” doctrine still applies in Idaho. However, it rarely is encountered because the requisite proof of a mental state (i.e., the intent to abandon) can be difficult to make.

C. The forfeiture statute

Idaho’s water code has long contained a provision declaring that if a water right is not placed to beneficial use for a period of five years, it is “forfeited”—regardless of the owner’s intent.¹⁰⁸ Section 42-222(2) provides, in part:

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

¹⁰⁸ Predecessors to the current forfeiture provision have been on the books since 1903. 1903 Idaho Sess. Laws, at 223-24 (H.B. 146) (establishing a two year forfeiture period). In 1905, the period was extended to five years. 1905 Idaho Sess. Laws, at 27 (H.B. 19).

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 failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code.

Idaho Code § 42-222(2).¹⁰⁹ See, *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992). See also Idaho Code § 42-104 declaring that “when the appropriator or his successor in interest ceases to use it for such [beneficial] purposes, the right ceases.”

This provision is followed by another authorizing the Department to extend the five-year period for an additional five years upon a showing of “good and sufficient reason for nonapplication.” Idaho Code § 42-222(3) (This provision was added in 1933. 1933 Idaho Sess. Laws, ch. 193.) However, this appears to require an affirmative action by the user to obtain the extension prior to the expiration of the first five-year period. Moreover, the time may not be extended further than a total of ten years under this provision.

Courts have interpreted the statute as not to apply to water rights where the non-use results from circumstances beyond the right holder’s control. *Jenkins v. State Dep’t of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). The issue of what qualifies as a circumstance beyond the right holder’s control has been treated as a question of fact. Moreover, forfeiture does not apply if there is no need to divert water due to wet weather conditions. For instance, a storage right in a reservoir may be held for many years in anticipation of a drought.

Forfeiture must be proven by “clear and convincing evidence.” This is a heightened evidentiary standard applicable in special cases such as abandonment,¹¹⁰ forfeiture,¹¹¹ fraud,¹¹² and prescription¹¹³ where the outcome is one disfavored in the law.

¹⁰⁹ See also Idaho Code § 42-350 (added by 1986 Idaho Sess. Laws, ch. 313). This provision authorized IDWR to issue a show cause order and to initiate proceedings leading to the revocation of a license under which water has not been put to beneficial use for five years. As of this writing, there are no published decisions addressing this statute.

¹¹⁰ *Jenkins v. State Dep’t of Water Resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982).

¹¹¹ *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001).

¹¹² *Sowards v. Rathbun*, 134 Idaho 702, 706, 8 P.3d 1245, 1249 (2000).

¹¹³ *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000).

D. Statutory exceptions to forfeiture

In addition, numerous specific statutory defenses to forfeiture have been enacted over time. Idaho Code § 42-223 (previously codified to section 42-222(2)).¹¹⁴ The statutory exceptions to forfeiture include:

- (1) Water rights appurtenant to lands placed in a federal cropland set aside program.
- (2) Water right held by municipal provider for “planning horizon” needs.
- (3) Water rights replaced by land application of waste water.
- (4) Ground water rights not diverted in compliance with a ground water management plan aimed at bringing ground water withdrawals in balance with ground water recharge.
- (5) Water rights placed in the water supply bank.¹¹⁵
- (6) Nonuse resulting from circumstances over which the water right holder has no control.
- (7) Nonuse of water supplied by an irrigation delivery entity (where nonuse is beyond the control of the delivery entity).
- (8) Nonuse resulting from exclusion of land from an irrigation district (where nonuse is beyond control of the irrigation district).
- (9) Nonuse resulting from a water conservation practice.¹¹⁶
- (10) Nonuse resulting from the water right being used for mitigation purposes.
- (11) Nonuse of a water right for “mining, mineral processing or milling,” where the nonuse was “due in whole or in part to mineral prices,” and where the water right owner “has maintained the property and mineral rights for potential future mineral production.”
- (12) Codification of resumption of use under *Sagewillow*.

E. The “no control” issue

Idaho Code § 42-223(6) sets out the defense to forfeiture that “the water right owner has no control.”

“Typical circumstances in which this [no-control] exemption might apply include weather-related factors, family or civilian emergencies, financing problems, legal difficulties, or the destruction of diversion facilities.” Peter R. Anderson, *Why Does Idaho’s Water Law Regime Provide for Forfeiture of Water Rights?*, 48 Idaho L. Rev. 419, 435 (2012).

There is little Idaho case law on the subject. One issue addressed by the courts is that the defense applies when water under the right is not physically available:

¹¹⁴ See, *Jenkins v. State, Dep’t of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

¹¹⁵ The water supply bank protection from forfeiture is repeated in Idaho Code § 42-1764(2).

¹¹⁶ See discussion in section 18.C beginning on page 326.

The availability of water qualifies as a circumstance over which an appropriator has no control. That is, “for a water right to be forfeited water must be available to satisfy the water right during the alleged period of non-use.” In *Re SRBA Case No. 39576, Subcase No. 65-05663B, Order of Partial Decree*, Idaho Dist. Ct. for the 5th Judicial District (May 9, 2002), p. 32–33 (Burdick, J.) (“*Wood v. Troutt*”). Similarly, this Court recently held that a senior water right holder was “entitled to the full measure of its rights, subject to availability of water.” *Idaho Ground Water Ass'n v. IDWR*, 160 Idaho 119, 132, 369 P.3d 897, 910 (2016).”).

Barnes v. Jackson, 163 Idaho 194, 198, 408 P.3d 1266, 1270 (2018) (J. Jones, J.).

F. Resumption of use

The courts also have carved out another special exception to forfeiture and abandonment, known as the resumption doctrine.¹¹⁷ Under this doctrine, forfeiture may be avoided despite a period of nonuse, if the right is resumed before any third party obtains rights that would be impaired by the resumption. Until 2003, the scope of this doctrine and, in particular, the nature of third party rights that would defeat the resumption, was unclear.

In *Sagewillow, Inc. v. IDWR* (“*Sagewillow I*”), 138 Idaho 831, 70 P.3d 669 (2003) (Eismann, J.), the Supreme Court clarified the circumstances in which resumption will be allowed.¹¹⁸ In that case, a landowner applied to the Department to change the place of use of numerous ground and surface water rights that originally had been authorized for irrigation of up to 2,390 acres in the Little Lost River Basin. The application was protested, and at the hearing it was established that two of the ground

¹¹⁷ *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937); *Carrington v. Crandall*, 65 Idaho 525, 532-32, 147 P.2d 1009, 1011 (1944); *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (Givens, C.J.).

¹¹⁸ A prior case, *Sagewillow, Inc. v. IDWR* (“*Sagewillow I*”), 135 Idaho 24, 13 P.3d 855 (2000), involved the same parties and facts. On appeal, however, the Supreme Court vacated and remanded the decision of the District Court, Seventh Judicial District, which had affirmed the Department’s findings of forfeiture, on the ground that the Snake River Basin Adjudication Court had exclusive jurisdiction. In response, the 2001 Legislature enacted Idaho Code § 42-1401D to provide that judicial review of Department actions subject to review under the Idaho Administrative Procedure Act (including *Sagewillow I*) were not to be heard in the SRBA district court, but rather in the district courts authorized by Idaho Code § 67-5272. The case was immediately transferred from the SRBA back to the Seventh Judicial District Court, which reissued its original order affirming the Department without further proceedings. The matter was back before the Supreme Court on a *Sagewillow*’s Notice of Appeal by April of 2001.

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

The Supreme Court held that common law resumption remains a valid defense to forfeiture that can be defeated by a showing that a third party has made a “claim of right” to the water prior to the senior’s resumption of use.¹¹⁹ A third party has made a claim of right to the water if he has: 1) instituted proceedings to declare a forfeiture; 2) obtained a valid water right authorizing the use of such water with a priority date prior to the resumption; or 3) used the water pursuant to an existing right. *Sagewillow II*, 138 Idaho at 842, 70 P.3d at 680. The court also held that the resumption need not be made by the original appropriator, but must be upon the lands to which the water right originally was appurtenant. *Id.* Resuming the use of only a portion of the forfeited or abandoned right will not prevent a loss of the non-resumed portion. *Id.*

The Court remanded the case to the Department for further proceedings, in part because:

[T]he Department did not make any finding that after the statutory period of nonuse and before resumption of use by Sagewillow and/or its predecessors, any junior appropriator used water that was available because of continued nonuse by Sagewillow and/or its predecessors. The Department

¹¹⁹ The court did not address the argument made by the protestants, James Mays and Mays Land & Livestock, that the common law resumption doctrine was abrogated by enactment of Idaho Code § 42-222(4). That statute requires an application to be filed with the Department prior to the running of the forfeiture period requesting an extension of time to resume the use. The statute also establishes a procedure by which the Department determines whether other water rights will be “impaired by granting an extension of time within which to resume the use of the water,” and whether good cause exists for the nonuse. Justice Kidwell, in a separate opinion concurring only in the result (joined by Justice Schroeder), found this argument persuasive. *Sagewillow II*, 138 Idaho at 846, 70 P.3d at 684.

likewise did not make any finding that during such period any third party applied for and obtained a water right in the same or an interconnected watercourse. For example, the Department did not find that the two watercourses involved in this case were overappropriated and that because of continued nonuse by Sagewillow and/or its predecessor, junior water users received water that they would otherwise not have received.

Sagewillow II, 138 Idaho at 838, 70 P.3d at 676.¹²⁰

Thus, although a water right may have gone unused for a significant period (in *Sagewillow II* nonuse continued for over twenty years), it may be resumed with the original priority date and to the original extent if it can be shown that junior water users did not obtain a determination of forfeiture or directly benefit from the forfeiture.

This is a big “if.” As a practical matter, it is unlikely that a valid resumption of use can occur on many water systems in Idaho. This is because these systems already are fully (or over) appropriated.¹²¹ By implication, there are juniors on the system who are benefiting from the senior’s non-use and would be harmed by the resumption. Interestingly, although resumption essentially serves as an affirmative defense in the face of facts demonstrating forfeiture or abandonment, the court did not place the burden of proof on the party asserting the resumption defense. Rather, the court held:

[A]lthough the owner of the water right has the burden of raising defenses to statutory forfeiture, the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense.¹²²

Sagewillow II, 138 Idaho at 842, 70 P.3d at 680.

¹²⁰ Compare *Sagewillow II*’s focus on whether the junior had made use of the water, with the Court’s statement in *Jenkins* that a resumption that changes a junior’s relative status on the ladder of priority clearly causes injury to the junior. (“Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to the right holder.”)

¹²¹ *Sagewillow II*, 138 Idaho at 846, 70 P.3d at 684 (Justices Kidwell and Schroeder concurring in result).

¹²² *Id.*, 138 Idaho at 842, 70 P.3d at 680.