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Snake River Basin Adjudication Issue 10: Partial Forfeiture for Non-Use of a Water Right in Idaho

by

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SNAKE RIVER BASIN ADJUDICATION ISSUE 10: PARTIAL FORFEITURE FOR NON-USE OF A WATER RIGHT IN IDAHO

NOTE

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I. INTRODUCTION

Historically, Idahoans have paid high premiums for water use, both economically and emotionally. Intense emotions that surround water issues in Idaho have destroyed families, obliterated lifelong friendships, and even led to the shedding of blood.[1] Without question, water rights are a serious matter in many western states and will continue to be a subject of controversy in the future as the need for water increases.

1. Interview with Dorald Jacobson, Idaho farmer and water user, in Irwin, Idaho (Mar. 18, 1996).

One hot topic regarding Idaho water rights is whether Idaho Code § 42-222(2) contemplates partial forfeiture[2] of a water right for non-use. The Idaho Supreme Court answered the foregoing question in the affirmative when it declared that Idaho Code § 42-222(2) subjects appropriated water rights in Idaho to partial forfeiture when the user fails to beneficially apply those rights.[3]

The Idaho Supreme Court's finding that partial forfeiture is contemplated by Idaho Code § 42-222(2) is supported by the historic development of water right allocation in Idaho. The legal framework for the distribution of water rights in this country consisted of very flexible riparian laws which originated in the water-saturated Eastern Seaboard.[4] However, expansion of the human populace to portions of the arid West required a significant and novel deviation from the water right framework that developed in the East.[5] The doctrines of "first in time, first in right" and "prior appropriation" were developed specifically for the allocation of water in the West.[6] Idaho deemed the allocation of water rights important enough to incorporate allocation doctrines into its state constitution.[7] In Idaho, demand for water has

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2. Partial forfeiture means that a portion of an allocated water right can be lost when the user fails to beneficially apply that portion of the appropriated water right. *See* State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 744, 947 P.2d 400, 408 (1997). Opponents of partial forfeiture argue that the wording of Idaho Code § 42-222(2) only provides for a complete forfeiture, and only if the water right holder fails to beneficially apply all of the appropriated water right. *See id.*

3. *See id.* at 744, 947 P.2d at 408.

4. *See* Norman K. Johnson & Charles T. DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 NAT. RESOURCES J. 347, 348 (1989).

5. *See id.*

6. *See id.* at 350.

7. IDAHO CONST. art. XV, § 3. The section provides:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.
>
> *Id.*

increased substantially since the common law development of water right allocation principles in the West. Recognition of partial forfeiture is consistent with Idaho's "beneficial use" requirements and supports the uniform, statewide adjudication of water rights in the Snake River Basin Adjudication (SRBA).[8]

This Note begins by briefly exploring the historic development of water right allocation in the United States in general and in the western United States in particular, with the ultimate focus on water right allocation in Idaho. Additionally, this Note will analyze the holding and reasoning of *State v. Hagerman Water Right Owners, Inc.*[9] (*Hagerman*) and propose that the adoption of partial forfeiture enhances the maximum and beneficial use of water in Idaho. To support this conclusion, this Note will explore the Idaho case law concerning the recognition of a partial forfeiture doctrine. Furthermore, this Note will discuss the statutory construction of Idaho Code § 42-222(2), with specific focus on which interpretation best promotes public policy goals for the State of Idaho. Finally, this Note concludes that Idaho Code § 42-222(2) provides for partial forfeiture and promotes both the public policy goals of Idaho and the general water policy of the West.

II. GENERAL DEVELOPMENT OF WATER RIGHTS

A. Water Rights

Early American colonizers settling the Eastern Seaboard found that the climate and environment of the New World were similar to their ancestral home in England.[10] Plentiful precipitation and topography similar to England's made it easy for colonists to apply the traditional framework of English water law and customs.[11]

The legal framework of England allowed Eastern states to develop riparian laws that would subsequently prove to be unworkable for arid western states.[12] Flexible Eastern riparian law provided for reasonable use or "use which created no unreasonable interference with the rights of other riparians."[13] Western states adopted the riparian laws of the Eastern states and then modified them to promote

8. *See generally id.*; *In re* Snake River Basin Water Sys., 115 Idaho 1, 3-4, 764 P.2d 78, 80-81 (1988) (describing commencement of Snake River Basin Adjudication and explaining its purpose and coverage).

9. 130 Idaho 736, 947 P.2d 400 (1997).

10. *See* Johnson & DuMars, *supra* note 4, at 347.

11. *See id.*

12. *See id.* at 348.

13. *Id.*

social growth and development.[14] The variety of changes implemented by each state reflected the differing cultural values and economic needs of water users.[15] Unlike the development of water law along the Eastern seaboard, Western states developed a legal framework aimed at resolving conflicting water use claims.

1. Western Water Law Development

Unlike the water-rich Eastern states, water in the West is scarce and demand is consequently very high. Early Western water law originally developed to resolve conflicting water use claims made by miners during the California Gold Rush.[16] The early California courts introduced a doctrine of "first in time, first in right" to resolve those conflicts.[17] As settlers began to establish homesteads in the arid West, additional conflicts arose concerning water use.[18] To resolve those conflicts, Western courts essentially extended the mining doctrine of "first in time, first in right" to all water conflicts.

The doctrine of "first in time, first in right" provides that the first individual claiming and using a water right has priority over subsequent users.[19] The first settler claiming a piece of land could claim enough water to meet irrigation needs.[20] The next settler in the area had first choice of any remaining land and could use whatever water the first settler did not use.[21] Each person thereafter took in relation to a prior taker.[22] This type of allocation is known as "prior appropriation."[23] Most Western states have adopted the doctrine of prior appro-

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14. *See id.* at 348-49.

15. *See id.*

16. *See* Gregory Harwood, Comment, *Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation*, 29 IDAHO L. REV. 153, 155 (1992).

17. *Id.*

18. *See id.* at 155-56.

19. *See* THE SNAKE RIVER BASIN ADJUDICATION: THE 1ST TEN YEARS 1 (Randy Stapilus ed., 1996).

20. *See* Harwood, *supra* note 16, at 155-56.

21. *See id.* at 156.

22. *See id.*

23. *See id.* It is important to clarify the difference between the classic riparian doctrine and prior appropriation. Under classic riparian doctrine, rights to surface water adhere to the land; they are not lost if the water is not used; and these rights can be used on the riparian land to the extent that the use does not unreasonably interfere with other riparian uses. *See* GEORGE A. GOULD & DOUGLAS L. GRANT, CASES AND MATERIALS ON WATER LAW 6-7 (5th ed. 1995). In contrast, under the prior appropriation doctrine, the beneficial use of the water, not land ownership, is the basis of the right. *See id.* Although most state laws require that the water be diverted from the watercourse to constitute a use, there are generally no limitations on where the water may be used. *See id.* Unlike riparian rights, appropriative rights can be lost by non-use. *See id.* Moreover, each appro-

priation by incorporating it into their state constitutions through statute or by judicial decision.[24]

2. Water Rights in Idaho

In Idaho, once water is appropriated, the water becomes a right that is defined, identified, and restricted by beneficial use.[25] A water right is usufructuary in nature but considered to be real property.[26] The appropriative water right can be severed, sold, or transferred separately from land on which it has been used.[27] Protecting a water right is necessary to "promote investment of capital and protect the stability of long-term financial arrangements related to economic development which depend[] on water use."[28] Idaho has long recognized the doctrine of prior appropriation and has protected the doctrine by incorporating it into the state constitution.[29]

In addition to appropriation from the streambed, Idaho law requires that the water be put to beneficial use.[30] Historically, farmers, miners, power companies, and cities met the beneficial use requirement by simply using the water.[31] These uses were considered intrinsically beneficial because they were associated with the production of wealth.[32] However, the modern conservation debate over beneficial use has challenged historical measurement of beneficial use by wealth production and attempted to expand beneficial use to protect public interests such as fish, wildlife, water quality and recreation.[33]

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priative right receives a priority date based on the first beneficial use of the water, and appropriators receive their entire allotted water right in order of their seniority. *See id.*

24. *See* Harwood, *supra* note 16, at 156.

25. *See* Crow v. Carlson, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984) (affirming priority of a prior appropriator over subsequent appropriators under the doctrine of prior appropriation and finding a water right to be a real property right); *see also* Harwood, *supra* note 16, at 156-57.

26. *See* Johnson & DuMars, *supra* note 4, at 351.

27. *See* Harwood, *supra* note 16, at 157; *see also* BLACK'S LAW DICTIONARY 1592 (6th ed. 1990) (defining water rights).

28. Johnson & DuMars, *supra* note 4, at 351.

29. *See* IDAHO CONST. art. XV, § 3; *see also supra* note 7 and accompanying text.

30. *See* IDAHO CODE § 42-222(2) (Supp. 1998). Historically, diversion of water for irrigation use, sluicing for gold, and mining by Mormons, Indians, and the Spaniards was considered to be a beneficial use. *See* Johnson & DuMars, *supra* note 4, at 350. The extent of the water right was limited by these beneficial uses. *See id.*

31. *See* Harwood, *supra* note 16, at 156.

32. *See id.*

33. *See* THE SNAKE RIVER BASIN ADJUDICATION: THE 1ST TEN YEARS, *supra* note 19, at 31. Attempts by conservationists to apply the "public trust doctrine" have been unsuccessful. *See id.* at 8, 31. The Idaho Supreme Court has declared that the "public trust doctrine" does not apply to the SRBA. *See id.* at 8.

One major obstacle in meeting modern demands on Idaho water are fully appropriated water sources.[34] A system that allows water users to retain water rights that are not being used is wasteful and robs Idaho's water allocation system of the ability to meet current water needs.[35] Modern water needs include higher demands for domestic water uses and changing conservation beliefs.[36] Recognition of partial forfeiture by the Idaho Supreme Court provides the Idaho Department of Water Resources (IDWR) with the flexibility to achieve the proper allocation of water and water rights in Idaho.[37]

B. Snake River Basin Adjudication Background

The SRBA is a judicial process established for the purpose of determining all of the water rights pertaining to the Snake River Basin.[38] The entire State of Idaho, with the exception of the Northern Panhandle, is within the Snake River Basin.[39] The SRBA originated as an effort to resolve disputes regarding water use in the Snake River Basin between the competing interests of electrical power generation and agricultural irrigation.[40] In an effort to resolve thousands of water right claims, an agreement to support water right adjudication legislation was reached between the Governor of Idaho, the Attorney General of Idaho, and Idaho Power.[41] These efforts resulted in legislation that allowed the director of the IDWR to file a petition in district court[42] for a general adjudication and administration of all rights arising under state or federal law for the use of surface and ground waters from the Snake River Basin.[43]

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34. *See* Janis E. Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest*, 27 ENVTL. L. 127, 129-30 (1997).

35. *See Hagerman*, 130 Idaho at 744, 947 P.2d at 408.

36. *See* Carpenter, *supra* note 34, at 129-30.

37. *See Hagerman*, 130 Idaho at 743-44, 947 P.2d at 407-08.

38. *See In re* Snake River Basin Water Sys., 115 Idaho 1, 2-4, 764 P.2d 78, 79-81 (1988). The Snake River Basin encompasses all of the tributaries and aquifers that flow into the Snake River. *See id.*

39. *See id.*

40. *See id.*

41. Idaho Power named as defendants the State of Idaho and 7,500 individuals claiming water rights in the Snake River Basin. *See In re Snake River Basin Water Sys.*, 115 Idaho at 3, 764 P.2d at 80.

42. The Idaho Supreme Court assigned the SRBA to the Fifth Judicial District at Twin Falls and to District Judge Daniel Hurlbutt. *See* THE SNAKE RIVER BASIN ADJUDICATION: THE 1ST TEN YEARS, *supra* note 19, at 7. The Idaho Supreme Court found that the SRBA district court has exclusive jurisdiction over all water claims within the Snake River Basin. *See* Walker v. Big Lost River Irrigation Dist., 124 Idaho 78, 79, 856 P.2d 868, 869 (1993).

43. *See In re Snake River Basin Water Sys.*, 115 Idaho at 3-4, 764 P.2d at 80-81.

C. General Forfeiture Policy in Idaho

Idaho Code § 42-222(2) specifically recognizes forfeiture under certain circumstances, stating in part:

> (2) 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 . . . .[44]

In *Gilbert v. Smith*,[45] the Idaho Supreme Court interpreted this forfeiture provision to mean that "an appropriator who fails to apply his water right to a beneficial use for a continuous five year period is regarded as having lost all rights to the use of such water."[46] Prior to *Gilbert*, Idaho case law did not plainly state the differences between abandonment and statutory forfeiture.[47] The *Gilbert* court clarified that an abandonment includes both actual intent to abandon and an actual relinquishment of the right.[48] By contrast, forfeiture is a statutory declaration that all rights to use water *may be lost* where an appropriator fails to make beneficial use of the water for a statutory period, regardless of intent.[49]

III. STATEMENT OF THE CASE

A. Facts of *Hagerman*

The *Hagerman* case originated from the general adjudication of water rights in the SRBA.[50] Specialized rules of procedure were developed during the course of conducting the SRBA litigation to allow a party to file a motion designating basin-wide issues which the party

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44. IDAHO CODE § 42-222(2) (Supp. 1998).

45. 97 Idaho 735, 552 P.2d 1220 (1976).

46. *Id.* at 738, 552 P.2d at 1223. The Idaho Supreme Court also indicates that there are recognized exceptions where a showing of good and sufficient reason for non-use will extend the five year statutory period. *See id.* at 738 n.2, 552 P.2d at 1223 n.2.

47. *See id.* at 738, 552 P.2d at 1223.

48. *See id.*

49. *See id.* Statutory forfeiture of water rights is not favored in Idaho: "all intendments are indulged in against a forfeiture." *Id.* at 740, 552 P.2d at 1225. The court will apply forfeiture in situations where there is clear and convincing evidence of non-use and where there is evidence that the use was not beneficial. *See* Jenkins v. State, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).

50. *See Hagerman*, 130 Idaho at 737, 947 P.2d at 401.

believed would materially affect others in the adjudication.[51] Hagerman Water Rights Owners, Inc. (HWRO)[52] filed a motion to designate a basin wide issue, stating the issue as follows: "Under Idaho law, if a water right has been appropriated and continuously used, but the recent usage is for less than the full diversion amount, can the unused portion of the right be forfeited?"[53] The State of Idaho argued that the issue should be rephrased in the context of the SRBA and suggested that the question should read as follows: "In a general adjudication, what authority does the court have to determine or adjudicate the elements of a previously decreed or licensed water right based on its actual application to a beneficial use?"[54] On January 20, 1996, the district court designated Basin Wide Issue Number 10 as follows: "Are water rights in Idaho subject to partial forfeiture for non-use?"[55]

B. The District Court's Opinion

The district court issued a decision on April 26, 1996, holding as a matter of law that water rights in Idaho are not subject to partial forfeiture for non-use.[56] The court concluded that the issue of partial forfeiture was one of first impression that turned on the proper interpretation of the specific wording in Idaho Code § 42-222(2).[57] The court focused on the plain and ordinary meaning of the statute which it found precluded any contemplation of partial forfeiture.[58]

The State of Idaho, the Chemical Lime Company of Arizona, Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, and the United States filed for permission to take an interlocutory appeal which was granted by the district court.[59] The Supreme Court of Idaho granted the interlocutory appeal on August 5, 1996.[60]

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51. *See id.* at 738, 947 P.2d at 402.

52. Hagerman Water Right Owners, a group of water right holders in the Thousand Springs/Hagerman area, were represented by the Hepworth law firm of Twin Falls, and have been "a spearhead for more action in the SRBA in the last four years — including a string of basin wide issue proposals and a major dispute over the 'private attorney general doctrine' — than any other party in the case." *See* THE SNAKE RIVER BASIN ADJUDICATION: THE 1ST TEN YEARS, *supra* note 19, at 166-67.

53. Appellant State of Idaho's Opening Brief at 1, *Hagerman* (No. 23214).

54. *Id.*

55. *Hagerman*, 130 Idaho at 738, 947 P.2d at 402.

56. *See id.*

57. *See id.*; *see also* IDAHO CODE § 42-222(2) (Supp. 1998).

58. *See Hagerman*, 130 Idaho at 738, 947 P.2d at 402.

59. *See id.*

60. *See id.*

C. The Idaho Supreme Court Decision

The Idaho Supreme Court reversed the decision of the district court, determining that Idaho Code § 42-222(2) does allow for partial forfeiture of water rights.[61] The court found that Idaho case law had never directly addressed the issue of partial forfeiture.[62] The court also found Idaho Code § 42-222(2) to be ambiguous.[63] Consequently, statutory construction was deemed necessary.[64]

The Idaho Supreme Court looked at current administrative application to aid its statutory construction.[65] The IDWR recognized partial forfeiture in administering Idaho Code § 42-222(2).[66] Because the IDWR had interpreted statutory forfeiture to include partial forfeiture, the court assumed that a significant portion of the public had detrimentally relied on this interpretation.[67] The court buttressed its recognition of partial forfeiture upon a finding that partial forfeiture promotes important policy goals for Idaho.[68] Such goals require that Idaho's water resources be put to the most beneficial and economic use possible.[69]

IV. DISCUSSION

A. Partial Forfeiture Recognized in Other Western States

Most Western states that adhere to a prior appropriation doctrine provide a mechanism that allows for partial forfeiture of a water right for a statutory time period of non-use. In the West, water is a rare commodity and, consequently, demand for water is continually increasing.[70] Increasing demand requires more active management by Western state water administrators who seek to develop a water allo-

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61. *See id.* at 744, 947 P.2d at 408.
62. *See id.* at 741, 947 P.2d at 405.
63. *See id.* at 742, 947 P.2d at 406.
64. *See id.*
65. *See id.* at 742-43, 947 P.2d at 406-07.
66. *See id.* at 743, 947 P.2d at 407.
67. *See id.*
68. *See id.* at 744, 947 P.2d at 408. Both agriculture and industry depend on water. *See id.* Whereas Idaho receives very little annual precipitation, Idahoans must secure the maximum use and benefit of this limited resource. *See id.* This is the very focus of Idaho's water law policy. *See id.*
69. *See id.*
70. *See* Kunz v. Utah Power & Light Co., 117 Idaho 901, 904, 792 P.2d 926, 929 (1990); *see also* Carpenter, *supra* note 34, at 128-29. "The West is a land where 'life is written in water.'" Mark Honhart, *Carrots for Conservation: Oregon's Water Conservation Statute Offers Incentives to Invest in Efficiency*, 66 U. COLO. L. REV. 827, 827 & n.2 (1995) (inscribed on the atrium wall of the Colorado State Capitol Building in Denver, Colorado).

cation system that maximizes both beneficial and economical uses of water.[71] The concept of partial forfeiture is a tool that allows optimal water allocation in arid Western states that recognize the prior appropriation doctrine.[72] Arizona,[73] California,[74] Colorado,[75] Montana,[76]

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71. *See* Carpenter, *supra* note 34, at 128-29.

72. *See Hagerman*, 130 Idaho at 744, 947 P.2d at 408.

73. Arizona has adopted the concept of partial forfeiture by statute. ARIZ. REV. STAT. ANN. § 45-188(A) (West Supp. 1997). Arizona Code § 45-188(A), reads in pertinent part:

> Any person who is entitled to divert or withdraw public waters of the state through an appropriation initiated on or after June 12, 1919 and evidenced by a certificate of water right issued under article 5 of this chapter, a court decree, or previous possession or continued beneficial use and who intentionally abandons the use thereof or who voluntarily fails, without sufficient cause, to beneficially use all or any part of the right to withdraw for any period of five successive years shall relinquish such right or portion thereof.

Id. The Arizona Supreme Court confirmed that a partial forfeiture occurs when an appropriator fails to beneficially use allocated water for the statutory time period. *See* Arizona Pub. Serv. Co. v. Long, 773 P.2d 988, 997 (Ariz. 1989). The rights relinquished revert to the state and become available for appropriation. *See id.* The court stated that "[t]hese statutes apply when an appropriator fails to withdraw some or all of the water to which he is entitled." *Id.*

74. California recognizes the concept of partial forfeiture by clear and specific statutory language. *See* CAL. WATER CODE § 1241 (West Supp. 1998). On the issue of partial forfeiture, California Water Code § 1241 states:

> When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, such unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water.

Id. The concept of partial forfeiture of a water right has long been recognized as an important part of water allocation in the State of California:

> Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose.

Smith v. Hawkins, 42 P. 453, 454 (Cal. 1895).

75. Colorado does not have an actual forfeiture statute. However, Colorado's abandonment statute has essentially the same effect as a partial forfeiture statute. *See* COLO. REV. STAT. ANN. § 37-92-402(11) (West 1990). The abandonment statute reads in relevant part:

> For the purpose of procedures under this section, failure for a period of ten years or more to apply to a beneficial use the water available under a water right when needed by the person entitled to use same shall create a rebuttable presumption of abandonment of a water right with respect to the amount of such available water which has not been so used; except that such presumption may be waived by the division engineer or the state engineer if special circumstances negate an intent to abandon.

Nevada,[77] New Mexico,[78] Oregon,[79] Texas,[80] Utah,[81] Washington[82] and Wyoming[83] all use partial forfeiture mechanisms. The determination

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Id. The abandonment statute indicates that the legislature is willing to create a rebuttable presumption of intent to abandon a water right to the extent that the right is not beneficially used for ten years. *See id.*

In 1996, the Colorado Supreme Court confirmed this interpretation by finding that Denver had "failed to apply the water rights to a beneficial use for a period exceeding ten years. This continued non-use of the irrigation water rights for an unreasonable period of time created a presumption that Denver intended to abandon the water rights." City & County of Denver v. Middle Park Water Conservancy Dist., 925 P.2d 283, 287 (Colo. 1996). This type of "constructive intent" works a partial statutory forfeiture even though the word forfeiture is not used. The court found that Denver had abandoned (partially forfeited) irrigation water rights. *See id.*

76. Montana does not have a forfeiture statute. However, the Montana Supreme Court has created a "constructive intent" to abandon which effectuates a forfeiture to the extent a water right is not beneficially used:

> "It has been a mistaken idea in the minds of many, not familiar with the controlling principles applicable to the use of water in arid sections, that he who has diverted, or 'claimed' and filed a claim of, water for any number of given inches, has thereby acquired a valid right, good as against all subsequent persons. But, as the settlement of the country has advanced, the great value of the use of water has become more and more apparent. Legislation and judicial exposition have, accordingly, proceeded with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes. As a result, the law, crystallized in statutory form, is that an appropriation of a right to the use of running water flowing in the creeks must be for some useful or beneficial purpose, and when the appropriator, or his successor in interest, abandons and ceases to use the water for such purpose, the right ceases."

79 Ranch, Inc. v. Pitsch, 666 P.2d 215, 217-18 (Mont. 1983) (quoting Power v. Switzer, 55 P. 32, 35 (Mont. 1898)).

The court further recognized that mere non-use raises a rebuttable presumption of abandonment. *See id.* The court confirmed this interpretation of constructive intent in *In re* Musselshell River Drainage Area, 840 P.2d 577 (Mont. 1992), finding that long periods of non-use of a water right is "strong evidence" of an intent to abandon. *Id.* at 579. This broad interpretation of an abandonment provision allows partial forfeiture through legislation that creates a constructive intent by the appropriator to abandon the water right to the extent that the right is not put to beneficial use. *See id.*

77. Water rights can be partially forfeited for non-use in the State of Nevada. *See In re* Manse Spring and Its Tributaries, 108 P.2d 311, 315 (Nev. 1940). Nevada Revised Statutes § 533.060 provides in pertinent part:

> Except as otherwise provided in subsection 4, if the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtenant thereto theretofore acquired, and all the water so formerly appropriated by such owner or owners and their predecessors in interest may be again appropriated for beneficial use the same as if such ditch, canal, reservoir, or other

> means of diversion had never been constructed, and any qualified person may appropriate any such water for beneficial use.

NEV. REV. STAT. ANN. § 533.060(2) (Michie 1995). The Nevada Supreme Court recognized that a water right could be partially forfeited due to non-use. *See In re Manse Spring and Its Tributaries*, 108 P.2d at 315. The right to water can be lost in whole or part by non-use. *See id.*; *see also* Town of Eureka v. Office of State Eng'r, 826 P.2d 948, 950 (Nev. 1992). The focus of the court was on whether a forfeiture statute could be applied retroactively to ground water. *See Town of Eureka*, 826 P.2d at 949-50.

78. New Mexico has insured that portions of unused water rights revert back to the public. *See* N.M. STAT. ANN. § 72-5-28(A) (Michie 1997). The New Mexico statute dealing with the concept of partial forfeiture reads in relevant part:

> When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested for the purpose for which it was appropriated or adjudicated, except the waters for storage reservoirs, for a period of four years, such unused water shall, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the state engineer, revert to the public and shall be regarded as unappropriated public water . . . .

Id. Accordingly, subject to certain statutory limitations, an appropriator of a water right can lose the right to the extent there is a failure for four years, after a one year notice, to beneficially use the water right. *See id.*

79. Oregon has recognized the concept of partial forfeiture of a water right for non-use by statute. *See* OR. REV. STAT. § 540.610(1) (Butterworth 1988). The Oregon statute regarding partial forfeiture reads as follows:

> Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use the water appropriated for a period of five successive years, the right to use shall cease, and the failure to use shall be conclusively presumed to be an abandonment of water right. Thereafter the water which was the subject of use under such water right shall revert to the public and become again the subject of appropriation in the manner provided by law . . . .

Id. Thus, in Oregon, a conclusive presumption of abandonment works a forfeiture of water if the appropriator fails to use all or part of a water right for a period of five successive years. *See id.* The Oregon Court of Appeals confirmed this interpretation:

> [T]he statute limits the certificate holder's right by authorizing use of appropriated water only for the specific purpose set out in the application which the Water Resources director has determined to be beneficial. Beneficial use is not defined by the statute. Instead, certain important uses, including irrigation, are enumerated and declared to be beneficial. Moreover, unreasonable waste of all or part of the water constitutes "non-beneficial use."

Hennings v. Water Resources Dep't, 622 P.2d 333, 335 (Or. Ct. App. 1981) (citations omitted). The court goes on to conclude that the water right of the appropriator was forfeited because the water was not applied to a beneficial use. *See id.*

80. Texas adheres to the fundamental philosophical belief of prior appropriation: "use it or lose it." Kevin Smith, Comment, *Texas Municipalities' Thirst For Water: Acquisition Methods for Water Planning*, 45 BAYLOR L. REV. 685, 695 (1993). For the forfeiture of an appropriation, Texas Water Code § 11.030 provides, "If any lawful appropriation or use of state water is willfully abandoned during any three successive years, the right to use the water is forfeited and the water is again subject to appropriation." TEX. WATER

CODE ANN. § 11.030 (West 1988). A rebuttable presumption of intent to willfully abandon arises if there is an unexplained, extended time of failure to use the water. *See* Smith, *supra* at 697. The Texas forfeiture provision works just like the abandonment provisions of Montana and Colorado where a "constructive intent" to abandon is presumed from an extended period of water right non-use. *See supra* notes 75-76.

81. Utah's forfeiture statute reads much like Idaho Code § 42-222(2). Utah Code § 73-1-4 reads in pertinent part: "When an appropriator or the appropriator's successor in interest abandons or ceases to use water for a period of five years, the water right ceases and the water reverts to the public . . . ." UTAH CODE ANN. § 73-1-4(1)(a) (Supp. 1997).

The Utah Supreme Court has interpreted this statutory language to allow for the partial forfeiture of a water right for non-use. *See* Platt v. Town of Torrey, 949 P.2d 325, 331-32 (Utah 1997). In fact, the court states that beneficial use is one of the "most fundamental principle[s] of water law in this arid state." *Id.* at 331. A water right is limited by the amount that can be put to beneficial use: "[T]he nonuse of water for five years by an appropriator works a loss of the right *to the unused water*, and it reverts to the public for appropriation and use by someone else." *Id.* at 331-32 (emphasis added); *see also* UTAH CODE ANN. § 73-1-4(1)(a).

82. Washington has enacted legislation that allows for the relinquishment of water rights for failure to beneficially use the water without sufficient cause. *See* WASH. REV. CODE ANN. § 90.14.160 (West 1992). Washington Code § 90.14.160 states in pertinent part:

> Any person entitled to divert or withdraw waters of the state . . . who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to divert or withdraw for any period of five successive years after the effective date of this act, shall relinquish such right or portion thereof, and said right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation . . . .

Id.

The Washington Supreme Court has interpreted this legislative language to work a partial forfeiture of a water right. *See* State Dep't of Ecology v. Grimes, 852 P.2d 1044, 1055 (Wash. 1993). *Grimes* involved an appeal by the Grimeses from an adjudicated water decree which adversely diminished their water right. *See id.* at 1046. One of the five issues on appeal involved the assertion that the diminishment of the prior water appropriation was a taking of their property right for which they deserved either compensation or the full water right. *See id.* at 1054.

The Washington Supreme Court confirmed that in a state where the law of prior appropriation is followed, "[a]n appropriated water right is established and maintained by the purposeful application of a given quantity of water to a beneficial use upon the land." *Id.* at 1049. In response to the issue of a taking, the court reasoned as follows:

> Pursuant to RCW 90.14.160, Appellants Grimes were entitled to "divert or withdraw" the subject water. However, the referee's finding, which we will not disturb, that their voluntary failure, "without sufficient cause," to beneficially use all of the waters diverted requires that those waters "revert to the state . . . and . . . become available for appropriation." The Grimeses' claim that their water right has been partially "taken" without just compensation necessarily fails.

Id. at 1055.

Washington's statute and case law recognize the partial forfeiture of a water right when the appropriator fails to beneficially use that water right without sufficient cause. *See id.*; *see also* WASH. REV. CODE ANN. § 90.14.160.

that Idaho Code § 42-222(2) contemplates the partial forfeiture of a water right as the result of non-use is consistent with Idaho case law, administrative construction, and general Western state policy of partial forfeiture.[84]

B. Idaho Case Law

In *Hagerman*, the Idaho Supreme Court did not find any case precedent that directly determined whether Idaho Code § 42-222(2) contemplated partial forfeiture of a water right for non-use.[85] However, the dicta in a number of the cases assumed that a partial forfeiture could occur.[86] The following review of the early Idaho case precedent will show that the requirements of an abandonment and a statutory forfeiture were often intermingled in the same case. This intermingling of the two theories confused the parties and the lower courts as to the actual differences between an abandonment and a forfeiture. This confusion clouded the issue of partial forfeiture in Idaho. Recent decisions by the Idaho Supreme Court, however, clarify the differences between statutory forfeiture and abandonment, which has indirectly clarified the issue of partial forfeiture.

The earliest case indicating the Idaho Supreme Court's recognition of partial forfeiture is *Albrethsen v. Wood River Land Co.*[87] Albrethsen brought an action to acquire a portion of the decreed water of Wood River Land Company (WRLC), asserting a theory of abandonment and loss for failure to put allocated water to beneficial use for five years.[88] The claim focused on the carrying capacity of the ditch used by WRLC to divert the decreed water.[89] Engineers for both sides testified as to differing estimations of carrying capacities.[90] The highest estimate fixed the maximum capacity of the ditch at 3,863

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83. Wyoming recognizes that a water right appropriator can intentionally or unintentionally lose all or some of their water rights for failure to use that water. *See* WYO. STAT. ANN. § 41-3-402 (Michie 1997). The statute reads in pertinent part:

> When any appropriator has failed, intentionally or unintentionally, to use any portion of surface, underground or reservoir water appropriated by him, whether under an adjudicated or unadjudicated right, for a period of five (5) successive years, the state engineer may initiate forfeiture proceedings against the appropriator with the state board of control, to determine the validity of the unused right.

Id.

84. *See Hagerman*, 130 Idaho at 741-44, 947 P.2d at 405-08.
85. *See id.* at 741, 947 P.2d at 405.
86. *See id.*
87. 40 Idaho 49, 231 P. 418 (1924).
88. *See id.* at 51, 231 P. at 418.
89. *See id.* at 52, 231 P. at 419.
90. *See id.*

inches.[91] The court concluded that WRLC abandoned and forfeited any water right above the 3,863 inches actually diverted from Wood River.[92]

The court never actually reached the issue of abandonment or forfeiture; the only issue in *Albrethsen* was whether "the evidence is insufficient to sustain the findings of fact and conclusions of law and judgment entered thereon."[93] The ditch could never physically divert WRLC's previously allocated sum of water; therefore, the allocated water right was 3,863 inches no matter what figure was mistakenly fixed to the water decree.[94] A water right cannot be forfeited if it was never actually diverted and put to beneficial use.[95]

Interpreting *Albrethsen* as standing for the Idaho Supreme Court's recognition of partial forfeiture is incorrect. *Albrethsen* does contain dicta that stands for the unremarkable proposition that both abandonment and forfeiture allow evidence "which shows or tends to show that, after the water had been decreed, it had not been put to a beneficial use, but had been abandoned for the statutory period after the entry of such decree."[96] *Albrethsen's* interpretation is consistent with the modern elements of the two distinct theories of abandonment and statutory forfeiture.[97]

Instead, the bulk of the language in the *Albrethsen* opinion consists of a framework for the theory of abandonment and reasons why public interest is best served by recognizing an abandonment doctrine:

> The law safeguards decreed rights as well as other rights by providing that a loss by abandonment cannot arise until after a failure to apply the water to a beneficial use for a period of five years, and this intent must be made to appear by clear and convincing evidence. But a decreed right is not immune from a showing that it has been abandoned, and such showing does not impeach the decree upon which such right was based, where the evidence received with reference to the abandonment relates to a time subsequent to the decree. To hold otherwise would defeat a well-settled rule of public policy that the right to the use of the public water of the state can only be

91. *See id.* at 55, 231 P. at 420.

92. *See id.* at 57, 231 P. at 421.

93. *Id.* at 52, 231 P. at 419.

94. *See id.* at 55, 231 P. at 420. The court found that the highest carrying capacity estimate given by any of the engineers was 3,863 inches which is less than the 5,995 inches decreed in 1909. *See id.* at 420-21.

95. *See* Graham v. Leek, 65 Idaho 279, 299, 144 P.2d 475, 486 (1943).

96. *Albrethsen*, 40 Idaho at 59-60, 231 P. at 422 (on petition for rehearing).

97. *See* Gilbert v. Smith, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976).

claimed where it is applied to a beneficial use in the manner required by law.[98]

On petition for rehearing, the court thoroughly discussed the theory of water right abandonment.[99] Statements made by the court concerning forfeiture were limited to a general recognition that abandonment and forfeiture require a showing that water rights have not been used beneficially for the statutory period of five years.[100] The court spent a majority of the opinion on the theory of abandonment, even though the single issue before the court was whether the facts supported the conclusions of law and the judgment of the district court.[101]

In *Graham v. Leek*,[102] the court addressed the question of whether a judicially decreed water right could be lost to abandonment or forfeiture.[103] Leek possessed a State of Idaho Department of Reclamation Certificate of Water Right to 3.2 cubic feet per second (c.f.s.) of water from Three Mile Creek for irrigation.[104] The certificate was created as a result of an order of a district court.[105] Graham claimed a right to 160 inches of Three Mile Creek to irrigate 160 acres of land.[106] Graham's claim was adverse to Leek's claim.[107]

The *Graham* court reaffirmed the framework of *Albrethsen* by finding that a judicially-decreed water right is not immune from a showing that it has been abandoned and that such a showing does not impeach the decree upon which the right was based.[108] The court emphasized that it is the non-use for five years that results in an abandonment.[109] Like *Albrethsen*, the *Graham* court only decided whether or not the findings of the lower court were supported by sufficient evidence in the record.[110] The issue of partial forfeiture of a water right was not before the court.

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98. *Albrethsen*, 40 Idaho at 60, 231 P. at 422.

99. *See id.* at 58-64, 231 P. at 421-23.

100. *See id.* at 59-60, 231 P. at 421-22.

101. *See id.* at 60, 231 P. at 422. The court, on rehearing, spends a large part of the opinion "selling" the public policy benefits of an abandonment doctrine. *See id.*

102. 65 Idaho 279, 144 P.2d 475 (1943).

103. *See id.* at 287, 144 P.2d at 479.

104. *See id.* at 283-84,-144 P.2d at 477.

105. *See id.* at 283, 144 P.2d at 477.

106. *See id.* at 284, 144 P.2d at 478.

107. *See id.* A claim of adverse possession by Graham is supported by the following facts: in the spring of 1910 a ditch was built and water diverted from Three Mile Creek at a carrying capacity of 160 inches, the ditch was used to irrigate and reclaim land, and the use was open, notorious and continuous for the five year statutory period preceding the filing of the complaint. *See id.* at 284-85, 144 P.2d at 478.

108. *See id.* at 287, 144 P.2d at 479.

109. *See id.*

110. *See id.* at 290-94, 144 P.2d at 481-83.

In *Gilbert v. Smith*,[111] the court attempted to clarify the difference between the requirements of common law abandonment and the statutory requirements of forfeiture in the State of Idaho.[112] Appellant claimed to have enlarged an original 1920 water right decree by placing an increased diversion of water from Densmore and Birch Creeks to beneficial use.[113] Appellant's claim was based on two alternative theories, adverse possession and abandonment.[114] The lower court concluded that both parties failed to prove an actual measurement of the water used.[115] The appellants failed to prove water use in excess of their original right or any of the elements of adverse possession.[116] On appeal, the court was asked to decide whether the evidence supported the conclusion of the lower court.[117]

The importance of the *Gilbert* opinion is not that the decision of the lower court was upheld but that the Idaho Supreme Court felt it necessary to clarify the legal concept of statutory forfeiture.[118] The issue of partial forfeiture was never actually reached because there was no evidence as to non-use for the statutory period.[119] However, there is a clear indication the court felt that the parties and even the lower court may have been confused as to the application of certain legal concepts dealing with water right loss.[120]

Common law abandonment requires an intent to abandon as well as an actual relinquishment of the water right.[121] Abandonment is distinct from the statute-based doctrine of forfeiture, which occurs where an appropriator fails to make beneficial use for a statutory period.[122] Intent is not a factor for statutory forfeiture.

However, the Idaho Supreme Court assumed that there was a potential for water right loss due to a partial forfeiture in *Olson v. Bedke*.[123] *Olson* involved an action to terminate a lease of 480 acres of farm land between Olson (the lessor) and Bedke (the lessee).[124] The complaint alleged that Bedke violated terms of the lease by failing to put all decreed water on the ranch to beneficial use.[125] Bedke's con-

111. 97 Idaho 735, 552 P.2d 1220 (1976).
112. *See id.* at 737, 552 P.2d at 1222.
113. *See id.*
114. *See id.*
115. *See id.*
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.*
120. *See id.* at 738, 552 P.2d at 1223.
121. *See id.*
122. *See id.*
123. 97 Idaho 825, 555 P.2d 156 (1976).
124. *See id.* at 827, 555 P.2d at 158.
125. *See id.* at 827-28, 555 P.2d at 158-59.

duct placed the reversionary interest of the water right in danger of loss.[126] The trial court found adequate protection of Olson's reversionary interest in Idaho Code § 42-607.[127] Idaho Code § 42-607 provides that where a duly elected water master is charged with the administration of waters in a water district, no one can adversely possess the right of another water user.[128] The court found that Idaho Code § 42-607 applied only to adverse possession and that the Olsons could suffer a potential loss from a claim of statutory forfeiture (essentially a partial forfeiture) of their original water rights.[129]

The *Olson* court relied heavily on *Gilbert* and quoted directly from the language of Idaho Code § 42-222(2).[130] The appeal presented in *Gilbert*, however, was also confined to a determination of whether the evidence supported a decision of the lower court.[131] Language indicating that water rights can be partially forfeited is dicta and does not conclusively answer whether partial forfeiture is contemplated by Idaho Code § 42-222(2).[132] The language of *Gilbert* also indicates that forfeiture is not favored and "all intendments are indulged in against a forfeiture."[133] Support for the concept of partial forfeiture cannot be found simply by consulting the words of Idaho Code § 42-222(2).[134]

Recent Idaho Supreme Court opinions do not directly address partial forfeiture, but the issue is present in the dicta of several cases. In 1983, the court faced the determination of the validity of subordination clauses in water licenses obtained by Idaho Power to acquire Federal Power Commission (FPC) licenses to construct dams.[135] Opponents of Idaho Power argued that all or part of its water rights were lost due to abandonment or forfeiture.[136] The court did not find a partial or even a full forfeiture of water rights and remanded the issue to the lower court for a factual determination.[137] The court never addressed the issue of partial forfeiture. Partial forfeiture was instead assumed as an affirmative defense by the parties and by the court.[138]

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126. *See id.* at 828, 555 P.2d at 159.
127. *See id.*; IDAHO CODE § 42-607 (1996).
128. *See* IDAHO CODE § 42-607.
129. *See Olson*, 97 Idaho at 828-29, 555 P.2d at 159-60.
130. *See id.* at 828-29 & n.1, 555 P.2d at 159-60 & n.1.
131. *See* Gilbert v. Smith, 97 Idaho 735, 740-41, 552 P.2d 1220, 1225-26 (1976).
132. *See* IDAHO CODE § 42-222(2) (Supp. 1998).
133. *Gilbert*, 97 Idaho at 740, 552 P.2d at 1225.
134. *See* IDAHO CODE § 42-222(2); *see also Hagerman*, 130 Idaho at 742, 947 P.2d at 406.
135. *See* Idaho Power Co. v. State, 104 Idaho 575, 578-79 661 P.2d 741, 744-45 (1983).
136. *See id.* at 588, 661 P.2d at 754.
137. *See id.*
138. *See id.*

The court assumed a partial forfeiture could occur in *Crow v. Carlson*.[139] In determining the validity of a 1910 Rexburg water decree,[140] the Idaho Supreme Court stated that a water decree is presumed to be valid.[141] No evidence was presented to support a transfer of the water right, an abandonment, or a forfeiture.[142] *Carlson* indicates a recognition of partial forfeiture under Idaho law.[143] However, the court's inquiry was confined to whether the evidence supported the verdict of the lower court.[144] Whether partial forfeiture is contemplated by the language of Idaho Code § 42-222(2) was not at issue.[145]

In 1992, *Dovel v. Dobson*[146] indicated court recognition of partial forfeiture but did not directly answer whether Idaho Code § 42-222(2) contemplates recognition of partial forfeiture. The primary issue presented in *Dovel* was whether there was sufficient evidence to support the decision of the Director of the IDWR in transferring one water right and making a permit for another.[147] Dobson applied to the department for a new water permit to divert .84 c.f.s. and to transfer part of the Porter Creek water right appurtenant to approximately eighteen acres of land.[148] Dobson's Porter Creek water right included a total of ninety acres comprising three fields: one of seventy-eight acres, one of twelve acres, and one of six acres.[149] Dovel objected to the transfer, arguing that part of the Porter Creek water right had been forfeited and that a transfer would enlarge an already existing right.[150] Dovel also objected to the issuance of a new water permit, pointing to an already insufficient water supply and arguing that the transfer and permit were both in violation of the local public interest.[151]

The Director approved the transfer and made no changes to Dobson's historical diversion rate of 1.6 c.f.s., even though there was a finding that the rights appurtenant to a six-acre plot of the Porter

139. *See* Crow v. Carlson 107 Idaho 461, 690 P.2d 916 (1984).

140. 120 inches of water was decreed as appurtenant to 240 acres of land, 160 of which were owned by the Crows, and 80 acres by the Gordons. *See id.* at 463-64, 690 P.2d at 918-19. The decree was the result of a dispute between the Rexburg Irrigation Company and the Teton Irrigation Company. *See id.* Crow claimed a right to all 120 inches of water. *See id.*

141. *See id.* at 465, 690 P.2d at 920.

142. *See id.* at 466, 690 P.2d at 921.

143. *See id.*

144. *See id.* at 467, 690 P.2d at 922.

145. *See id.*

146. 122 Idaho 59, 831 P.2d 527 (1992).

147. *See id.* at 60, 831 P.2d at 528.

148. *See id.*

149. *See id.* at 61, 831 P.2d at 529.

150. *See id.*

151. *See id.*

Creek water right had been forfeited due to non-use.[152] The Director rationalized that the forfeited water from the six-acre field had been put to beneficial use on the other ninety acres.[153] Approval was also given for the water permit, and additional provisions were made to safeguard local public interests.[154] Both the district court and the Idaho Supreme Court upheld the findings of the Director concerning the six-acre field, the water right permit, and the adequacy of the safeguards for protecting the local public interest.[155] The issue of whether partial forfeiture is part of Idaho Code § 42-222(2) was not addressed by the court, and the holding was limited to a narrow review of the evidence.[156]

Prior to *Hagerman*, the issue of whether Idaho Code § 42-222(2) contemplated partial forfeiture had not been directly addressed by the Idaho Supreme Court. However, the fact that a water right could be partialy forfeited had been assumed by the court and by the petitioning parties.

C. Idaho Code Section 42-222(2)

When construing a statute, a court is required to give the specific text of the statute "'its plain, obvious and rational meanings.'"[157] Because the plain meaning of Idaho Code § 42-222(2) did not expressly deny partial forfeiture, the court could engage in statutory construction.[158] In Idaho, deference is granted to administrative interpretation in construing a statute, subject to certain limiting factors.[159] This section addresses important public policy goals that the partial forfeiture doctrine promotes in Idaho.

1. Plain Meaning or Ambiguity

Forfeiture is a statute-based doctrine that applies when an appropriator fails to make beneficial use of allocated water for a statutory period.[160] Idaho case law historically recognized the doctrine of

152. *See id.* at 63, 831 P.2d at 531.
153. *See id.*
154. *See id.* at 64, 831 P.2d at 532.
155. *See id.* at 65, 831 P.2d at 533.
156. *See id.* at 64, 831 P.2d at 532.
157. Cathy R. Silak, *The People Act, The Courts React: A Proposed Model For Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1, 21 (1996) (quoting Grand Canyon Dories v. Idaho State Tax Comm'n, 124 Idaho 1, 5, 855 P.2d 462, 466 (1993)).
158. *See* IDAHO CODE § 42-222(2) (Supp. 1998).
159. *See* J.R. Simplot Co. v. Idaho State Tax Comm'n, 120 Idaho 849, 862-63, 820 P.2d 1206, 1226-27 (1991).
160. *See* IDAHO CODE § 42-222(2).

forfeiture,[161] and legislators eventually codified the doctrine.[162] Idaho statutory law clearly recognizes total forfeiture when all of a water right goes unused for the statutory period of five years.[163] The conflict arises, however, as to whether the legislature intended Idaho Code § 42-222(2) to include the partial forfeiture of a water right that goes unused for the statutory period of five years. Resolution of this conflict requires statutory construction by the court to determine the legislative intent.

When construing a statute, a court must begin by determining whether the text of the statute is clear or ambiguous.[164] "When a statute or constitutional provision is clear, the Court must follow the law as written, and when the language is unambiguous there is no occasion for the application of the rules of construction."[165] In *Hagerman*, the district court determined that the plain meaning of Idaho Code § 42-222(2) excludes partial forfeiture.[166] In reaching its determination, the district court interpreted the word "all" as meaning an entire or total number or amount.[167] The district court interpretation applied the word "all" as an adjective that modified the word "water," which precluded the recognition of partial forfeiture.[168] The supreme court held this interpretation of Idaho Code § 42-222(2) to be erroneous.[169]

The Idaho Supreme Court found that in interpreting relative and qualifying words within a statute, it is imperative to apply "generally accepted principles of English grammar."[170] In particular, the Idaho Supreme Court held that referential and qualifying words are applied to words immediately proceeding them and not to words or phrases more remote, unless a contrary intent can be shown.[171] In Idaho Code § 42-222(2), the adjective "all" modifies the word "rights" and does not modify the word "water." There is no contrary intent by the legislature that requires using the word "all" to modify the word "water." The legislature could have easily placed the word "all" before "water,"

161. *See, e.g.*, Gilbert v. Smith, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976).

162. *See* IDAHO CODE § 42-222(2).

163. *See id.*

164. *See* Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 457, 926 P.2d 1301, 1304 (1996).

165. *Id.*

166. *See Hagerman*, 130 Idaho at 741-42, 947 P.2d at 405-06.

167. *See id.* at 742, 947 P.2d at 406.

168. *See id.*

169. *See id.*

170. State v. Troughton, 126 Idaho 406, 411, 884 P.2d 419, 424 (1994).

171. *See id.* ("[A] referential or qualifying phrase refers solely to the last antecedent, absent a showing of contrary intent."); *see also Hagerman*, 130 Idaho at 742, 947 P.2d at 406 ("[A]djectives precede or immediately follow the noun they modify.").

or constructed a sentence that would have unambiguously precluded the concept of partial forfeiture.[172]

The rules of statutory construction must be applied to determine legislative intent. In light of the foregoing rules, the statute cannot be read to preclude partial forfeiture.[173]

2. Statutory Construction

Ambiguity in the language of Idaho Code § 42-222(2) required the court to interpret the language of the statute by determining legislative intent and applying the statute accordingly.[174] Determining the policy goals behind a legislative enactment helps determine the legislative intent.[175] Moreover, policy goals often can best be determined by construing all sections of an ambiguous statute collectively.[176]

In interpreting the language of an ambiguous statute, the court is "not alone in [its] responsibilities to interpret and apply the law. . . . To carry out [its] responsibility, administrative agencies are generally 'clothed with power to construe [the law] as necessary precedent to administrative action.'"[177] Thus, before the court can engage in a "free review" of statutory meaning, the effect of an administrative interpretation must be given appropriate deference.[178]

The Idaho Supreme Court determined that the appropriate level of deference given an agency's statutory construction will depend on whether the agency has satisfied four criteria: (1) the agency must have authority or be entrusted with the responsibility to administer the statute, (2) the agency's statutory construction must comport with reason, (3) the statutory language at issue must not expressly treat the precise question at issue, and (4) any of the rationales underlying the rule of deference must be present.[179]

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172. *See Hagerman*, 130 Idaho at 742, 947 P.2d at 406.

173. *See id.*

174. *See* J.R. Simplot v. Idaho State Tax Comm'n, 120 Idaho 849, 854, 820 P.2d 1206, 1211 (1991).

175. *See id.*

176. *See id.*

177. *Id.* (quoting Kopp v. State, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979)).

178. *Id.* at 862, 820 P.2d at 1219.

179. *See id.* The *J.R. Simplot* court observed that as Idaho and the majority of the states move away from the rule of deference, the United States Supreme Court has appeared to more fully embrace the doctrine. *See id.* at 861, 820 P.2d at 1218. In contrast to the Idaho Supreme Court, the United States Supreme Court believes that when a court reviews the construction of an administrative agency, the first area of inquiry is to determine whether the legislature has specifically spoken to the precise question at issue. *See id.* If the intent of the legislature is clear then no further inquiry is required. *See id.*

First, the *Hagerman* court held that the IDWR is entrusted with the administration of water resources in the State of Idaho with respect to Idaho Code § 42-222(2).[180] In *Jenkins v. State*,[181] Jenkins claimed that the IDWR did not have jurisdiction to determine whether a water right had been abandoned.[182] The Idaho Supreme Court concluded that "the director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture" of allocated water rights.[183] Accordingly, the IDWR has authority to construe Idaho Code § 42-222(2) to include partial forfeiture of water rights in Idaho.[184]

Second, the IDWR's interpretation of Idaho Code § 42-222(2) is a reasonable interpretation. A recognition of partial forfeiture does not require a strained reading of, nor the addition of language to, Idaho Code § 42-222(2).[185] By allowing for the partial forfeiture of a water right, other water users are able to make beneficial use of water that would otherwise go unused by prior appropriators.[186] This interpretation better effectuates Idaho's policy goals of economic and beneficial water use.

Third, the *Hagerman* court held that the wording of Idaho Code § 42-222(2) does not expressly address the issue of partial forfeiture.[187] The actual language of the code provides that "[a]ll 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 . . . ."[188] Therefore, there is no affirmative denial by the legislature that a partial forfeiture of water rights could occur.

Fourth, the *J.R. Simplot* court made it clear that when an agency with appropriate authority has made a reasonable construction of a statute on a question without a precise statutory answer, the court must determine if the rationales underlying the rule of deference are present.[189] The IDWR has defined Idaho Code § 42-222(2) to include partial forfeiture of a water right for failure by the appropriator to

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However, where there is ambiguity, the inquiry shifts only to a determination of whether the agency construction of the statute is a permissible one. *See id.*

180. *See Hagerman*, 130 Idaho at 743, 947 P.2d at 407; *see also* IDAHO CODE §§ 42-1701 to -1778, 42-1801 to -1806 (1996 & Supp. 1998).

181. 103 Idaho 384, 647 P.2d 1256 (1982).

182. *See id.* at 386-87, 647 P.2d at 1258-59.

183. *Id.* at 387, 647 P.2d at 1259.

184. *See id.*

185. *See Hagerman*, 130 Idaho at 742-43, 947 P.2d at 406-07.

186. *See id.*

187. *See id.* at 743, 947 P.2d at 407.

188. IDAHO CODE § 42-222(2) (Supp. 1998).

189. *See* J.R. Simplot v. Idaho State Tax Comm'n, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991).

apply allocated water to beneficial use for the statutory time period.[190] The court in *J.R. Simplot* determined that the additional rationales underlying the rule of deference are (1) the presumption of legislative acquiescence,[191] (2) contemporaneous agency interpretation,[192] and (3) agency expertise.[193]

The legislature has acquiesced in the IDWR interpretation. The *Hagerman* court found that in *Dovel*, the IDWR had made "findings of partial forfeiture in the past."[194] Additionally, the very forms used by the IDWR to transfer a water right asks an applicant whether or not, to their knowledge, "any portion" of the water right has undergone a period of non-use for five or more consecutive years.[195] Administratively, the IDWR has recognized the partial forfeiture of a water right. This recognition was contemporary with passage of Idaho Code § 42-222(2) as reflected by Idaho case law.[196] Finally, the IDWR is an expert in the area of Idaho water law and should be granted judicial deference.[197]

3. Recognition of Partial Forfeiture Advances Important Public Policy Goals

Idaho is fortunate to have access to water located in the Snake River Basin which is distributed throughout the state by a number of smaller tributaries.[198] Idaho has always recognized the importance of proper water allocation.[199] Allowing a third party to perfect an interest in water rights that are lost due to abandonment or forfeiture is a right that is protected by Idaho constitutional provisions.[200] The policy behind the enactment of Title 42 of the Idaho Code is to secure the maximum benefit and use of water resources.[201] Failure to recognize partial forfeiture jeopardizes the fundamental constitutional principle

190. *See Hagerman*, 130 Idaho at 743, 947 P.2d at 407.
191. *See J.R. Simplot*, 120 Idaho at 864, 820 P.2d at 1221.
192. *See id.* at 865, 820 P.2d at 1222.
193. *See id.*
194. *Hagerman*, 130 Idaho at 743, 947 P.2d at 407 (discussing Dovel v. Dobson, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992)).
195. *Id.* at 743, 947 P.2d at 407.
196. *See* Dovel v. Dobson, 122 Idaho 59, 831 P.2d 527 (1992); Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984); Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976).
197. *See Hagerman*, 130 Idaho at 743, 947 P.2d at 407.
198. *See* THE SNAKE RIVER BASIN ADJUDICATION: THE 1ST TEN YEARS, *supra* note 19, at 1.
199. *See* Kunz v. Utah Power & Light Co., 117 Idaho 901, 904, 792 P.2d 926, 929 (1990).
200. *See* IDAHO CONST. art. XV, § 3.
201. *See* IDAHO CODE § 42-101 (1996).

of economic and beneficial use of water, which in turn defeats the overall purpose of Idaho's enacted water legislation.

If Idaho Code § 42-222(2) did not contemplate the concept of partial forfeiture, an appropriation of water could be retained indefinitely by using only a small portion of the decreed water right.[202] The problem with this type of water allocation system is that while an initial allocation would reflect the current water needs, such a system lacks the flexibility to deal with future water demands. One example of future uncertainties is the modern population growth in western states, which has increased urban water use.[203] Partial forfeiture adds flexibility to water systems that are dealing with increased urban development. A water allocation system that recognizes partial forfeiture prevents a water user from hoarding water rights by using only a portion of those rights.[204]

Recognizing that a water right can be partially forfeited promotes efficient water allocation. In *Hagerman*, the Idaho Supreme Court specifically states that water users are not permitted to waste water.[205] An argument that partial forfeiture will compel people to waste water to maintain a water right is simply unsupportable. A water user cannot maintain any water right by engaging in waste.[206] Water users who waste water lose their right to the water that is not being put to beneficial use.[207] Water waste violates the foundational principle of beneficial use on which all water rights are allocated.[208]

V. CONCLUSION

The Idaho Supreme Court was correct in finding that Idaho Code § 42-222(2) recognizes the doctrine of partial forfeiture of a water right for failure to beneficially use that water right for the statutory period.[209] Recognition of partial forfeiture provides state water administrators the ability to make fair and proper allocations of water in the State of Idaho. Under Idaho's prior appropriation system, entrenched traditional water users pose a formidable barrier to future

202. Under the district court's interpretation of Idaho Code § 42-222(2), forfeiture would not occur unless the water user failed to use all of the appropriated water for the statutory time period. *See Hagerman*, 130 Idaho at 738, 947 P.2d at 402.

203. *See* Carpenter, *supra* note 34, at 128-30.

204. If partial forfeiture is contemplated in Idaho Code § 42-222(2), an appropriator who fails to use allocated water makes available the unused portion of their water right for "beneficial use" by another appropriator. *See Hagerman*, 130 Idaho at 744, 947 P.2d at 408.

205. *See id.*

206. *See id.*

207. *See id.*

208. *See generally* IDAHO CONST. art. XV, § 3.

209. *See Hagerman*, 130 Idaho at 744, 947 P.2d at 408.

water uses.[210] Any water allocation system must be structured to respond rapidly to changes in what society and the economy dictate as appropriate water uses. Rapid response is even more important to arid western states where recent increases in population have caused demand for water to skyrocket.[211] Allowing a prior appropriator to hold water rights against all subsequent appropriators by partial use robs Idaho's water allocation system of needed flexibility and defeats the legislative objective of the SRBA.[212]

Malcontents will point out that there are superior ways of structuring water allocation systems or better tools to more accurately distribute water under Idaho's prior appropriation system.[213] The recognition of partial forfeiture is a decision that provides Idaho's present water allocation system with flexibility, while protecting the interests of water right holders. Further, the decision in *Hagerman* is buttressed by case law, consistent with the actual language of the statute, in accord with administrative interpretation, and represents a clear promotion of the public policy behind Idaho's constitution and water law.

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210. *See* Carpenter, *supra* note 34, at 129-30.

211. *See id.*

212. *See In re* Snake River Basin Water Sys., 115 Idaho 1, 3-4, 764 P.2d 78, 80-81 (1988).

213. This article is not an attempt to solve all water allocation problems. It is simply a recognition that under Idaho's current system, partial forfeiture adds flexibility which will allow the IDWR to meet the constitutionally mandated goals of economic and beneficial use of water.

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