WHY DOES IDAHO'S WATER LAW REGIME PROVIDE FOR FORFEITURE OF WATER RIGHTS?

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I. INTRODUCTION

"Use it or lose it" is an oft-quoted, reputedly fundamental, axiom of western water law.[1] "Forfeiture" of water rights is the statutory manifestation of this principle, and it generally provides that appropriative rights are lost if unused for a statutorily defined period of time.[2] Idaho's forfeiture doctrine has historically been mired in confusion because of its convoluted development, codification, and interpretation. Idaho's Water Code has a "forfeiture statute,"[3] which the Legislature copied from the Wyoming Water Code; Idaho's Code also has a statutory provision identical to a California statute, which the California Supreme Court interpreted to establish forfeiture in that state. Colorado, which has never recognized forfeiture, relying instead on a presumption of abandonment for nonuse,[4] also contributed to the Idaho water law regime.

Despite the circuitous development of the forfeiture doctrine in Idaho, the state's Water Code has always contemplated water rights conditioned on beneficial use, and its corollary, forfeiture for nonuse. Idaho adopted a comprehensive water code in 1903. The populist social leanings of the period heavily influenced the state's early water legislation. Consequently, Idaho's forfeiture rule was originally intended to extinguish water rights for nonuse to prevent speculative and monopolistic behavior—the same rationale behind California and Wyoming's forfeiture doctrines.

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1. Other basic axioms include the familiar "first in time, first in right" and "beneficial use is the basis, measure, and limit of a right." *See, e.g.*, Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 920 (1998) (referring to the latter phrase as an accepted catechism of western water law).

2. JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 400 (4th ed. 2006). *See also* Charles B. Roe, Jr. & William J. Brooks, *Loss of Water Rights—Old Ways and New*, 35 ROCKY MTN. MIN. L. INST. § 23.02[2] (1989) ("Forfeiture statutes are based on the theory that the continuance of the title to a water right is dependent upon continuing beneficial use; and where the right is not exercised for a certain period of time, the right is forfeited.").

3. Throughout this article the phrase "forfeiture statute" relates to Idaho Code section 42-222(2) and its predecessors, which provides, at the most basic level, that water rights are lost if they are not used for five years. IDAHO CODE ANN. § 42-222(2) (2003).

4. 2 CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS § 1119 (2d ed. 1912) (1893). *See also* COLO. REV. STAT. § 37-92-402(11) (2011) (creating a rebuttable presumption of abandonment of a water right for ten years of nonuse). Abandonment is a common law doctrine that provides for loss of an appropriative water right when the owner intentionally relinquishes the right to future use; nonuse alone is insufficient to establish abandonment. SAX ET AL., *supra* note 2, at 400; *see also* Gilbert v. Smith, 552 P.2d 1220, 1222–23 (1976) (distinguishing between abandonment and forfeiture). *See also infra* Part IV.E.

Idaho's beneficial use and forfeiture rules historically sought to promote actual use and maximum utilization of water in the state. But Idaho courts have long hesitated to declare water rights forfeited. For early Idaho courts, this was in part because the law governing loss of water rights was unclear and because they were especially sensitive to property rights. Modern Idaho courts also loathe declaring rights forfeited because forfeiture is a harsh result and because the policy undergirding the rule—deterring speculation and monopoly—no longer resonates with Idahoans. Indeed, the traditional beneficial use requirement has been significantly curtailed by an ever-increasing list of exceptions to the forfeiture rule. Now only those without political or legal sophistication, financial resources, or who are too indolent to act to prevent it, are likely to forfeit their water rights.

Idaho's Water Code originally contemplated loss of water rights for nonuse as a means to free water resources from unproductive, speculative repose. The doctrine of forfeiture lay mired in confusion until the Idaho Supreme Court ultimately untangled it and confirmed that it should be applied sparingly. There continue to be some articulable reasons for the forfeiture doctrine in Idaho, even though those reasons have changed since the doctrine's first appearance in the Idaho Water Code. Nevertheless, Idaho's exception-laden forfeiture statute has become increasingly difficult to defend.

This article is organized as follows: Part II explores the history of Idaho's forfeiture doctrine. It considers philosophical justifications, Wyoming's and California's forfeiture rules, and historical and present iterations of the doctrine. Part III addresses the present state of forfeiture, including exceptions in Idaho. Finally, Part IV discusses alternative justifications for forfeiture.

II. A BRIEF HISTORY OF FORFEITURE

Idaho subscribes to the prior appropriation doctrine and only recognizes appropriative rights.[5] Formally, an appropriative water right gives the holder the ability to legally take water from a public waterway on condition that it is applied to beneficial use.[6] This beneficial use requirement is well accepted in western water law and serves as the foundation for forfeiture.[7]

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5. IDAHO CONST. art. XV, § 3. "Water rights," as used in this article, refer to appropriative rights unless noted otherwise.

6. Wells A. Hutchins, *Idaho Law of Water Rights*, 5 IDAHO L. REV. 1, 29, 39 (1968); *See also* IDAHO CONST. art. XV, § 1 (providing that appropriations of water from Idaho waterways are subject to regulation by the State); IDAHO CODE ANN. §§ 42-101, -104 (2003) (affirming the right to divert waters of the State but recognizing that those rights persist only so long as the water is put to beneficial use).

7. *See* Hutchins, *supra* note 6; Neuman, *supra* note 1.

A. Doctrinal and Philosophical Underpinnings

At the turn of the last century, Samuel Wiel observed that *use* of water had replaced *possession* of water as the measure of a water right:

> The law of appropriation arose as a branch of law of possessory rights upon the public domain. . . . But the rapid tendency of recent decision and statute . . . has been in making beneficial use the sole measure of the right, and spreading the change through the law as a deduction from that.[8]

Indeed, beneficial use has been a principal aspect of western water law since the early days of mining camps in California and the Rockies. By reference to the early mining codes of Colorado, one commentator contends that the actual use of water, rather than mere diversion or possession thereof, was always a condition of a water right.[9] The subsequent codification of the beneficial use doctrine in state water codes was part of a broader social movement—a movement that favored equal opportunity for settlers over moneyed interests.

Western water law developed in the midst of a populist upswing.[10] Many western settlers feared speculation and monopoly.[11] Toward the end of 19th century, westerners became increasingly worried about private control of public resources.[12] The privatized railroads fostered concern that wealthy monopolists would usurp control of other public services and resources.[13] The mining codes reflected these worries and were "thoroughly democratic in . . . character, guarding against every form of monopoly, and requiring continued work and occupation in good faith" to protect rights.[14] Against this anticapitalist, antimonopoly backdrop, California adopted water rights statutes based on judicial interpretations of mining codes and customs.[15] And, in 1872, California codified

8. 1 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 139 (3d ed. 1911) (1905) (footnotes omitted).

9. David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 ECOLOGY L.Q. 3, 21 (2005) (noting that claims to water, like mining claims themselves, were only valid when "worked," that is, when the water was used).

10. *Id.* at 25; WIEL, *supra* note 8, § 124.

11. WIEL, *supra* note 8, § 123. *See also* Neuman, *supra* note 1, at 963 (pointing out that one who controls a scarce water supply wields power over others, and this reality shaped the water law of the developing west.)

12. 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 436 (2d ed. 1913) (1893). *See generally* Schorr, *supra* note 9.

13. BRYCE, *supra* note 12, at 436. "Monopoly" was used generally to describe anti-agrarian interests and also in reference "to the accumulation of property . . . beyond what was practical for personal use, particularly for purposes of speculation or deriving income from tenants." Schorr, *supra* note 9, at 27.

14. Schorr, *supra* note 9, at 30 (quoting U.S. Senator and former miner William Stewart) (internal quotation marks omitted).

15. 1 CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS § 620 (2d ed. 1912) (1893).

the beneficial use rule,[16] a rule that Idaho subsequently copied.[17] Throughout the West, similar constitutional and statutory provisions attempted to eliminate speculative water grabs.[18]

B. State Control of Water Resources and the Wyoming Model

A movement for strict state administration of water resources gained traction as well.[19] Elwood Mead, a staunch advocate for state control of water, encouraged new western states and territories to use their police power to administer water resources: "The growing belief in the public ownership of public utilities applies especially to water, the most essential of all utilities."[20] Mead embraced a utopian, yeoman vision of the West.[21] He argued that agriculture provided a means for each independent farmer to make a living, and it also served as a cornerstone of the Western economy.[22] Irrigation, he claimed, had not only increased the value of land, it provided cheap products, without which other industries would flounder.[23] According to Mead, anything that might jeopardize low-cost irrigation must be avoided, and greedy speculators posed just such a threat.[24] Mead spoke of the water allocation mistakes of western European nations.[25] He likened wealthy American corporations to the water-monopolizing nobility of France and Italy and warned that western farmers would be like the peasants of those nations if states did not intervene.[26]

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16. 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 11 (1971) ("The earliest water rights statute of California, enacted in 1872, declared that the appropriation of water must be for some useful or beneficial purpose, and that when the appropriator or his successor in interest ceases to use the water for such purpose, the right ceases. Twelve years earlier, the California Supreme Court had stated that a claim of appropriative right to be valid must be for some useful or beneficial purpose, or in contemplation of a future appropriation therefore.").

17. *See infra* Part II.B.2.

18. HUTCHINS, *supra* note 16, at 11.

19. 1 WIEL, *supra* note 8, § 124.

20. *Id.* (citing U.S. Dep't of Agric., Bulletin No. 100 (1901)).

21. *See generally* JAMES R. KLUGER, TURNING ON WATER WITH A SHOVEL (1992) (biography of Mead).

22. *See* Elwood Mead, The Ownership of Water: Address by Professor Mead Before the Farmers at Fort Collins, at 2 (1887) (on file with U.S. Bureau of Reclamation Library, Denver, Colo.).

23. *Id.* Mead was indeed adamant that farming was central to the economy. *Id.* ("Without the cheap products of our farms, the cost of living would be so great that hundreds of mines would have to be abandoned and many industries that now flourish could not be conducted with profit. It is manifest, therefore, that anything which effects the success and prosperity of this interest not only concerns those engaged in the pursuit, but the welfare and the progress of the State.").

24. *Id.*; KLUGER, *supra* note 21, at 12.

25. Mead, *supra* note 22, at 3.

26. *See id.* ("Six hundred years ago when a King of France wanted to reward a noble he gave him the waters of a stream. To-day for the noble . . . we have substituted that pulpy individuality called a corporation, and have said here is a fertile and bounteous land . . .").

1. Wyoming Adopts the First State Agency-Administered Water Code

Mead's solution was a comprehensive water code that provided for state agency administration of all aspects of water rights, including: permitting, adjudication, and termination.[27] His proposed code would virtually eliminate the possibility of speculation due to its strictly enforced beneficial use requirement.[28] Diversion alone would not ripen into a right, nor would it maintain a right; one had to actually use the water and do so in accordance with the terms of a state-issued permit. Mead argued forcefully that water rights "should inhere in the land to be irrigated" and "water-rights should go with land titles."[29] To support his position, Mead invoked John Wesley Powell, who contended that the American West required irrigation, making water particularly valuable and thus likely to be monopolized.[30] Mead reiterated Powell's admonishment: Legislators must "devise some practical means by which water rights may be distributed among individual farmers . . . [or] be denounced as oppressors of the people."[31] In Mead's West, there would be no wealthy speculators developing water works in anticipation of selling water to settlers. The settlers themselves would have the first right to water without having to pay dearly to the greedy corporations.

Mead was not unique in his stance on state control of water resources. Clesson Kinney, a water law scholar, also espoused Mead's ideas. He wrote at length on the topic and argued for an allocation system based on actual use with a strict forfeiture rule.[32] Of the western U.S., Kinney wrote:

> The very life of this arid country depends largely upon the use of all of the available water supply. Therefore, by the forfeiture of the rights which are claimed by certain parties, but who fail to use them, the ends of justice are met, and the water is made to do the greatest good to the greatest number. . . . Where these [statutory forfeiture] provisions are enforced, it practically disposes of the "dog in the manger" or the "water hog."[33]

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27. *See generally id.*

28. Anne MacKinnon, *Historic and Future Challenges in Western Water Law: The Case of Wyoming*, 24 WYO. L. REV. 291, 302 (2006).

29. Mead, *supra* note 22, at 5 (quoting John Wesley Powell) (internal quotation marks and emphasis omitted).

30. *Id.*

31. *Id.* at 4–5 (quoting John Wesley Powell) (internal quotation marks omitted).

32. 2 KINNEY, *supra* note 4, § 1118.

33. *Id.* "Dog in the manger" is a reference to one of Aesop's fables:

> A dog looking for a quiet and comfortable place to take a nap jumped into the manger of the ox and lay there on the hay.
>
> Some time later the ox, returning hungry from his day's work, entered his stall and found the dog in his manger. The dog, in a rage because he had been awakened from his nap, stood up and barked and snapped whenever the ox came near his hay.

Mead was an assistant state engineer of Colorado and a professor at Colorado State University when he first began promoting state agency control of water resources.[34] But Colorado never fully incorporated his recommendations. The state did eventually adopt a water code, though it differed from the administrative system Mead championed.[35]

Mead had more luck in Wyoming. In 1890, Wyoming enacted a comprehensive water allocation regime managed by a state agency that Mead himself developed and oversaw as Wyoming's first State Engineer.[36] This administrative system, which included a beneficial use requirement and a forfeiture rule, is rooted in the Wyoming Constitution.[37] Wyoming's Water Code is credited as the first to incorporate a wholly administrative scheme that relied on an agency for all water right permitting.[38] Central to the scheme was the requirement that water right holders beneficially use water or lose their water rights.

2. Idaho's First Water Code

Since at least 1881, Idaho has had a statutory beneficial use requirement for new appropriations.[39] At that time, beneficial use was not explicitly made the basis for the continuing existence of a water right.[40] In 1881, Idaho Territory copied a California statute requiring appropriators to follow particular formalities when making appropriations in order to obtain a priority date earlier than the date of first beneficial use.[41]

> The ox is a patient beast, but finally he protested: "Dog, if you wanted to eat my dinner I would have no objection. But you will neither eat it yourself nor let me enjoy it, which strikes me as a very churlish way to act."

AESOP'S FABLES 1 (Grosset & Dunlap 1974). An early and frequently cited decision from Nevada also used the reference: "In appropriation of water, there cannot be any 'dog in the manger' business by either party, to interfere with the rights of others, when no beneficial use of the water is or can be made by the party causing such interference." Union Mining Co. v. Dangberg, 81 F. 73, 119 (1897) (Hawley, J.), *quoted in* 1 WIEL, *supra* note 8, § 478.

34. KLUGER, *supra* note 21, at 12, 13.

35. 3 CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS § 1338 (2d ed. 1912) (1893); 6 MARK SQUILLACE & REED D. BENSON, *Wyoming*, *in* WATERS AND WATER RIGHTS 1195 (Robert E. Beck, ed., 2005). Notably, the Colorado Supreme Court's decisions issued shortly after Mead's address prevented the water monopolies he warned of. KLUGER, *supra* note 21, at 12. Furthermore, Mead's position as assistant state engineer makes it probable that his ideas helped shape Colorado's Code.

36. KLUGER, *supra* note 21, at 14. Before statehood, Wyoming Territory had water-related statutes, including a forfeiture statute. *See* Laws Wyo., 1888, ch. 55, § 14. And Mead served as Wyoming's first Territorial Engineer from 1888–1890. KLUGER, *supra* note 21, at 14. But his comprehensive water code was adopted upon Wyoming's admission to the Union. *Id.*; 2 KINNEY, *supra* note 4, § 1119.

37. WYO. STAT. ANN. §§ 1, 2 (2012).

38. SQUILLACE & BENSON, *supra* note 35, at 1195. A principal difference between Colorado and Wyoming's water codes is the nature of making appropriations and, in Colorado's case, the original jurisdiction of the courts in resolving disputes.

39. 1881 Idaho Terr. Sess. Laws 267.

40. *See id.*

41. Title 9, IDAHO REV. CODES (1908) (prefatory note).

Those formalities included posting notice at the point of diversion, recording a copy of the notice with the county, and procuring rights-of-way in proceedings in front of county commissioners.[42] Then, in 1887, Idaho's Territorial Legislature copied another California statute, which mandated the termination of appropriative rights when any right was no longer applied to a beneficial use.[43]

In 1903, Idaho adopted its first comprehensive Water Code. Drawing from the civil codes of Wyoming and Colorado, Idaho replaced the notice-posting and county recording system of appropriation, and gave oversight of the state's water to a state engineer.[44] Idaho's explicit "forfeiture statute" first appeared in that legislation.[45] The Idaho Code's language governing appropriation, including the forfeiture statute itself, came from Wyoming's Code.[46] But the Code utilized the process of adjudicating water rights from Colorado's system.[47] And Wyoming and Colorado's adjudications systems are strikingly different: Wyoming gave jurisdiction over disputes to a board of control (an administrative agency), while Colorado gave original jurisdiction over disputes to the courts.[48] Further complicating matters, Idaho's 1903 act did not change the beneficial use statute Idaho had previously copied from California.[49] So, in 1903, Idaho effectively meshed the beneficial use requirement, as enacted in California, with portions of two different comprehensive Water Codes adopted in Colorado and Wyoming. Idaho's new Water Code thus contained a diverse and mismatched pedigree: an explicit forfeiture statute, like Wyoming's; an adjudication system like Colorado's, which did not recognize forfeiture;[50] and, California's beneficial use statute, which the California Supreme Court interpreted as an independent basis for forfeiture.

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42. 1881 Idaho Terr. Sess. Laws 267.

43. IDAHO TERR. REV. STAT. § 3156 (1887). That statute provided: "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." *Id.* The exact language of that 1887 statute is used today in Idaho Code section 42-104. *See* IDAHO CODE ANN. § 42-104 (2003). That Territorial Code provision is also virtually identical to the California Civil Code provision that gave rise to the forfeiture doctrine articulated in *Smith v. Hawkins*, 42 P. 453 (Cal. 1895), discussed *infra*.

44. Title 9, IDAHO REV. CODES (listing a brief history of the statutory control of Idaho water in a prefatory note). *See also* 3 KINNEY, *supra* note 35, § 1338; 1903 IDAHO SESS. LAWS 223.

45. 1903 IDAHO SESS. LAWS 223. *See also* IDAHO CODE ANN. § 42-222 (listing historical codifications of the statute). The 1903 forfeiture statute provided: "All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of two years to apply it to the beneficial use for which it was appropriated . . . ." *Id.* The use of the word "abandoned" was the source of confusion, as discussed in Part II.D.

46. Title 9, IDAHO REV. CODES (listing a brief history of the statutory control of Idaho water in a prefatory note). *See also* 3 KINNEY, *supra* note 35, § 1338; 1903 IDAHO SESS. LAWS 223 (enacting Idaho's first water code, including the original "forfeiture statute").

47. 3 KINNEY, *supra* note 35, § 1338.

48. *Id.*

49. *See* Title 9, IDAHO REV. CODES.

50. *See supra* note 4 and accompanying text.

Idaho's Frankenstein-esque Water Code would confuse Idaho courts and lawyers for the next forty-one years of the Code's existence. Until 1944, there was considerable uncertainty as to whether the forfeiture statute was a modification of the common law abandonment doctrine, and thus required intent, or if it was based solely on nonuse. Finally, in *Carrington v. Crandell*,[51] the Idaho Supreme Court recognized forfeiture as an independent doctrine. Before discussing *Carrington*, however, it is helpful to review two California cases and an earlier Idaho case that underlie the *Carrington* opinion.

C. California's Supreme Court Articulates its Forfeiture Doctrine

The California Supreme Court first discussed forfeiture as an independent doctrine of water right loss in the late 1800s. The court articulated the doctrine in a series of early cases.

1. *Smith v. Hawkins*

In 1895, the California Supreme Court held in *Smith v. Hawkins* that failure to beneficially use an appropriative water right for five years constituted forfeiture of that right.[52] The court relied on California Civil Code section 1411,[53] which stated: "[T]he 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."[54] The court distinguished forfeiture by nonuse from abandonment, noting that abandonment results in the loss of a right once the owner manifests intent to abandon, regardless of the period of nonuse.[55] The court stated that the issue with forfeiture is "one of nonuser merely . . . [and] [h]ow long must this nonuser continue before the right lapses?"[56] The Code did not specify a period of nonuse for forfeiture, so the court borrowed from other areas of California law.[57] It looked to the period of time required for adverse possession and for loss of a prescriptive right, which was five years.[58] "[F]or analogous reasons [the court] consider[ed] [five years] to be a just and proper measure of time for the forfeiture of an appropriator's rights for a failure to use the water for a beneficial purpose."[59]

When it construed section 1411, the court wrote:

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51. 147 P.2d 1009 (1944).

52. 42 P. 453 (Cal. 1895).

53. Section 1411 of the California Civil Code was the basis for section 1240 of the California Water Code in 1943. *See* Act effective Aug. 4, 1943, 1943 Cal. Stat. 1615.

54. *Smith*, 42 P. at 453. *See also* Lindblom v. Round Valley Water Co., 173 P. 994, 996 (1918) (quoting California Civil Code section 1411). This statutory language is virtually identical to Idaho Code section 42-104. *See supra* note 43.

55. *Smith*, 42 P. at 454.

56. *Id.*

57. *See id.*

58. *Id.*

59. *Id.*

> 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.[60]

Thus, the court's construction of section 1411 seemed to be undergirded by the same strict adherence to beneficial use that motivated Mead's water rights scheme and its forfeiture rule. Despite this reasonable rationale, water law scholars of the day criticized the *Smith* decision as exceeding the court's authority. Clesson Kinney opined that "the Court unquestionably exercised legislative power" in applying a five-year period of nonuse for forfeiture.[61] As discussed above, Kinney supported a strong forfeiture rule, but he might have disagreed with the length of time the court grafted onto the statute. Samuel Wiel agreed with Kinney, but seemed more sympathetic to the court, noting that "though open to the charge of judicial legislation . . . [*Smith*'s holding] is likely to be followed" in other states due to its objectivity and easy administration.[62] In fact, Wiel correctly predicted that Idaho's forfeiture statute would "be construed in the light of [*Smith*]."[63] But Idaho's reliance on *Smith* was to be more attenuated than Wiel guessed. When Idaho ultimately construed its forfeiture statute, it looked to *Lindblom v. Round Valley Water Co.*,[64] a subsequent California case applying *Smith*.[65]

2. *Lindblom v. Round Valley Water Co.*

In *Lindblom v. Round Valley*, the court reaffirmed the *Smith* forfeiture rule. But before considering *Lindblom*, it is important to note a significant distinction between California and Idaho water law. California, unlike Idaho, recognizes both riparian and appropriative water rights.[66] Generally speaking, riparian water rights are an incident of any real property located adjacent to a waterway (i.e. riparian land). A person acquires a riparian water right by virtue of owning riparian land, not by diversion and application to beneficial use. The riparian doctrine is, of

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60. *Id.*
61. 2 KINNEY, *supra* note 4, § 1120.
62. 1 WIEL, *supra* note 8, §§ 575, 576.
63. *Id.* § 576 (predicting Idaho, specifically, would follow California's lead in *Smith*).
64. Lindblom v. Round Valley Co., 173 P. 994 (Cal. 1918).
65. An interesting aside: *Lindblom* and *Smith* are both cited in another Idaho case: *Fed. Land Bank of Spokane v. Union Cent. Life Ins. Co.*, 6 P.2d 486, 488 (1931). But they are referenced for the proposition that where no time is fixed by statute regarding water rights, it is appropriate to borrow from other statutes fixing time for adverse possession or lost prescriptive rights. *Id.* The issue in *Fed. Land Bank of Spokane* dealt with a water right transfer, not forfeiture specifically. *Id.*
66. *See* CAL. WATER CODE ANN. §§ 101–02 (West 2009).

course, replete with jurisdiction-specific iterations and nuance, but this basic premise suffices for the discussion here.

In *Lindblom*, the appellant, Lindblom, owned riparian land on a creek downstream from Round Valley's dam.[67] Round Valley diverted water from the creek to a reservoir, and in turn sold the water for beneficial use.[68] For some time, Lindblom bought water from Round Valley but later decided to exercise his riparian right.[69] He claimed this right entitled him to natural flow in the stream in excess of the amount of water Round Valley was able to sell.[70] Lindblom admitted that his right was subordinate to Round Valley's appropriative right.[71] But he alleged that Round Valley unreasonably diverted more water than it had sold for beneficial use for more than five consecutive years and thus forfeited some of its claimed right.[72]

The California Supreme Court agreed with Lindblom. Again, the court distinguished forfeiture from abandonment. It noted that nonuse may be evidence of intent to abandon a right but does not conclusively establish abandonment.[73] Relying on *Smith*, however, the court reiterated its understanding that nonuse for five or more consecutive years results in forfeiture, regardless of intent.[74] It found that Round Valley had diverted and stored more water than it sold.[75] This storage without application to beneficial use was sufficient grounds for forfeiture.[76] The court therefore declared that Lindblom was entitled to the creek's natural flows in excess of what Round Valley sold for beneficial use.[77]

D. Idaho Adopts California's Interpretation of Forfeiture

As alluded to above, for almost half a century, the Idaho courts wrestled with whether Idaho's Water Code contemplated common law abandonment or something akin to forfeiture, as the doctrine is now understood. Part of the confusion was due to the language of the forfeiture statute, which originally used the word "abandonment."[78] A series of Idaho cases, however, helped resolve the ambiguity.

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67. *Lindblom*, 173 P. at 996.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 995.
72. *Id.*
73. *Id.* at 996.
74. *Id.* The *Lindblom* court also discussed a second appeal of *Smith v. Hawkins*, in which the court reiterated its earlier forfeiture rule and held that it could result in a partial forfeiture, or forfeiture of a portion of a claimed water right in excess of the right holder's beneficial use. *See id.* (citing Smith v. Hawkins, 52 P. 139 (Cal. 1898)).
75. *Id.* at 997.
76. *Id.*
77. *Id.*
78. *See* Act of Mar. 11, 1903, 1903 Idaho Sess. Laws 223 (1903). *See also* Gilbert v. Smith, 552 P.2d 1220 (1976) (noting that the Idaho Supreme Court had used the terms abandonment and forfeiture interchangeably and thus implying that it lent to the confusion); Jenkins v. State Dep't of Water Res., 647 P.2d 1256, 1260 (1982) (noting that Idaho's forfei-

1. *Zezi v. Lightfoot*

In 1937, in *Zezi v. Lightfoot*,[79] the Idaho Supreme Court considered a claim that a water right had been "abandoned" because the owner had allegedly failed to beneficially use it for a five-year period.[80] At the time, Idaho's forfeiture statute read: "All rights to the use of water acquired under this chapter or otherwise shall be lost and *abandoned* by a failure for the term of five years to apply it to the beneficial use for which it was appropriated . . . ."[81] The court underscored the statute's requirement that a water right must be unused for five years to be abandoned, and it further noted that "[a]bandonments and forfeitures are not favored."[82] Because there was insufficient evidence that the right holder had failed to use the water in question for five years—at least for a five-year period that might affect the claimants—the court held that there was no abandonment under the statute.[83] *Zezi* highlighted the court's reliance on beneficial use as the foundational aspect of the water right, but it did not address the issue whether "abandonment," as contemplated by the Idaho Water Code, was common law abandonment or forfeiture.

2. *Carrington v. Crandall*

In 1944, in *Carrington v. Crandall*, the Idaho Supreme Court relied on California's *Lindblom* decision to help construe Idaho's forfeiture statute. In that case, the plaintiff, Carrington, alleged a number of defendants had "abandoned" their water rights through five consecutive years of nonuse.[84] The trial court entered judgment against Carrington and quieted title in the disputed water rights for the defendants.[85] The Supreme Court recognized that Carrington had a significant burden on appeal.[86] The court was bound to uphold the trial court's judgment if the lower court's findings were supported by substantial evidence and its judgment was based on those findings.[87] Furthermore, the court noted that it could only declare a property right abandoned upon a finding

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ture statute was confusing before it was amended because it used the term "lost and abandoned"). The original forfeiture statute also required only two years of nonuse to constitute an "abandonment," but the legislature amended the Code in 1905 to provide a five-year period. *See supra* note 45 and accompanying text; Act of Feb. 23, 1905, 1905 Idaho Sess. Laws 27 (1905).

79. Zezi v. Lightfoot, 68 P.2d 50 (1937).

80. *Id.* at 51. The plaintiffs in *Zezi* alternatively contended that the water right in issue was abandoned because the owners failed to apply it to the beneficial use for which it was originally appropriated.

81. *Id.* at 52 (quoting Idaho Code section 41-216, the predecessor of Idaho Code section 42-222(2)) (internal quotation marks omitted) (emphasis added).

82. *Id.*

83. *Id.*

84. Carrington v. Crandall, 147 P.2d 1009, 1009 (1944).

85. *Id.* at 1011.

86. *Id.*

87. *Id.*

supported by clear and convincing evidence.[88] The evidence in the case was "conflicting, indefinite, and inconclusive."[89] Apparently, the only thing the record disclosed was "that there was more or less fussing and squabbling over [the] water for a long period of years."[90]

Although the record was murky, and Carrington only advanced a theory of abandonment based on the statute,[91] the court took the opportunity to distinguish between forfeiture and abandonment. This clarification was probably spurred by the respondents in the case, who argued that Carrington's claims failed because he did not prove the respondents had the intent to abandon.[92] The court wrote that "[a]bandonment of a water right under [statute] must have been continuous for five consecutive years."[93] It explained that intent was not an element of the statute.[94] To support this proposition, the court looked to *Lindblom*: "It has been held under a statute like ours, proof of intent to abandon is not required where reliance is placed on a non-user for the full period of five years as prescribed by statute."[95] The court further pointed out that *Lindblom* was founded on the California-equivalent of Idaho's beneficial use statute,[96] the statute Idaho copied from California in 1887. Without explanation, the court then shifted its focus to the explicit forfeiture statute that Idaho lifted from Wyoming's Civil Code, stating: "What has just been said relates to forfeiture (abandonment as it is designated by the statute, sec. 41-216, I.C.A.)."[97] The court explained that even though "the statute designates it as 'abandonment', it is in fact a *statutory forfeiture*."[98] Then the court distinguished the doctrine of common law abandonment: "[t]here is . . . another kind of abandonment which is actual, not dependent upon length of time, the essential element of which is intent to [surrender or relinquish]."[99] The court determined there was no intent to abandon in the case before it.[100]

Interestingly, the court did not explicitly apply the forfeiture rule it had just articulated; it simply affirmed the trial court's judgment that there was no forfeiture.[101] Nor did the court refer to authorities, other than *Lindblom*, to support its forfeiture rule. One might naturally as-

88. *Id.*
89. *Id.*
90. *Id.*
91. Brief of Appellants at 44–45, *Carrington*, 147 P.2d 1009 (1944) (No. 7140) (on file with Idaho State Historical Society).
92. Brief of Respondents at 29, *Carrington*, 147 P.2d 1009 (1944) (No. 7140) (on file with Idaho State Historical Society).
93. *Carrington*, 147 P.2d at 1011.
94. *Id.*
95. *Id.* (emphasis omitted).
96. *Id.*
97. *Id.* Idaho Code section 41-216, addressed in *Carrington*, was a predecessor to Idaho Code section 42-222(2), featuring substantially the same language and in force from 1933 to 1969. *See* IDAHO CODE ANN. § 42-222(2) (2003).
98. *Carrington*, 147 P.2d at 1101 (emphasis in original).
99. *Id.* at 1011–12.
100. *Id.*
101. *Id.* at 1012.

sume that the court would have looked to the applicable Wyoming statute, the model for Idaho's forfeiture statute. But Wyoming's case law would have offered little support at the time because its supreme court did not construe the Wyoming forfeiture statute until 1960.[102] Ironically, the Wyoming court relied on *Carrington* to articulate its forfeiture rule.[103]

Notwithstanding the lack of supporting authority, or the Idaho Supreme Court's relatively limited statutory analysis, it correctly interpreted the forfeiture statute. The statute's history and the doctrine's underlying purpose make this apparent. And the considerable writing by the water law scholars of the day suggests that forfeiture was a well-accepted, if infrequently used, doctrine.

3. *Gilbert v. Smith*

In 1976, in *Gilbert v. Smith*,[104] the Idaho Supreme Court further elucidated the difference between abandonment and forfeiture. *Gilbert* also involved claims of abandonment.[105] The court read those claims as presenting theories of common law abandonment and statutory forfeiture, as defined in *Carrington*.[106] The court recognized that, at the time, the law of forfeiture was still confusing in light of the Idaho case law on the subject.[107] So the court again parsed the distinct elements of abandonment, highlighting the intent element, and explained that forfeiture required only nonuse for the statutory period.[108] According to the *Gilbert* court, "the case of [*Carrington*] makes it clear that they are distinct legal concepts and should be considered as such."[109] The court admitted that it had previously been sloppy about clearly distinguishing between the two doctrines, but it "deem[ed] it essential for this and other future cases of a similar nature to keep the concepts of abandonment and statutory forfeiture, and their application, distinct."[110] After all this, the court affirmed the trial court's judgment, holding there was insufficient evidence to support abandonment or forfeiture.[111] So, again, the court explained that Idaho recognizes forfeiture, that forfeiture operates when a water right goes unused for five years, and that the intent of the right-

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102. 2 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 327 (1974).

103. *See* Ward v. Yoder, 355 P.2d 371, 376 (Wyo. 1960).

104. 552 P.2d 1220 (1976).

105. *Id.* at 1222.

106. *Id.*

107. *Id.*

108. *Id.* at 1223.

109. *Id.*

110. *Id.* The court again reiterated the difference between abandonment and forfeiture in a subsequent case; it also noted there that *Carrington* "clearly pointed out the distinction between the two terms." Jenkins v. State Dep't of Water Res., 647 P.2d 1256, 1260 (1982).

111. *Gilbert*, 552 P.2d at 1224.

holder is irrelevant under that doctrine. As an aside, the court declined to hold that the right was lost.

It is worth noting that now, in Idaho, loss of a water right for nonuse pursuant to statute may only occur under Idaho Code section 42-222(2), Idaho's "forfeiture statute." The Idaho Supreme Court has acknowledged both the constitutional basis for the beneficial use doctrine and its appearance throughout the Water Code, but relied on the tenet of statutory construction that a specific pronouncement governs the general.[112] Given the existence of section 42-222(2), and its direction that five years of nonuse results in forfeiture, the Court held that other statutes relating to beneficial use (e.g., section 42-104) generally cannot provide an alternative basis for forfeiture or abandonment.[113]

The legislature revised Idaho's forfeiture statute in 1969—before *Gilbert*—to use the word "forfeited," instead of "abandoned" for nonuse.[114] Due to this statutory change, and the *Gilbert* decision, Idaho's lawyers and judges probably better understand that abandonment and forfeiture are distinct concepts. It is, however, unclear whether forfeiture actions brought after the doctrinal clarification have been any more successful. Indeed, in the reported cases after *Gilbert*, the court seems willing to hold rights forfeited only in the most egregious scenarios.[115] This result is not unexpected, given the high standard required to prove forfeiture—clear and convincing evidence.[116] This standard of proof manifests the court's "often repeated . . . position that forfeiture of water rights is not favored in Idaho."[117] Whether Mead, and other early advocates of forfeiture, would have regarded the court's application of Idaho's forfeiture rule as too lenient is hard to say.[118] It is apparent that the modern political climate disfavors forfeiture. The ever-increasing number of exceptions to forfeiture is perhaps the most objective support for this point.

III. THE PRESENT STATE OF FORFEITURE IN IDAHO

The antispeculator, antimonopolist purpose of forfeiture probably vanished as fast as the West was settled, and certainly by the time *Car-*

112. State v. Hagerman Water Right Owners, Inc., 947 P.2d 409, 416 (1997).

113. *Id.* at 417.

114. *See* Act of Mar. 27, 1969, ch. 303, sec. 2, 1969 Idaho Sess. Laws 905, 906–07.

115. *See, e.g.*, *Jenkins*, 647 P.2d 1256 (upholding a decision to deny a water right transfer because the right had been forfeited by eighteen years of nonuse); McCray v. Rosenkrance, 20 P.3d 693 (2001) (upholding decision that right was either forfeited or abandoned based on considerable testimony that water was not used on appurtenant land for at least five years, that ditches were filled in, and hand lines were in disrepair).

116. *Gilbert*, 552 P.2d at 1223.

117. *McCray*, 20 P.3d at 699. *Accord* Hodges v. Trail Creek Irr. Co., 297 P.2d 524, 527 (1956) ("Forfeiture or abandonment of water rights is not favored and is not to be presumed, and all intendments are to be indulged in against a forfeiture."); *Gilbert*, 552 P.2d at 1225 ("Forfeiture of water rights is not favored and all intendments are indulged in against a forfeiture."); *Jenkins*, 647 P.2d at 1261 ("Forfeitures are not favored . . . .").

118. *But see* 2 KINNEY, *supra* note 4, § 1118 (arguing that forfeiture statutes should be strictly construed while allowing relief from forfeiture upon a showing of good cause).

rington was decided. Accordingly, there was little need for the strict construction of a statute that originally sought to prevent the "dog in the manger." Perhaps the statute sufficiently fulfilled its purpose—deterring would-be "water hogs"—and ran its course. Regardless, by the time *Carrington* was decided in 1944, westerners, and Idahoans in particular, were no longer concerned with great numbers of speculators arriving to take water. The populist movement was waning. Idaho's water users had become well established. The question now is whether there continue to be sound policy rationales for the forfeiture doctrine.

Before those rationales can be explored, however, the current structure of the forfeiture doctrine must be described. Idaho has moved far beyond a strict beneficial use requirement.[119] The Idaho courts and legislature have developed numerous exceptions to forfeiture.[120]

A. Idaho's Statutory Exceptions to Forfeiture

In 1933, before the Idaho Supreme Court articulated Idaho's forfeiture rule, the Idaho Legislature provided a process by which a water right holder could apply for an extension of time to avoid forfeiture, so long as the extension was applied for during the initial five years of nonuse:[121]

> Upon proper showing before the director of the department of water resources of good and sufficient reason for nonapplication to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years.[122]

In addition to this mechanism through which proactive water users can avoid forfeiture, between 1988 and 2008, the Idaho legislature codified eleven self-executing exceptions to forfeiture.[123] The following is a list of these statutory exceptions in order of enactment:

(1) A water right appurtenant to land obtained in a "federal cropland set-aside program" is not subject to forfeiture.[124] This exception

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119. Idaho is not alone in this regard. The apparent trend in the Northwest, and perhaps many other western states, is a softened beneficial use requirement that protects existing uses of water. *See generally* Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881 (1998).

120. *See* IDAHO CODE ANN. § 42-223 (Supp. 2011) (listing eleven enumerated exceptions to forfeiture and explicitly conceding the possibility of other common law exceptions).

121. Act of Mar. 13, 1933, ch. 193, sec. 1, 1933 Idaho Sess. Laws 382, 385.

122. IDAHO CODE ANN. § 42-222(3) (2003).

123. Many of the statutory exceptions, including sections 42-223(5) to -223(8), are simply codifications of judicial decisions and administrative practices. 2002 IDAHO H.R. RES. & CONSERVATION COMM. MINUTES, Feb. 19, 2002 (testimony of Karl Dreher, Director of Idaho Department of Water Resources).

124. Act of Mar. 24, 1988, ch. 153, sec. 1, § 42-222(2), 1988 Idaho Sess. Laws 273, 274 (currently codified at IDAHO CODE ANN. § 42-223(1) (Supp. 2011)).

is apparently designed to remove forfeiture as a disincentive to participation that would result from the risk of loss of participants' water rights for nonuse. However improbable, it is conceivable that a water user might look to these programs, in part, as a means to avoid forfeiture.

(2) "A water right held by a [municipality] to meet reasonably anticipated future needs" is considered to be beneficially used until the planning horizon for those anticipated needs has passed.[125] Because these municipal water rights are licensed absent the usual actual water use requirement,[126] this exemption from forfeiture is hardly surprising.

(3) A water right is not lost by forfeiture if the water diverted under that right is wastewater returned to the land after beneficial use (e.g., discharge from dairy lagoons).[127] The risk of forfeiture was seen as a disincentive to the use of wastewater.[128]

(4) A water right is not lost by forfeiture if the reason for the nonuse is to comply with a groundwater management plan approved by the Idaho Department of Water Resources (IDWR).[129] In these circumstances, groundwater is simply not available to allow the exercise of the water right.

(5) A water right is not lost by forfeiture if water is unused while placed in a water supply bank or rented for statutorily authorized purposes.[130] This provision encourages water users to participate in a water market when they will not be using their water right and makes the water right available for rental by others.

(6) A water right is not lost by forfeiture if it is unused due to circumstances over which the water right owner has no control, as determined on a case-by-case basis.[131] Typical circumstances in which this exemption might apply include weather-related factors, family or civilian emergencies, financing problems, legal difficulties, or the destruction of diversion facilities.

(7) A water right is not lost by forfeiture when the right is held by an entity, such as an irrigation district, which holds it for distribution,

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125. Act of Mar. 18, 1996, ch. 297, sec. 5, § 42-222(2), 1996 Idaho Sess. Laws 967, 973–76 (currently codified at IDAHO CODE ANN. § 42-223(2) (Supp. 2011)). This is also known as the "growing community" exception.

126. IDAHO CODE ANN. § 42-219(1) (2003).

127. Act of Mar. 18, 1996, ch. 333, sec. 1, § 42-222(2), 1996 Idaho Sess. Laws 1128, 1130 (currently codified at IDAHO CODE ANN. § 42-223(3) (Supp. 2011)).

128. 1996 Idaho H.R. Statements of Purpose H625.

129. Act of Mar. 29, 2000, ch. 85, sec. 3, § 42-223(4), 2000 Idaho Sess. Laws 181, 185 (currently codified at IDAHO CODE ANN. § 42-223(4) (Supp. 2011)).

130. Act of Mar. 27, 2002, ch. 343, sec. 1, § 42-223(5), 2002 Idaho Sess. Laws 961 (currently codified at IDAHO CODE ANN. § 42-223(5) (Supp. 2011)).

131. *Id.* § 42-223(6), 2002 Idaho Sess. Laws at 961–62 (currently codified at IDAHO CODE ANN. § 42-223(6) (Supp. 2011)).

unless the nonuse is subject to the control of the entity.[132] This is a refinement of exception six, above.[133]

(8) No portion of a water right held by an irrigation district is lost by forfeiture when unused on land excluded from the district, unless the district has control of the circumstances resulting in the nonuse.[134] This is a refinement of exception seven, above.

(9) No portion of a water right is lost by forfeiture for nonuse resulting from water conservation practices so long as the full beneficial use is maintained.[135] Although it is doubtful that the threat of forfeiture would incentivize conservation practices, the threat could discourage a water user from adopting conservation measures.

(10) No portion of a water right is lost by forfeiture for nonuse if the nonuse results from the water right being used for mitigation purposes approved by the IDWR.[136] In these circumstances, the threat of forfeiture could prevent the nonuse of water rights as a mitigation measure, and hamper new or ongoing water uses in areas short of water.

(11) No portion of a water right related to mining is lost by forfeiture for nonuse due to reduced production resulting from adverse changes in mineral prices, so long as the property and mineral rights are maintained for future production.[137] This is Idaho's most recent legislatively enacted exception to forfeiture, and it is a telling sign that forfeiture will no longer prevent the "dog in the manger"—rather, this exception virtually guarantees speculation.[138] The statute provides that as long as nonuse of a water right is due to low mineral prices (i.e., low profits) the nonuse is excusable. The obvious question, of course, is this: other than low profits, why else would a mining operation, or any other water-using business enterprise, be voluntarily suspended? This exception now makes it possible for speculators to buy mining claims and the associated water rights, and to hold on to both without actually using them, on the basis that their purchases may yield profits in the future due to increased mineral prices.[139]

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132. *Id.* § 42-223(7), 2002 Idaho Sess. Laws at 962 (currently codified at IDAHO CODE ANN. § 42-223(7) (Supp. 2011)).

133. The origin of this exception is *Aberdeen Springfield Canal Co. v. Peiper*, 982 P.2d 917 (1999).

134. Act of Mar. 27, 2002, ch. 343, sec. 1, § 42-223(8), 2002 Idaho Sess. Laws at 962 (currently codified at IDAHO CODE ANN. § 42-223(8) (Supp. 2011)).

135. Act of Mar. 27, 2003, ch. 166, sec. 1, § 42-223(9), 2003 Idaho Sess. Laws 470, 471 (currently codified at IDAHO CODE ANN. § 42-223(9) (Supp. 2011)).

136. Act of Mar. 23, 2004, ch. 178, sec. 1, § 42-223(10), 2004 Idaho Sess. Laws 560, 561 (currently codified at IDAHO CODE ANN. § 42-223(10) (Supp. 2011)).

137. Act of Mar. 25, 2008, ch. 239, sec. 1, § 42-223(11), 2008 Idaho Sess. Laws 719, 721 (currently codified at IDAHO CODE ANN. § 42-223(11) (Supp. 2011)).

138. *See* IDAHO S. RES. AND ENV'T COMM., February 15, 2008 MINUTES AT 4 (testimony of Mr. Jack Lyman), *available at* http://www.legislature.idaho.gov/sessioninfo/2008/standingcommittees/sresmin.pdf.

139. Some in the mining industry hoped that this exception would apply retroactively to revive presumably forfeited water rights in the Snake River Basin Adjudication, despite an informal opinion from the Idaho Attorney General that application of the statute to previ-

The legislature also provided a sweeping savings clause to retain all other potential defenses to forfeiture:

> The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not recognize the existence or validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.[140]

This clause recognizes that the Idaho Supreme Court has developed its own forfeiture exceptions. For example, if a water user resumes uses after forfeiture has presumably occurred, there is no forfeiture.[141] Also, no forfeiture occurs if a water master interferes with the exercise of a water right.[142] And, more generally, there can be no forfeiture if the right holder is prevented from exercising his right to the water by circumstances beyond his control.[143] Several of these exceptions to forfeiture are discussed in more detail below.

B. Judicially Created Exceptions to Forfeiture

1. Resumption of the Use

Of the judicially created exceptions, none is subtler and more uncertain than the so-called resumption of use doctrine. This exception provides that a water right is not subject to forfeiture, even if unused for the statutory period, if the right is re-used before a competing water right is established by a third party.[144] The crux of the doctrine is that no injury can occur to a junior appropriator if his appropriation commences after a senior appropriator has resumed her original use.[145] Be-

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ously forfeited water rights, though perhaps not so decreed, is unconstitutional. *See generally* Letter from Garrick Baxter, Deputy Att'y Gen., State of Idaho, to Wendy Jaquet, Minority Leader, Idaho H.R. (Mar. 5, 2008) *reprinted in* 2008 IDAHO H.R. RES. AND CONSERVATION COMM. MINUTES, Feb. 19, 2009. A special master in the Snake River Basin Adjudication opined that this exception cannot be applied retroactively if a third party water right holder would be injured. *In re* SRBA, Case No. 39576, Subcase Nos. 63-02446, 63-02489, and 63-02499 (Dec. 16, 2009) (Memorandum Decision and Order on Motion for Summary Judgment).

140. IDAHO CODE ANN. § 42-223 (Supp. 2011).

141. Zezi v. Lightfoot, 68 P.2d 50, 52–53 (1937); Carrington v. Crandall, 147 P.2d 1009, 1011–12 (1944); Jenkins v. State Dep't of Water Res., 647 P.2d 1256, 1261 (1982); Sagewillow, Inc. v. Dep't of Water Res., 70 P.3d 669, 675 (2003).

142. Almo Water Co. v. Darrington, 501 P.2d 700, 705 (1972).

143. Hodges v. Trail Creek Irrigation Company, 297 P.2d 524, 527 (1956) (citing Welch v. Garrett, 51 P. 405 (1897)).

144. *Carrington*, 147 P.2d at 1011–12; *Jenkins*, 647 P.2d at 1261.

145. *See Jenkins*, 647 P.2d at 1261.

cause the junior takes subject to senior users, the junior has no reasonable expectation of more water than was available at the time of its original appropriation. This judicially created doctrine is obviously at odds with a strict interpretation of the forfeiture statute.[146]

The doctrine was seemingly narrowed in *Jenkins v. Department of Water Resources* to apply only to the most junior rights in a particular basin.[147] In times of shortage, the prior appropriation doctrine provides that an earlier appropriator is entitled to satisfy her entire water right before a subsequent appropriator may exercise his right.[148] So, in *Jenkins*, the court suggested that only a junior appropriator at the bottom of the priority ladder could resume use without injuring another right holder.[149] This is based on the notion that forfeiture operates automatically, and so five years of nonuse results in loss of a right and automatically moves the priority of any junior water user up the priority queue. It also recognizes that priority is essential to an appropriative right and any subsequent use of the forfeited right would be a *per se* injury to the junior user's new place in the queue.[150]

However, in *Sagewillow, Inc. v. Department of Water Resources*, the court upended this narrowing of the resumption of use doctrine.[151] In that case, the court held that a seemingly forfeited water right might be reclaimed as long as a junior appropriator has not yet beneficially used water associated with the forfeited right.[152] According to the court, the junior user cannot be said to have made a "claim" on the forfeited right simply because his priority would increase when the senior user forfeited her right.[153] Rather, to make a claim, the junior user would have to suffer a loss of water because of the senior user's resumed use, or the junior user must initiate a forfeiture action before the resumed use.[154] Aside from the court's apparently flawed take on the nature of a water right as constituting a right to water rather than a right to use water,[155]

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146. *See Sagewillow*, 70 P.3d at 685 (Kidwell, J., specially concurring) (noting that resumption of the use is an antiquated doctrine and that Idaho's statutory scheme is intended to displace the resumption defense).

147. *Jenkins*, 647 P.2d at 126.

148. Hutchins, *supra* note 6, at 37.

149. *See Jenkins*, 647 P.2d at 1260.

150. *Id.*

151. *Sagewillow*, 70 P.3d 669 at 675.

152. *Id.*

153. *Id.*

154. *Id.*

155. As is well-established in western water law, an appropriative water right provides the owner a legally protected right to take water from the public domain for application to a beneficial purpose; it does not entitle the right holder to any singularly identified quantum of water. *See*, *e.g.*, David B. Anderson, *Water Rights as Property in Tulare v. United States*, 38 MCGEORGE L. REV. 461, 487–506 (2007) (distinguishing between privileges conferred by an appropriative right and the use of water resulting from diversions associated with such a right). The water in any watercourse does not belong to a particular water right holder. So, in this context, it is unavailing to discuss, as the *Sagewillow* court does, a junior appropriator's injury in terms of whether he was able to use water. The injury is to the junior's right, not to his use. Once a senior right is forfeited, the junior user's right increases in priority and is therefore injured *per se* if it is subsequently subordinated to a resumed use.

the decision creates great uncertainty over whether the forfeiture statute is self-executing or requires a forfeiture determination by the IDWR or a court before a water right is considered forfeited.

2. Tolling Forfeiture During General Basin Adjudications

The Snake River Basin Adjudication (SRBA) district court tolled the application of the forfeiture statute to all water rights claimed in the adjudication from the time they are claimed to when they are partially decreed.[156] The SRBA was commenced in 1987 and will determine the status of most of the significant water rights covering eighty percent of the State of Idaho.[157] The implications for forfeiture were huge:

> [I]f a water right holder ceased irrigating without excuse or exception in 1986, filed a claim [in] the SRBA four years later in 1990, and had that claim adjudicated in 2004, he or she would be entitled to a partial decree without forfeiture, and the five-year clock for forfeiture would begin again in 2004—despite 18 years of nonuse.[158]

As a result of this decision, for the great majority of significant water rights in the State of Idaho, forfeiture has not been possible for almost two decades. Presumably this same exemption will be applied in the North Idaho adjudications,[159] and eventually in the final adjudication of the Bear River Basin in Southeastern Idaho.

IV. MODERN JUSTIFICATIONS FOR FORFEITURE

Water right forfeiture has moved far beyond its origins as a doctrine designed to encourage Western settlement by preventing the monopolization of water rights by people who, having obtained a water right, hold it unused. It is now defined more by its exceptions than by its application. Rather than acting as a mechanism to make water availa-

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See Sagewillow, 70 P.3d at 685 (Kidwell, J., specially concurring) (quoting *Jenkins*, 647 P.2d at 1259–60).

156. *In re* Snake River Basin Adjudication, No. 39576, Consolidated Subcase 36-02708 et al. (Idaho 5th Jud. Dist. Ct., Twin Falls Cnty., Dec. 29, 1999) (Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue); *In re* Snake River Basin Adjudication, No. 39576, Consolidated Subcase 65-05663B (Idaho 5th Jud. Dist. Ct., Twin Falls Cnty., May 13, 2002) (Memorandum Decision and Order on Challenge; and, Order of Partial Decree).

157. JEFFERY C. FEREDAY ET AL., GIVENS PURSLEY LLP, WATER LAW HANDBOOK: THE ACQUISITION, USE, TRANSFER, ADMINISTRATION, AND MANAGEMENT OF WATER RIGHTS IN IDAHO 282 (2011), http://givenspursley.com/handbook.aspx?HID=12.

158. *Id.* at 26.

159. The North Idaho water right adjudications commenced in the SRBA court. *See*, *In re* Snake River Basin Adjudication, No. 49576 (Idaho 5th Jud. Dist. Ct., Twin Falls Cnty., Nov. 12, 2008) (Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication) (commencing the first North Idaho general stream adjudication in response to a petition from the IDWR), *available at* http://www.idwr.idaho.gov/WaterManagement/NorthIdAdju/CourtDocs/PDFs/20081112_Commencement_Order.pdf.

ble to the common person, it is now so easy for sophisticated and well-financed water rights holders to avoid forfeiture that the only people who are at significant risk are those too ignorant,[160] indolent, or impecunious to avoid it—often the very people that the doctrine was originally intended to help. To justify the doctrine's continued existence in Idaho, then, it is necessary to find new rationales for its operation. While many spring to mind, none are particularly compelling in light of the many exceptions outlined above. Nevertheless, the following is a list of possible justifications. It is by no means comprehensive, and its shortfalls highlight the difficulty in defending Idaho's exception-laden forfeiture rule.

A. Forfeiture Protects Expectations Based upon the Physical Condition of the Water Supply

Idaho protects the expectations of junior water users based upon the actual availability of water for use: "we now declare and determine the rule, generally applicable, to be that junior appropriators have a vested right to a continuance of the conditions existing on the stream at and subsequent to the time they made their appropriations."[161]

Statutory forfeiture could be justified as one means of protecting juniors' expectation that the conditions of their water source at the time of appropriation will continue. If they have not observed a competing water use for five years, they can rely upon that condition to develop their own water use. Someone seeking to appropriate water, or an existing junior appropriator, can simply judge whether her investment would be worthwhile by the apparent volume of undiverted water during the five-year forfeiture period. This justification has some appeal, especially for water rights developed *before* the mandatory permit statutes[162] and completion of the Snake River Basin Adjudication[163] and the North Idaho Adjudication,[164] when there are often no water right records to be consulted on a stream to determine if there were unknown other claimants to the junior user's water supply.

But this premise is unsound for at least two reasons. First, the mandatory permit statutes and the likelihood of the adjudication of the

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160. This is meant to indicate "ignorance" of the law of forfeiture, rather than "ignorance" in the general pejorative sense.

161. Crockett v. Jones, 277 P. 550, 552 (1929) (referencing junior users' protection against injury during a change in point of diversion or place of use of a senior water right).

162. Act of Mar. 25, 1963, ch. 216, sec. 1, 1963 Idaho Sess. Laws 624 (codified at IDAHO CODE ANN. § 42-229 (2003)) (mandating groundwater permit process); Act of Mar. 24, 1971, 1971 Idaho Sess. Laws 843 (codified at IDAHO CODE ANN. §42-103 (2003) and codified as amended at IDAHO CODE ANN. § 42-201 (Supp. 2011)) (mandating surface water permit process).

163. *See generally* Phillip J. Rassier, *Idaho Adjudication Presumption Statutes*, 28 IDAHO L. REV. 507 (1992) (outlining the initiation and purpose of the Snake River Basin Adjudication).

164. *See* IDAHO CODE ANN. § 42-1406B (2003) (authorizing the North Idaho Adjudication).

water rights on a water source now necessitates a review of the "paper rights" (i.e., water rights records) on any given water source to truly ascertain the existence of unclaimed water supply conditions.[165] Second, as a practical matter, the numerous exceptions to forfeiture, combined with the application of those exceptions to senior rights that cannot be ascertained by junior water users, makes any reliance on actual water supply conditions a risky proposition for the junior water appropriator. In other words, the uncertainty that flows from the forfeiture exceptions has virtually eliminated one's ability to gauge whether a water right is still valid either by looking at a stream or by simply consulting records of paper rights.

B. Forfeiture Is an Efficient Mechanism for "Clearing" the Water Rights Record

Every major water right in Idaho is scheduled to be adjudicated in the SRBA, the North Idaho Adjudication, and the Bear River adjudication, or is represented by an IDWR-issued license. When these adjudications are completed Idaho will have comprehensive, readily accessible record of all water rights in the state.[166] This will be a hugely valuable record of water use in Idaho. Presumably a water user who wants to understand the scope of the other water uses on her water source should be able to examine that record to determine what those water uses are.

Unfortunately, that valuable record will begin to decay the moment the adjudications are completed. Water uses will change or cease, and the paper rights on record will not reflect actual "wet" water use.[167] If the authorized paper water rights far exceed actual water use, there again will arise a huge amount of legal uncertainty as to the status of water rights associated with a water source. This slack in the recorded water right priority queue makes it difficult for the IDWR to issue new water rights and water right transfer decisions. Further, it creates uncertainty for water users seeking to make business decisions. As with any property transaction, the risk involved is inversely proportional to the certainty of the right being bought or sold. In this circumstance, the doctrine of forfeiture could conceivably provide the means to clear the

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165. The term "paper right" is used to describe the legal definition of a water right license issued by the state. This is to be contrasted with a "wet right," which is the actual amount of water put to use. In a theoretical system in which the beneficial use requirement is strictly applied, a water right would only be as good as the water actually used—the wet right. The paper right would not define a user's legally protected right to divert water. As this article has pointed out, however, beneficial use does not strictly define a right, so paper rights often represent both the licensed right and the legally recognized extent of the right. For a detailed discussion on the topic, see Adell Amos, *Freshwater Conservation in the Context of Energy and Climate Policy: Assessing Progress and Identifying Challenges in Oregon and the Western United States*, 12 U. DENV. WATER L. REV. 1, 41–42 (2008).

166. The Idaho Department of Water Resources offers access to water rights records via the departmental website. *See About Water Rights*, IDAHO DEP'T OF WATER RES., http://www.idwr.idaho.gov/WaterManagement/WaterRights/default.htm (last visited Mar. 1, 2012).

167. *See supra* note 165.

water right record and erase the legal uncertainty caused by potentially dormant water rights. A water user would then be able to rely upon Idaho's water right records to accurately determine water use.

In reality, this is not how the forfeiture doctrine works. Similar to the idea that forfeiture somehow protects reliance on "physical notice" of available water in a watercourse, the "clearing the records" rationale cannot be upheld in light of the myriad exceptions to the doctrine. Consider again the recently enacted mining exception.[168] Even assuming that statute is applied only prospectively,[169] the best-case scenario for non-mining water rights, there still exists the potential for countless mining water rights to lie dormant, "clouding the title" of other water rights for years or decades. Similar clouds on title regularly occur due to application of other exceptions—many of which will provide no accessible paper trail for other interested water users. Further, the IDWR conducts only very limited water right forfeiture investigations, most of these occurring in the context of water right applications such as changes and leases to the water supply bank. It has no grand program to ferret out unused water rights, especially in the face of the forfeiture exceptions that often leave no record for the IDWR to evaluate. Given the likelihood that a single basin could have water rights protected by any or all of the exceptions to forfeiture, and the IDWR having no regular program to evaluate potential forfeitures, the doctrine can never efficiently be used to maintain the accuracy of Idaho's water right records vis-à-vis actual water use.

C. Forfeiture Promotes Economic Development

Forfeiture could be justified as a means to free water from the legal claims of holders of unused water rights, and to make it available for new economic enterprise and economic development generally. However, the stated rationale for many of the statutory forfeiture exceptions shows that the actual perception of water right holders, and the Idaho legislature, is that forfeiture hinders economic development.

Consider, for example, Idaho Code section 42-223(3), which provides a forfeiture exemption to water right holders who maintain the beneficial use of their licensed right through the use of wastewater.[170] This exception was advanced by Idaho dairy farmers as means of encouraging conservation and thus promoting increased economic activity.[171] The dairymen argued that without this type of exception, there

168. *See supra* note 137 and accompanying text.

169. Meaning, the statute applies only to those water rights with an associated mining use, which have not yet been forfeited. That is, those water rights that have been used at least once within the preceding five years, or have been protected by some other mechanism. The other scenario would include a retrospective application of the statute.

170. IDAHO CODE ANN. § 42-223(3) (Supp. 2011).

171. *See* 1996 Idaho H.R. Statements of Purpose H625.

would be no impetus to invest in wastewater re-use projects and the full potential of a given dairy operation would be curtailed.[172]

Similarly, Idaho Code section 42-223(11), the mining exception, was justified on economic grounds. In his testimony before the Idaho Senate Resources and Environment Committee in support of the exception, the executive vice president of the Idaho Mining Association claimed that Idaho would profit immensely if only mining operations were exempted from forfeiture:

> This legislation is needed to provide the security in water rights necessary to attract the investment that will be necessary to expand mineral production and take advantage of current high metal prices . . . .
>
> This bill [exempting mining operations from forfeiture] would facilitate the expansion of mining in the Silver Valley, [in North Idaho], would secure the mining jobs of hundreds of Idaho workers, could lead to a significant expansion of that work force, would facilitate economic development in North Idaho and would increase revenues to the State of Idaho.[173]

Likewise, the growing community exception[174] can be defended on economic grounds. The purpose of that doctrine is to provide security for cities as they develop infrastructure to accommodate reasonably anticipated growth. City planning is presumably done with an eye toward economic efficiency and secure, long-term water rights further such goals.

Each of these exceptions to forfeiture illustrates the common understanding that secure and predictable property rights are an important precursor to economic development. When forfeiture is perceived as a threat to property rights, it hinders rather than encourages economic investment.

D. Forfeiture Leads to the Conservation of Resources

This rationale is based upon the notion that, as water users reduce their water diversions, their maximum diversion rate will be reduced by forfeiture, leaving more water in the water source for other users. Theoretically, this "one way ratchet" will constantly reduce water diversions and permanently increase the amount of water available for other uses, including for *in situ* conservation use. This rationale fails for several reasons.

Diversions in excess of actual need are never authorized by a water right. A water right is based on the actual use for which it was appropriated.[175] Use of water, wasteful or otherwise, beyond the legally recog-

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172. *Id.*
173. 2008 Idaho S. Res. and Env't Comm. Minutes (testimony by Jack Lyman).
174. IDAHO CODE ANN. § 42-223(2). *See also supra* note 125 and accompanying text.
175. *See* Hutchins, *supra* note 6, at 39.

nized beneficial use is not, and never was, privileged by a water right, and so is not the subject of forfeiture:

> Although the two are closely related, forfeiture for nonuse and abatement of waste are distinct notions. Forfeiture results from the failure to make beneficial use of water which one is entitled to use. Abatement of waste, on the other hand, involves the prevention of the use of water to which one is not entitled. The distinctions between forfeiture and abatement of waste are sometimes blurred, at least at first blush, when the amount of water to which one holds a paper entitlement is greater than the amount of water which can be put to reasonable, beneficial use. Those two quantities may differ as a result of changes in what is considered "reasonable" water use practices, or because an appropriator makes improvements, which reduce the amount of water, needed to be diverted for a beneficial use.[176]

A water user can only forfeit her water right when the water is available and needed, yet unused. Otherwise, the water user could, for instance, face the forfeiture of a water right after five years of nonuse owing to plentiful rains, only to find herself in need of it during the subsequent dry years.

Moreover, the practical implications of this rationale for forfeiture could well discourage conservation—water users might feel that they must fully exercise a water right to avoid losing it, even when they could get by using lesser amounts of water than would be required for that purpose.[177] Idaho recognized this concern when it provided an exemption to forfeiture for water conservation practices so long as the full beneficial use is maintained.[178]

E. Forfeiture is an Objective Solution to the Difficulties of the Subjective Aspect of Common Law Abandonment

Beside forfeiture, abandonment is another recognized means of losing a water right through nonuse. Abandonment is a common law doctrine that requires a water right owner (1) to intend to give up her right and (2) to actually relinquish the right through nonuse.[179] Intent to give up the right, however, is the key element of abandonment, and the more

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176. *See* Roe & Brooks, *supra* note 2, § 23.02[2][a].

177. The concern is that a water user who switched to more efficient sprinkler irrigation, for example, could not return to flood irrigation when power rates increased so much that sprinkler irrigation was no longer economically viable. Indeed, this is the logic behind one of Oregon's exceptions to forfeiture, which allows a right holder who remains "ready, willing, and able" to divert water to retain the entirety of their paper right, whether the full extent of the right is diverted or not. OR. REV. STAT. § 540.610(3) (West, Westlaw through ch. 89 of 2012 Reg. Sess.). *See generally* Krista Koehl, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principle to Achieve Flexibility*, 28 ENVT'L L. 1137 (1998).

178. IDAHO CODE ANN. § 42-223(9).

179. Sears v. Berryman, 623 P.2d 455, 459 (1981).

difficult to prove.[180] Moreover, the duration of nonuse is not a critical element, only that there is nonuse coupled with intent.[181]

It is sometimes contended that abandonment is simply the common law predecessor of forfeiture.[182] Such arguments are often accompanied by a claim that forfeiture is easier to establish, and was adopted to avoid the difficulties of proving the subjective intent of abandonment.[183] Whatever the merits of those claims, it should be noted that the development of forfeiture was more complex than a basic statutory revision of common law rules, as discussed above. In fact, the first recorded water right abandonment case in California was decided the same year as *Smith v. Hawkins*, the case that first articulated California's forfeiture rule.[184] That case, *Utt v. Frey*,[185] contains no mention of any unduly harsh burden of proof, nor did the court seem to wrestle with concerns relating to the administrability of the rule.[186] In *Smith*, the court simply acknowledged the existence of abandonment, concluded it was inapplicable to the controversy before it, and continued with its forfeiture analysis.[187]

Likewise, the abandonment doctrine in Idaho is a distinct means by which a right is lost, not a mere predecessor to forfeiture.[188] Accordingly, the forfeiture doctrine cannot be understood as a simple statutory mechanism for avoiding the burdens of common law abandonment. It is an independent doctrine developed to advance a separate goal: enforcement of the beneficial use requirement for an appropriative water right. Furthermore, Idaho courts are no more amenable to forfeiture than they are to abandonment, and are loath to declare rights lost for nonuse on any theory.[189] Therefore, given forfeiture's independent doctrinal function and the rarity of its application by the courts, it cannot be justified as a more effective successor or alternative to abandonment.

F. Forfeiture Incentivizes Participation in Socially Desirable Programs

The final rationale for forfeiture discussed here is that avoidance of forfeiture incentivizes participation in socially desirable programs. The clearest example of this logic is contained in Idaho Code section 42-223(5), which provides an exemption for forfeiture for participants in

180. *See Carrington*, 147 P.2d at 1011–12.

181. *Id.*

182. *See, e.g.*, Gregory Harwood, *Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation*, 29 IDAHO L. REV. 153, 157 (1993).

183. *See, e.g.*, Janet C. Neuman & Keith Hirokawa, *How Good is an Old Water Right? The Application of Statutory Forfeiture Provisions to Pre-Code Water Rights*, 4 U. DENV. WATER L. REV. 1, 22 (2000).

184. *See* 42 P. 453 (Cal. 1895); *supra* Part II.C.1.

185. 39 P. 807 (Cal. 1895).

186. *See generally id.*

187. *Smith*, 42 P. at 454.

188. *See supra* Part II.D.

189. *See supra* note 117.

Idaho's water banking program.[190] The water bank facilitates temporary water transfers among users.[191] Essentially, those without an immediate need to use water associated with their rights may allow others to rent their water right, with the State acting as intermediary. Participants who "bank" their water right are exempt from forfeiture. The potential for forfeiture has thus been used as the "stick" that encourages participation in a water market system.[192] Avoidance of forfeiture could also be an incentive for placing water rights in the federal crop set-aside program.[193] If one overlooks the dubious propriety of using the threatened loss of a valuable property right to encourage water users to participate in socially desirable programs, this appears to be one of the clearest of the remaining justifications for forfeiture, and is perhaps the only logically defensible rationale for its continued existence.

V. CONCLUSION

Idaho's forfeiture doctrine was originally adopted to complement the state's beneficial use requirement, which encouraged equal access to water among the state's water users. Early twentieth century concern over speculators and "water hogs" demanded an approach by which only actual water users would be protected by the law. As water allocation has evolved, however, beneficial use faded as the critical element of a water right in Idaho. Accordingly, the harsh consequences of forfeiture have been softened to accommodate modern economic concerns. The numerous mechanisms and defenses to avoid forfeiture make it a real threat only to those water users who are the most ignorant of its provisions, who cannot afford lawyers to assist in avoiding its application, or who are too indolent to take the necessary steps to protect their rights. It is now hard to find sound justifications for forfeiture's continuance in Idaho. Perhaps the best defense of forfeiture is that it may push some water users to participate in socially desirable programs, such as the State's water supply bank or the crop set-aside programs.

In any case, it is apparent that Idaho's exception-laden forfeiture rule has created a host of water rights that are eligible to be held, unused, to the disadvantage of other water right holders and would-be appropriators. This result highlights the difficulty of trying to retain a nineteenth-century legal solution whose historic justification no longer applies.

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190. IDAHO CODE ANN. § 42-223(5) (Supp. 2011).

191. IDAHO CODE ANN. § 42-1761 to -1764 (2003).

192. ADAM SCHEMP, WESTERN WATER IN THE 21ST CENTURY: POLICIES AND PROGRAMS THAT STRETCH SUPPLIES IN A PRIOR APPROPRIATION WORLD 26 (2009), *available at* http://www.elistore.org/reports_detail.asp?ID=11349&topic=Water_Management_and_Governance.

193. IDAHO CODE ANN. § 42-223(1) (Supp. 2011).