

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 615

BY WAYS AND MEANS COMMITTEE

AN ACT

1 RELATING TO WATER; AMENDING SECTION 42-222, IDAHO CODE, TO PROVIDE THAT A
2 PARTY ASSERTING THAT A WATER RIGHT HAS BEEN FORFEITED HAS THE BURDEN
3 OF PROVING THE FORFEITURE BY CLEAR AND CONVINCING EVIDENCE; AND AMEND-
4 ING SECTION 42-223, IDAHO CODE, TO PROVIDE THAT CERTAIN WATER RIGHTS
5 SHALL NOT BE LOST OR FORFEITED FOR NONUSE AND TO PROVIDE FOR THIRD-PARTY
6 CLAIMS OF RIGHT.
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8 Be It Enacted by the Legislature of the State of Idaho:

9 SECTION 1. That Section 42-222, Idaho Code, be, and the same is hereby
10 amended to read as follows:

11 42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR
12 NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION
13 -- APPEALS. (1) Any person, entitled to the use of water whether represented
14 by license issued by the department of water resources, by claims to water
15 rights by reason of diversion and application to a beneficial use as filed
16 under the provisions of this chapter, or by decree of the court, who shall
17 desire to change the point of diversion, place of use, period of use or na-
18 ture of use of all or part of the water, under the right shall first make ap-
19 plication to the department of water resources for approval of such change.
20 Such application shall be upon forms furnished by the department and shall
21 describe the right licensed, claimed or decreed which is to be changed and
22 the changes which are proposed, and shall be accompanied by the statutory
23 filing fee as in this chapter provided. Upon receipt of such application it
24 shall be the duty of the director of the department of water resources to ex-
25 amine same, obtain any consent required in section 42-108, Idaho Code, and if
26 otherwise proper to provide notice of the proposed change in a similar man-
27 ner as applications under section 42-203A, Idaho Code. Such notice shall ad-
28 vise that anyone who desires to protest the proposed change shall file no-
29 tice of protests with the department within ten (10) days of the last date
30 of publication. Upon the receipt of any protest, accompanied by the statu-
31 tory filing fee as provided in section 42-221, Idaho Code, it shall be the
32 duty of the director of the department of water resources to investigate the
33 same and to conduct a hearing thereon. He shall also advise the watermaster
34 of the district in which such water is used of the proposed change and the wa-
35 termaster shall notify the director of the department of water resources of
36 his recommendation on the application, and the director of the department
37 of water resources shall not finally determine the action on the applica-
38 tion for change until he has received from such watermaster his recommenda-
39 tion thereof, which action of the watermaster shall be received and consid-
40 ered as other evidence. For applications proposing to change only the point
41 of diversion or place of use of a water right in a manner that will not change
42 the effect on the source for the right and any other hydraulically-connected

1 sources from the effect resulting under the right as previously approved,
2 and that will not affect the rights of other water users, the director of the
3 department of water resources shall give only such notice to other users as
4 he deems appropriate.

5 When the nature of use of the water right is to be changed to municipal
6 purposes and some or all of the right will be held by a municipal provider
7 to serve reasonably anticipated future needs, the municipal provider shall
8 provide to the department sufficient information and documentation to es-
9 tablish that the applicant qualifies as a municipal provider and that the
10 reasonably anticipated future needs, the service area and the planning hori-
11 zon are consistent with the definitions and requirements specified in this
12 chapter. The service area need not be described by legal description nor by
13 description of every intended use in detail, but the area must be described
14 with sufficient information to identify the general location where the wa-
15 ter under the water right is to be used and the types and quantity of uses that
16 generally will be made.

17 When a water right or a portion thereof to be changed is held by a munic-
18 ipal provider for municipal purposes, as defined in section 42-202B, Idaho
19 Code, that portion of the right held for reasonably anticipated future needs
20 at the time of the change shall not be changed to a place of use outside the
21 service area, as defined in section 42-202B, Idaho Code, or to a new nature of
22 use.

23 The director of the department of water resources shall examine all the
24 evidence and available information and shall approve the change in whole,
25 or in part, or upon conditions, provided no other water rights are injured
26 thereby, the change does not constitute an enlargement in use of the origi-
27 nal right, the change is consistent with the conservation of water resources
28 within the state of Idaho and is in the local public interest as defined in
29 section 42-202B, Idaho Code, the change will not adversely affect the local
30 economy of the watershed or local area within which the source of water for
31 the proposed use originates, in the case where the place of use is outside
32 of the watershed or local area where the source of water originates, and the
33 new use is a beneficial use, which in the case of a municipal provider shall
34 be satisfied if the water right is necessary to serve reasonably anticipated
35 future needs as provided in this chapter. The director may consider consump-
36 tive use, as defined in section 42-202B, Idaho Code, as a factor in determin-
37 ing whether a proposed change would constitute an enlargement in use of the
38 original water right. The director shall not approve a change in the nature
39 of use from agricultural use where such change would significantly affect
40 the agricultural base of the local area. The transfer of the right to the use
41 of stored water for irrigation purposes shall not constitute an enlargement
42 in use of the original right even though more acres may be irrigated, if no
43 other water rights are injured thereby. A copy of the approved application
44 for change shall be returned to the applicant and he shall be authorized upon
45 receipt thereof to make the change and the original water right shall be pre-
46 sumed to have been amended by reason of such authorized change. In the event
47 the director of the department of water resources determines that a proposed
48 change shall not be approved as provided in this section, he shall deny the
49 same and forward notice of such action to the applicant by certified mail,
50 which decision shall be subject to judicial review as hereafter set forth.

1 Provided however, minimum stream flow water rights may not be established
2 under the local public interest criterion, and may only be established pur-
3 suant to chapter 15, title 42, Idaho Code.

4 (2) All rights to the use of water acquired under this chapter or other-
5 wise shall be lost and forfeited by a failure for the term of five (5) years
6 to apply it to the beneficial use for which it was appropriated and when any
7 right to the use of water shall be lost through nonuse or forfeiture such
8 rights to such water shall revert to the state and be again subject to appro-
9 priation under this chapter; except that any right to the use of water shall
10 not be lost through forfeiture by the failure to apply the water to benefi-
11 cial use under certain circumstances as specified in section 42-223, Idaho
12 Code. The party asserting that a water right has been forfeited has the bur-
13 den of proving the forfeiture by clear and convincing evidence.

14 (3) Upon proper showing before the director of the department of water
15 resources of good and sufficient reason for nonapplication to beneficial use
16 of such water for such term of five (5) years, the director of the department
17 of water resources is hereby authorized to grant an extension of time extend-
18 ing the time for forfeiture of title for nonuse thereof, to such waters for a
19 period of not to exceed five (5) additional years.

20 (4) Application for an extension shall be made before the end of the
21 five (5) year period upon forms to be furnished by the department of water re-
22 sources and shall fully describe the right on which an extension of time to
23 resume the use is requested and the reasons for such nonuse and shall be ac-
24 companied by the statutory filing fee; provided that water rights protected
25 from forfeiture under the provisions of section 42-223, Idaho Code, are ex-
26 empt from this requirement.

27 (a) Upon the receipt of such application it shall be the duty of the di-
28 rector of the department of water resources to examine the same and to
29 provide notice of the application for an extension in the same manner as
30 applications under section 42-203A, Idaho Code. The notice shall fully
31 describe the right, the extension which is requested and the reason for
32 such nonuse and shall state that any person desiring to object to the
33 requested extension may submit a protest, accompanied by the statutory
34 filing fee as provided in section 42-221, Idaho Code, to the director of
35 the department of water resources within ten (10) days of the last date
36 of publication.

37 (b) Upon receipt of a protest it shall be the duty of the director of
38 the department of water resources to investigate and conduct a hearing
39 thereon as in this chapter provided.

40 (c) The director of the department of water resources shall find from
41 the evidence presented in any hearing, or from information available to
42 the department, the reasons for such nonuse of water and where it ap-
43 pears to the satisfaction of the director of the department of water re-
44 sources that other rights will not be impaired by granting an extension
45 of time within which to resume the use of the water and good cause ap-
46 pearing for such nonuse, he may grant one (1) extension of five (5) years
47 within which to resume such use.

48 (d) In his approval of the application for an extension of time under
49 this section the director of the department of water resources shall set
50 the date when the use of water is to be resumed. Sixty (60) days before

1 such date the director of the department of water resources shall forward to the applicant at his address of record a notice by certified mail setting forth the date on which the use of water is to be resumed and a form for reporting the resumption of the use of the water right. If the use of the water has not been resumed and report thereon made on or before the date set for resumption of use such right shall revert to the state and again be subject to appropriation, as provided in this section.

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9 (e) In the event the director of the department of water resources determines that a proposed extension of time within which to resume use of a water right shall not be approved as provided in this section, he shall deny same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

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15 (5) Any person or persons feeling themselves aggrieved by the determination of the department of water resources in approving or rejecting an application to change the point of diversion, place, period of use or nature of use of water under an established right or an application for an extension of time within which to resume the use of water as provided in this section, may, if a protest was filed and a hearing held thereon, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If no protest was filed and no hearing held, the applicant may request a hearing pursuant to section 42-1701A(3), Idaho Code, for the purpose of contesting the action of the director and may seek judicial review of the final order of the director following the hearing pursuant to section 42-1701A(4), Idaho Code.

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26 SECTION 2. That Section 42-223, Idaho Code, be, and the same is hereby amended to read as follows:
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28 42-223. EXCEPTIONS OR DEFENSES TO FORFEITURE. A right to the use of water shall not be lost by forfeiture pursuant to the provisions of section 42-222, Idaho Code, for a failure to apply the water to beneficial use under the conditions specified in any subsection of this section. The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not recognize the existence or validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.

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

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

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

9 (4) A water right shall not be lost or forfeited by a failure to divert
10 and apply the water to beneficial use if the reason for the nonuse of the wa-
11 ter is to comply with the provisions of a ground water management plan ap-
12 proved by the director of the department of water resources pursuant to sec-
13 tion 42-233a or 42-233b, Idaho Code.

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

22 (6) No portion of any water right shall be lost or forfeited for nonuse
23 if the nonuse results from circumstances over which the water right owner has
24 no control. Whether the water right owner has control over nonuse of water
25 shall be determined on a case-by-case basis.

26 (7) No portion of a water right held by an irrigation district, a Carey
27 Act operating company, or any other company, corporation, association, or
28 entity which holds water rights for distribution to its landowners, share-
29 holders or members shall be lost or forfeited due to nonuse by such landown-
30 ers, shareholders or members, unless the nonuse is subject to the control of
31 such entity.

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

37 (9) No portion of any water right shall be lost or forfeited for nonuse
38 if the nonuse results from a water conservation practice, which maintains
39 the full beneficial use authorized by the water right, as defined in section
40 42-250, Idaho Code.

41 (10) No portion of any water right shall be lost or forfeited for nonuse
42 if the nonuse results from the water right being used for mitigation purposes
43 approved by the director of the department of water resources including as a
44 condition of approval for a new water right appropriation approved pursuant
45 to section 42-203A, Idaho Code, a water right transfer approved pursuant to
46 section 42-222, Idaho Code, a water exchange approved pursuant to section
47 42-240, Idaho Code, or a mitigation plan approved in accordance with rules
48 promulgated pursuant to section 42-603, Idaho Code.

49 (11) No portion of any water right with a beneficial use related to min-
50 ing, mineral processing or milling shall be lost or forfeited for nonuse, so

1 long as the nonuse results from a closure, suspension or reduced production
2 of the mine, processing facility or mill due in whole or in part to mineral
3 prices, if the mining property has a valuable mineral, as defined in section
4 47-1205, Idaho Code, and the water right owner has maintained the property
5 and mineral rights for potential future mineral production.

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

10 (a) Instituted proceedings to declare a forfeiture;

11 (b) Obtained a valid water right authorizing the use of such water with
12 a priority date prior to the resumption of use; or

13 (c) Used the water made available by nonuse pursuant to an existing wa-
14 ter right.