STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 88-4

TO: R. Keith Higginson, Director
Department of Water Resources
Statehouse Mail
Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does the filing of an application for change in point of diversion, place of use, period of use, or nature of use of a water right toll the running of the forfeiture period for nonuse of a water right established by Idaho Code § 42-222(2) (Supp. 1988)?

2. Does an application for assignment of a water right to the water supply bank and subsequent acceptance of the right into the bank toll the running of the forfeiture period for nonuse of a water right established by Idaho Code § 42-222(2) (Supp. 1988), or does Idaho Code § 42-1764 (Supp. 1988) require that the water right be subsequently rented out of the bank and beneficially used to prevent forfeiture?

CONCLUSIONS:

1. The filing of an application for change in point of diversion, place of use, period of use, or nature of use of a water right does not toll the running of the forfeiture period for nonuse of a water right established by Idaho Code § 42-222(2) (Supp. 1988).

2. There are two possible interpretations of Idaho Code § 42-1764 (Supp. 1988), which provides for the tolling of the forfeiture period for non-use of water placed in the water supply bank. On its face, section 42-1764 seems to require that a water right be accepted and subsequently rented out in order to toll the forfeiture provisions of section 42-222(2); however, when the

Celebrate IDAHO
1890 • CENTENNIAL • 1990

section is interpreted in light of the entire Water Supply Bank Act, it is possible to argue that the forfeiture period should be tolled whenever a water right is placed into the bank. Because of the ambiguity within the Act, it is not possible to predict which interpretation a court might adopt.

ANALYSIS:

Your letter of June 14, 1988, requests guidance on three questions concerning forfeiture of water rights. After reviewing the questions presented, we find that the issues raised in the first two questions subsume the third question. Further, your letter indicates that the questions, while general in nature, have arisen in reviewing the application of the Canyon View Irrigation Company to place natural flow water rights from the Snake River basin into the water supply bank. The policy of this office is to provide opinions only on questions of law; therefore, we have reformulated your first two questions to focus solely on issues of law. We express no opinion on the nature and extent of any water rights claimed by Canyon View Irrigation Company.

Question 1:

Idaho Code § 42-222(2) (Supp. 1988) provides, in part, as follows with respect to forfeiture of water rights:

> (2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter....

Thus, failure to apply water to beneficial use over a five-year period will result in forfeiture of the water right. However, upon the filing of an application for extension of time to put water to beneficial use before the end of the five-year forfeiture period, the director of the department of water resources is authorized to extend the time for forfeiture for nonuse for a period not to exceed five additional years. Idaho Code § 42-222(2) (Supp. 1988).

Forfeiture statutes reflect a well-settled rule of public policy "that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law." Graham v. Leek, 65 Idaho 279, 287, 144 P.2d 475, 479 (1943).[1] By making nonuse of water for five consecutive years grounds for forfeiture under section 42-222(2), the Idaho Legislature intended to implement this policy. In light of this strong public policy, exceptions to the forfeiture statute should not be lightly inferred.

The language of section 42-222 does not manifest any intent by the legislature to toll the running of the forfeiture statute upon the filing of an application for change in point of diversion, place of use, period of use, or nature of use of a water right (hereinafter called "application for transfer"), and no Idaho case law has been found so interpreting the section. In the absence of some manifestation to the contrary, we assume the legislature intended the ordinary import of the words it used. Nicolaus v. Bodine, 92 Idaho 639, 641, 448 P.2d 645, 647 (1968). Furthermore, section 42-222 contains language which shows that when the Idaho Legislature wants to toll the running of the forfeiture statute, it will do so by an express provision. For example, through a 1988 amendment, the forfeiture statute is expressly tolled for "all water rights appurtenant to land contracted in a federal cropland set-aside program...." Idaho Code § 42-222(2) (Supp. 1988). Thus, since there is neither an express nor implied manifestation by the Idaho Legislature to toll the provisions concerning forfeiture for nonuse when an application for transfer is filed under section 42-222(1), we conclude that a filing of an application for transfer does not toll the running of the forfeiture period.[2]

---

[1] Idaho Code § 42-222(2) is the successor of other less lenient forfeiture statutes. For example, in 1899 the Idaho Legislature required that the right to use water "be for some useful or beneficial purpose, and when the appropriator or his successor in interest cease[d] to use it for such purpose, the right cease[d]." Act approved Feb. 25, 1899, § 3, 1899 Idaho Sess. Laws 380. This early statute is illustrative of the policy underlying forfeiture.

[2] Although the forfeiture period may have run, an individual may be able to claim a defense to forfeiture at the end of the

(Footnote Continued)

Question 2:

The second question asks whether the forfeiture provisions of Idaho Code § 42-222(2) (Supp. 1988) are tolled by filing an application for assignment of a water right to the water supply bank and subsequent acceptance of the right into the bank or, conversely, whether Idaho Code § 42-1764 (Supp. 1988) requires that the water right be subsequently rented out of the bank and beneficially used to prevent forfeiture. An answer to this question requires an analysis of the statute creating the water supply bank.

Idaho Code §§ 42-1761 to 42-1766 (Supp. 1988) create the water supply bank. Section 42-1762 authorizes the water resource board to "purchase, lease, rent or otherwise obtain water rights to be credited to the water supply bank." This section further provides that "[t]he water rights may be retained in the water supply bank for a period as determined by the board, all under such provisions as are specified in the terms of the purchase or lease."

Idaho Code § 42-1763 (Supp. 1988) provides for the leasing or renting of "[d]ecreed, licensed or permitted water rights" out of the water supply bank to end users. The same section also states that "[t]he terms and conditions of any such lease or rental must be approved by the director of the department of water resources."

Section 42-1764 limits the tolling of the forfeiture period to leases or rentals "acquired pursuant to section 42-1763" that have been "approved." Since section 42-1763 is limited to leases or rentals to end users and since the only approval specified in the Water Supply Bank Act concerns leases or rentals to end users pursuant to section 42-1763, it appears that the legislature intended to limit the tolling of the forfeiture period under section 42-1764 to those leases or rentals of water from the bank to an end user that have been approved by the director. This conclusion is further supported by the fact that section 42-1764 does not by its terms refer to section 42-1762, which is the

---

(Footnote Continued)
forfeiture time period. The Idaho courts have recognized several defenses to forfeiture. See Jenkins v. State, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).

provision authorizing the board to "purchase, lease, rent or otherwise obtain water rights" for the water supply bank.

Because of the grammatical structure of the second sentence of section 42-1764, however, the argument that the forfeiture period is only tolled when water committed to the water supply bank is withdrawn and put to use by a lessee is not without doubt. The sentence states: "Leases or rental of water rights acquired pursuant to section 42-1763, Idaho Code, shall not be subject to forfeiture under section 42-222(2), Idaho Code, provided that the rental agreements have been approved." This statement is a non sequitur. The subject of this sentence is the phrase "leases or rental." Section 42-222(2) does not affect leases or rentals, however; it affects water rights. Despite this grammatical problem, the specific reference back to section 42-1763 still lends support to the conclusion that the legislature intended to toll the forfeiture period only for approved leases from the water supply bank.

Another interpretation problem with section 42-1764 is that the last sentence of section 42-1763 is also the first sentence of section 42-1764. This repeat of a sentence in a successive section is not easily explained. Arguably, this redundancy supports the interpretation that the second sentence of section 42-1764 was intended to limit the tolling of the forfeiture period to those leases approved pursuant to section 42-1763. An interpretation that results in a redundancy is not favored, however. State v. Kozlowski, 143 Ariz. 137, 692 P.2d 316 (Ct. App. 1984). Thus, if the first sentence of 42-1764 is not treated as a redundancy, then it must have a different meaning from the last sentence of section 42-1763. The context of sections 42-1761 to 42-1764 suggests that it may refer to leases or rentals either to the water supply bank or from the water supply bank.

Because of these two ambiguities, a court could interpret section 42-1764 in light of apparent legislative purpose and public policy. State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614 (1981); Black v. Reynolds, 109 Idaho 277, 707 P.2d 388 (1985); 2A N. Singer, Sutherland Statutory Construction § 45.09 (4th ed. 1984). According to section 42-1761, the purposes of the water supply bank are to "make use of and obtain the highest duty for beneficial use from water, provide a source of adequate water supplies to benefit new and supplemental water uses, and provide a source of funding for improving water user facilities and efficiencies." These legislative policy considerations support a

broad interpretation of the Water Supply Bank Act that would result in a tolling of the forfeiture statute when a water right is "approved" by the board for placement into the water supply bank.

A water user would not want to place his water right in the water supply bank if he risked forfeiture by making the placement. Yet, the construction that the tolling of the forfeiture period occurs only upon approval of a lease from the bank could lead to this result in some situations. Thus, if the apparent statutory policy is to be fully achieved, the acceptance and retention of water rights by the water supply bank should be sufficient to toll the forfeiture period without requiring the subsequent lease or rental and use of the water by an end user.

In conclusion, there are two possible interpretations of section 42-1764. On its face, it seems to provide that the forfeiture provisions of section 42-222(2) are tolled only when a water right is accepted and subsequently rented out to another user, and then only if the director has approved the rental. On the other hand, an examination of the statutory language and of the purposes of the water supply bank seems to indicate that the forfeiture period should be tolled whenever a water right is placed into the water supply bank. Because both interpretations are plausible, we are unable to provide a definite answer to your question and suggest that you seek legislative clarification on this matter.

Authorities Considered:

1. Idaho Statutes

Idaho Code § 42-222 (Supp. 1988).
Idaho Code § 42-1761 through -1766 (Supp. 1988).
Act of Feb. 25, 1899, § 3, 1899 Idaho Sess. Laws 386.

2. Idaho Cases

Black v. Reynolds, 109 Idaho 277, 707 P.2d 388 (1985).
Graham v Leek, 65 Idaho 279, 287, 144 P.2d 475, 479 (1943).
Jenkins v. State, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).
Nicolaus v. Bodine, 92 Idaho 639, 641, 448 P.2d 645, 647 (1968).
State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614 (1981).

3. Other Cases

State v. Kozlowski, 143 Ariz. 137, 692 P.2d 316 (Ct. App. 1984).

4. Other Authorities

2A N. Singer, Sutherland, Statutory Construction § 45.09 (4th ed. 1984).
Minutes of Idaho House of Representatives Resource and Conservation Committee, February 9, 15, 19 and 23 (1979).
Minutes of Idaho Senate Resources and Environment Committee, March 16 and 21 (1979).
Water Supply Bank Rules, IDAPA 37.D.1.-2,6. (October, 1980).

Dated this 4TH day of October, 1988.

ATTORNEY GENERAL
State of Idaho

JIM JONES

ANALYSIS BY:

Clive J. Strong
Steve Strack
Phil Rassier

Deputy Attorneys General
Natural Resources Division