

Robert L. Harris (ISB #7018)
rharris@holdenlegal.com
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Clinton Aston

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 82640 IN THE
NAME OF CLINTON ASTON

**ASTON'S EXCEPTIONS TO
PRELIMINARY ORDER APPROVING
TRANSFER**

Applicant Clinton Aston, (hereinafter "Aston" or the "Applicant"), by and through his attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits *Aston's Exceptions to Preliminary Order Approving Transfer*. IDAPA 37.01.01 "contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of Idaho." Rule 001.02.¹ Transfer No. 82640 (hereinafter "82640") is a contested case before the Idaho Department of Water Resources' ("IDWR" or "Department"). These exceptions are being submitted to the Director of the Idaho Department of Water Resources, Gary Spackman, (hereinafter, the "Director") pursuant to Idaho Code § 67-5245(3) and Rule 730.02.c, and are offered in support of *Aston's Petition for the Director to Review Preliminary Order Approving Transfer* filed contemporaneously herewith. These exceptions are submitted in

¹ Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

response to the *Preliminary Order Approving Transfer* issued on August 5, 2019 (hereinafter, “Preliminary Order”) by Hearing Officer James Cefalo (hereinafter, the “Hearing Officer”).

I. STANDARD OF REVIEW

The *Preliminary Order* is a preliminary order as defined in IDAPA 37.01.01.730.01 because it was “issued by a person other than agency head . . . ,” which will become a final order of the agency “unless reviewed by the agency head (or the agency’s head’s designee) pursuant to Section 67-5245, Idaho Code.” The Hearing Officer is a person other than the agency head, and therefore, because it is a preliminary order, it is subject to an appeal within the agency to the agency head. The petition must be filed with the Department within fourteen days (14) after the service date of the *Preliminary Order* (Idaho Code § 67-5245(3) and IDAPA 37.01.01.730.01.c), which, in this case, is no later than 5:00 p.m. on August 19, 2019.

Aston has elected not to file a petition for reconsideration with the Hearing Officer, which is permitted pursuant to Rule 730.02.a. A petition for reconsideration is not mandatory for Aston to exhaust his administrative remedies. See FEREDAY ET AL., IDAHO WATER LAW HANDBOOK, THE ACQUISITION, USE, TRANSFER, ADMINISTRATION, AND MANAGEMENT OF WATER RIGHTS IN IDAHO, at 115 (February 2019). The matter should now be decided by the Director.

Idaho Code § 67-5245(7) provides that the Director is not bound by the fact-finding and analysis of the Hearing Officer in the *Preliminary Order*. The Director “shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing.” In other words, the Director’s review is akin to a *de novo* review in a court setting. “The term ‘de novo’ generally means a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of previous hearing. On such a hearing the court hears the matter as a court of original and not appellate jurisdiction.” *Knight*

v. Department of Ins., State of Idaho, 119 Idaho 591, 808 P.2d 1336 (Idaho App. 1991) (quoting *Beker Industries, Inc. v. Georgetown Irrigation District*, 101 Idaho 187, 190, 610 P.2d 546, 549 (1980)).

In reviewing the evidence presented at the hearing in this matter, “[t]he agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” Idaho Code § 67-5251; Rule 600. The Director may therefore step into the shoes of the Hearing Officer and make factual findings and legal conclusions as though he was the hearing officer in the first place. The Director may further “schedule oral argument in the matter before issuing a final order[.]” and may also “remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.” Rule 730.01.d. Opposing parties “shall have fourteen (14) days to respond to any party’s appeal within the agency.” *Id.*

In addition, “[t]he agency head (or designee) may review the preliminary order on its own motion.” IDAPA 37.01.01.730.01.c. As of the date of submission of these exceptions, the Director has not provided notice of a motion to review the *Preliminary Order* on his own.

II. PROCEDURAL HISTORY

The procedural history associated with the 82640 contested case is well described on pages 1-3 of the *Preliminary Order*. Aston does not desire to add any additional detail to this procedural history.

III. BACKGROUND

Clinton Aston purchased the land to which Water Right No. 13-4120 (hereinafter “13-4120”) and an 87-acre portion of Water Right No. 13-2209 (hereinafter “13-2209” for entire water right, and “13-8026” for the 87-acre portion of this water right associated with Aston’s property)

are appurtenant—and are the rights subject to 82640—in July of 2004. *Testimony of Clinton Aston*;² IDWR Exhibit 1. As the new owner of these rights, Aston fast became the target of neighbors that have attempted to re-write history while at the same time becoming the first person to blame whenever water issues arose. This is the case even though Aston does not enjoy the benefits of being entitled to any surface water from ownership of shares in the Weston Creek Irrigation Company, and is left to spend money from already-thin crop revenue margins on expensive electricity to pump ground water for his farming operations. This economic reality—and Aston’s economic disadvantage—has been the motivating force behind Aston’s efforts to modernize his farm by installing a variable speed drive pump and efficient center pivots to maximize the efficient use of water and minimize his use of electricity.

As part of Aston’s efforts to improve his farm, he has also responsibly attempted to address the status of the water rights associated with his farm. As is unfortunately the norm in the Bear River Basin of Idaho, where the last comprehensive water rights adjudication occurred nearly a century ago, water rights such as 13-4120 (a statutory claim) and 13-8026 had not had their elements verified and/or updated prior to the filing of 82640. In an effort to clean up the water rights record, 82460 was filed seeking to change the point of diversion and place of use for 13-8026 and proposes to change the place of use for statutory claim 13-4120. However, despite these changes on paper, both rights have been diverted from a well located in the NWNE, Section 8, T16S, R38E (the “Aston Well”) since the 1960s and the proposed point of diversion change to 13-

² There is no official transcript of the hearings associated with 82640. Aston has made efforts to transcribe portions of the hearing recording but given the limited time to file exceptions with the Director, not all the hearings have been transcribed. Where the hearing has been transcribed, Aston will quote from and cite to the transcription. Otherwise, Aston has referred to his notes and recollection from the hearing and cite generally to the testimony provided at the hearing.

8026 was submitted to update this right to where water has been diverted pursuant to this right for decades. *Preliminary Order* at 10 (¶54).

Aston originally only wanted to address 13-4120, not 13-8026, as 13-2209 (the parent right to 13-8026) had become the subject of significant controversy because of the localized actions and efforts of Jay Fannesbeck as described in more detail herein. However, Aston was directed by James Cefalo, the Water Resources Program Manager at the Eastern Region Office of IDWR, to include 13-8026 because it covered some of the same acres as 13-4120 in the transfer application that would eventually be numbered as 82640. As expected, Fannesbeck protested 82640 and encouraged others to protest as well. By the time the fourth day of hearings had occurred, all the protestants had either withdrawn their protests or had their protests dismissed, except for Fannesbeck and the Spradlins. It is fully anticipated that they will file exceptions with the Director, and for that reason, Aston has decided to file exceptions as well.

The *Preliminary Order* for 82640 is the result of evidence obtained through four (4) total days of hearings and review of voluminous pages of exhibits introduced at those hearings. What made the hearings particularly challenging were the efforts of Jay Fannesbeck to use the hearing on 82640 as a forum for him to attempt to rewrite history and assert his theories of why he should end up with ownership of all of 13-2209 (a previously licensed water right) based upon a convoluted and complicated theory contrary to recorded documents and the documents associated with the existing water right license for 13-2209. Accordingly, the Hearing Officer should be commended for his excellent work in sorting through the mountain of evidence as quickly and thoroughly as he did. These efforts are reminiscent of the following: “At the outset, it is important to commend the lengthy and scholarly opinion written by the district judge in this matter. The issues presented by the parties are extraordinarily complex and are matters of first impression. As

exemplified by the Director's 46 page Relief Order and the district judge's 126 page decision, there are no easy answers." *American Falls Reservoir District No. 2 v. Idaho Dept' of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 441 (2007) (the "AFRD#2 Case"). However, just like in the AFRD#2 Case, where the Idaho Supreme Court reversed the district court, the Director should also reach a different conclusion on the portions of the Hearing Officer's decision challenged herein, specifically, that a portion of 13-4120 was forfeited and that no exceptions to forfeiture (either statutory or common law) apply.

The findings of fact in the *Preliminary Order* are broken into the following sections:

1. Ownership of Water Right 13-2209;
2. Ownership of Water Right 13-4120;
3. Validity of Water Right 13-4120; and
4. Point of Diversion Change.

Aston is only raising exceptions to the third findings of fact section (Validity of Water Right 13-4120).

The analysis portion of the *Preliminary Order* is broken into the following sections:

1. Ownership of Water Right 13-8026 (13-2209);
2. Authority to Transfer Water Right 13-1420;
3. Validity of Water Right 13-4120;
4. Forfeiture Analysis;
5. Validity of Water Right 13-2209;
6. Ownership of Aston Well;
7. Injury to Existing Water Rights;
8. Enlargement;
9. Conservation of Water Resources; and
10. Local Public Interest

Aston is only raising exceptions to the fourth section (Validity of Water Right 13-4120) and fifth section (Forfeiture Analysis).

Aston's position is that the Hearing Officer's Preliminary Order was correct, except for those findings relating to forfeiture of 13-4120. Those findings have significant repercussions for Aston, as without additional water right acres, he will have no choice but to remove one of his

center pivots at great cost to him in the short term and long term. Based on the evidence presented, the Hearing Officer should have concluded that only 16 acres of 13-4120 should have been found to either not have been initially developed or otherwise forfeited. With this change to the *Preliminary Order*, 82640 should have been approved such that 13-8206 and 13-4120 in combination can irrigate no more than 171 total acres, not 141 acres as the *Preliminary Order* concludes.

IV. ARGUMENT

A. Water right forfeiture legal standards and analysis.

Before discussing the specific exceptions to the *Preliminary Order*, it is important to describe the legal standards and analysis associated with water right forfeiture.

Water right forfeiture is not contained in Idaho's Constitution. Rather, its basis in law is statutory and is found in Idaho Code § 42-222:

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; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section [42-223](#), Idaho Code.

Idaho Code § 42-222(2) (emphasis added).

The Idaho Supreme Court has held that “forfeitures are disfavored under Idaho law” and that disfavor is evident by the fact that “there are defenses and exceptions to forfeiture.” *Barnes v. Jackson*, 163 Idaho 194, 198, 408 P.3d 1266, 1270 (2018) (citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999)). Because a determination of water right

forfeiture takes away a property right³, the evidentiary standard for proving a water right forfeiture is high: “The party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by **clear and convincing evidence.**” *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2003) (citing *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944)) (emphasis added). More on the clear and convincing evidentiary standard is provided below.

Idaho Code § 42-223—cited to in Idaho Code § 42-222(2)—sets forth statutory defenses to forfeiture and describes its own application thusly:

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.**

Idaho Code § 42-223 (emphasis added). Thus, if the “failure to apply the water to beneficial use” for five years is caused by any of the “conditions specified in any subsection of” § 42-223, the water user has a viable defense to forfeiture. *Id.*

Based upon a prior Idaho Supreme Court case, the Department has jurisdiction to evaluate water right forfeiture as part of its review of a transfer application:

[T]he director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights. . . . The director is statutorily required to examine all evidence of whether the proposed transfer will injury other water rights or constitute an enlargement of the original right, and evidence which demonstrates that the right sought to be transferred has been abandoned or forfeited, is probative as to whether that transfer would injury other water rights.

³ A water right is real property. Idaho Code § 55-101; *see also Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). A water right is a “complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied.” Idaho Code § 42-101. This is a longstanding principle of Idaho water law. *See Koon v. Empey*, 40 Idaho 6, ___, 231 P. 1097, 1098 (1924) (“there can be no question that a water right becomes appurtenant to the land to which it has been applied and upon which the water has been used for irrigation.”).

Jenkins, v. State, Dep't of Resources, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). More recently, the Idaho Supreme Court has held that “[a]ny claim that the water right had been abandoned or forfeited in whole or in part by nonuse would be an issue raised either by the Department or a third party. Ordinarily, issues of forfeiture or abandonment are not adjudicated in a transfer proceeding, although they can be.” *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003).

Additionally, just like the Department’s obligation to protect against injury, enlargement, etc., described in Idaho Code § 42-222—even if those issues are not specifically raised by protestants—the Department is required to consider defenses to forfeiture in a contested case.

Based on the above-described statutory provisions—and the common-law recognized “resumption of use” doctrine—a three-step analysis is required to determine whether a water right has been forfeited:

- (1) whether there has been five years of non-use of the water right, Idaho Code § 42-222(2);
- (2) whether a statutory exception applies to prevent the forfeiture, Idaho Code § 42-223; and
- (3) whether any common law defense to forfeiture applies, such as if use of the water right was resumed before a third party asserted a claim of right to the forfeited water, *Sagewillow*, 138 Idaho at 836, 70 P.3d at 674 (quoting *Carrington*, 65 Idaho at 531–32, 147 P.2d at 1011).

Although Idaho Code § 42-222 does not explicitly provide for partial forfeiture, the Idaho Supreme Court has explained that “that partial forfeiture is provided for by [Idaho Code] § 42-222(2).” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). Accordingly, the three-part forfeiture analysis described herein applies identically to both complete forfeiture and partial forfeiture. *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680.

In a legal proceeding, the “concept of a burden of persuasion ordinarily applies to questions of fact, and ordinarily is expressed in one of three ways: (1) preponderance of the evidence; (2) clear and convincing evidence; and (3) proof beyond a reasonable doubt.” 29 AM. JUR. 2D Evidence § 170. “Clear and convincing evidence refers to a degree of proof greater than a mere preponderance.” *Idaho State Barr v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed).

As described above, “the party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by **clear and convincing evidence**.” *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680 (emphasis added) (citing *Carrington*, 65 Idaho 525, 147 P.2d 1009). Similarly, the absence of a defense or exception to forfeiture must be proven by clear and convincing evidence by the proponents of forfeiture, who in this matter are either the protestants or the Department:

Although the owner of the water right has the burden of raising defenses to statutory forfeiture, *Jenkins v. State, Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982), **the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense.** *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) (the party asserting there was a forfeiture of a senior water right had the burden of persuasion on issue that there was no resumption of use of the senior water right before the party's appropriation). See also *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (parties alleging forfeiture of water right have burden of proof).

Sagewillow, 138 Idaho at 842, 70 P.3d at 680 (emphasis added). Accordingly, the law is clear that a proponent of forfeiture—either the protestants or the Department in this matter—must disprove forfeiture defenses to a standard of clear and convincing.

“Clear and convincing evidence is generally understood to be ‘evidence indicating that the thing to be proved is highly probably or reasonably certain.’” *State v. Kimball*, 145 Idaho 542, 181 P.3d 468, 472 (2008) (citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060

(2006)). “It is not a burden of convincing one that the facts which are asserted are certainly true or that they are almost certainly true, but it is greater than a burden of convincing one that the facts are more probably true than not true.” 29 AM. JUR. 2D EVIDENCE § 170. The Idaho Civil Jury Instructions describe clear and convincing evidence as follows:

IDJI 1.20.2 – Burden of proof – clear and convincing evidence

INSTRUCTION NO. _____

When I say a party has the burden of proof on a proposition by clear and convincing evidence, I mean you must be persuaded that it is highly probable that such proposition is true. This is a higher burden than the general burden that the proposition is more probably true than not true.

This is different than the preponderance of the evidence standard, which the Idaho Civil Jury Instructions describes as follows:

IDJI 1.20.1 – Burden of proof – preponderance of evidence

INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression “if you find” or “if you decide,” I mean you must be persuaded that the proposition is more probably true than not true.

Relative to these evidentiary standards, the Idaho Civil Jury Instructions therefore embody the following principle: “If we are to give meaning to the phrase ‘clear and convincing proof,’ it must mean that the proponent must show that the facts which he asserts are **more than merely probably true; that the probabilities that they are great that they are true.**” Bryan M. Bennett, *Evidence: Clear and Convincing Proof: Appellate Review*, California Law Review Vol. 32, Issue 1, at 76-77 (1944) (emphasis added).

Accordingly, the law is well-defined that a proponent of forfeiture—either the protestants or the Department in this case—must disprove the defense to a standard of clear and convincing evidence, which means that in disproving the defense, the forfeiture proponent must prove that it

is highly probable (or great) that the defense does not apply. This is a difficult standard, one that is just below that of “beyond a reasonable doubt” standard applied in criminal proceedings.

There are no cases or other legal authority which provides that the Department has to establish evidence to a lesser evidentiary standard than that of clear and convincing evidence—the Department can examine the “question of abandonment and forfeiture” (*Jenkins, v. State, Dep’t of Resources*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982)), but it must do so to a clear and convincing evidence standard.

To be clear, however, Aston acknowledges that there remains an initial burden on him as the transfer applicant to provide some evidence showing that irrigation occurred on the property before the burden shifts to a proponent of forfeiture. This initial showing is analogous to an initial showing of material injury in a delivery call proceeding before the burden shifts to a junior water right holder to challenge the delivery call. See *AFRD#2* at 878, 154 P.3d at 449 (“Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior’s call.”).

As described below, Aston’s position is that the Hearing Officer’s evidence of forfeiture does not meet the clear and convincing evidentiary standard for 30 acres of 13-4120. It is critical to correctly decide issues of forfeiture, as this decision is sure to be legal precedent for claims to be filed in the forthcoming Bear River Basin Adjudication.

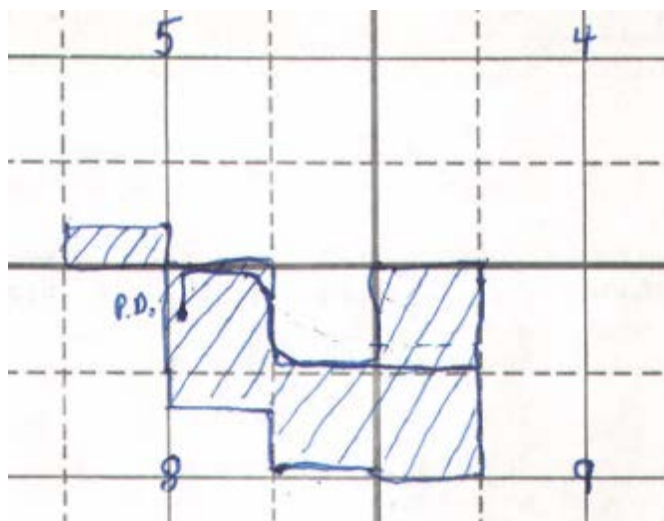
B. In this case, neither the Spradlins nor Fannesbeck were advocating for a finding of water right forfeiture, rather, Fannesbeck only asserted that 13-4120 was never developed and the Spradlins asserted local well interference.

Aston was a bona fide purchaser of the Sid Schvaneveldt farm in 2004 and was informed that he had 187 acres of water right both verbally and in writing. Testimony of Clinton Aston;

Exhibit 336 (bill of sale providing that sale included “IDAHO WATER RIGHT NUMBER 13-4120 FOR 2.8 CFS.”). 13-4120 is a statutory claim filed on January 18, 1980. Exhibit 110. The place of use description and map on the statutory claim form are reproduced here:

| T | R | SEC. | NE¼ | | | | NW¼ | | | | SW¼ | | | | SE¼ | | | | TOTAL |
|-----|-----|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-------|
| | | | NE¼ | NW¼ | SW¼ | SE¼ | NE¼ | NW¼ | SW¼ | SE¼ | NE¼ | NW¼ | SW¼ | SE¼ | NE¼ | NW¼ | SW¼ | SE¼ | |
| 16S | 38E | 5 | | | | | | | | | | | | 16 | | | | | 16 |
| 16S | 38E | 8 | 3 | 36 | 15 | 37 | | | | | | | | | | | | | 91 |
| 16S | 38E | 9 | | | | | | 40 | 40 | | | | | | | | | | 80 |
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No. of acres 187



Of note on the map is the darker pen line that depicted the irrigation distribution system proceeding from the well location to the north, then east, then south, and then east to the northwest corner of the SWNW of Section 9, 16S, R38E. At this point, the irrigation system splits and runs both (1) north to the northwest corner of Section 9, and (2) east to the center quarter corner of the NW1/4 of Section 9. The map shows the NWNW of Section 9 as being irrigated.

Jay Fannesbeck adamantly and persistently argued throughout these proceedings that 13-4120 was never used to irrigate the NWNW of Section 9, and yet, it was his own witness, El Ray Balls—Sid and Charlotte Schvaneveldt’s brother-in-law—who provided testimony that he moved pipe across the NWNW of Section 9 for at least one year in the early 1960s prior to the change to Idaho law effective March 1963 to appropriate water rights. *Preliminary Order* at 8 (¶ 39). Fannesbeck made it very clear that he was not advocating or arguing for forfeiture if the NWNW acres were developed—rather, he was arguing that the acres were never developed in the first place:

RH: Okay. So that was 3 years ago, what about 4 years ago, did you use the pump? Part of what I’m trying to do, Jay, is just understand what your view of forfeiture is to see if you believe that there’s rights that should be forfeited in this case. That’s why I’m asking these questions.

JF: You’re kicking a dead dog because you don’t understand. **I am not fighting forfeiture**, I’m fighting the fact that we’re talking about 40 acres that don’t exist.

RH: If the hearing officer were to find ElRay Balls testimony persuasive as he did before and say the water right was developed on the 40 acres prior to 1963, are you then saying then “I’m good with that, and I’m not saying that anything subsequent would then forfeit that right.”?

JF: No, maybe James and I aren’t on the same page. No, I would say no.

RH: So, you are contesting that it has been forfeited?

JF: **I’m not contesting it’s forfeited, I’m consistently saying it’s never existed. There’s a difference between forfeiting water has been put to a beneficial use and has been used for years and then abandoned or forfeited, but this has never even existed.**

RH: But, in your own words, you’re not here to contest forfeiture if the right has been developed, and I understand your position, saying very strongly that you don’t believe the water right was ever developed or perfected in the first place to be forfeited?

JF: Bingo.

JC: You’ve attempted this question 5 times, Mr. Harris.

RH: But I think that he just answered it, so, no I can move on.

JF: You can’t forfeit something that never existed.

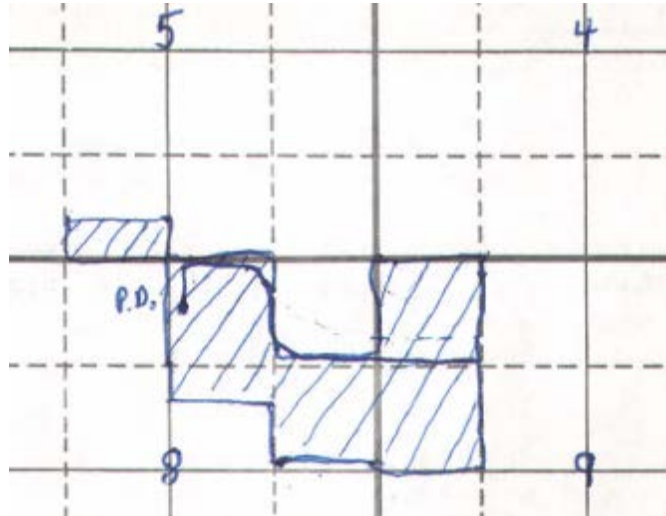
Hearing Recording, Part 4, Beginning at approximately 23:00 through 25:37 (RH is Rob Harris; JF is Jay Fannesbeck; and JC is Hearing Officer James Cefalo).⁴ Accordingly, where the Hearing Officer found that portions of the NWNW of Section 9 were developed under 13-4120, and where none of the protestants advocated for forfeiture, this should have significantly factored into the Hearing Officer's decision. While the Hearing Officer still has jurisdiction to consider forfeiture questions, the fact that the protestants did not advocate for forfeiture cuts against a finding that the NWNW of Section 9 acres were forfeited by clear and convincing evidence, particularly given both the evidence that it was irrigated and/or that defenses to forfeiture that are applicable.

C. Based on the evidence presented at the hearing, the Hearing Officer was correct to conclude that only 177 acres under 13-4120 were originally developed because there was a lack of an initial showing that the north pasture was irrigated.

The historic irrigation of the 16-acre "pasture" area within the SW1/4 of Section 5 was an issue at the hearing as it was part of the claimed place of use for 13-4120. The pasture area is divided into a 6-acre south pasture, and a 10-acre north pasture. *Preliminary Order* at 20. The pasture area was not sold to Aston in 2004, and at the hearing, Aston did not recollect having conversations with Sid Schvaneveldt about how this pasture area was irrigated. Testimony of Clinton Aston. The original statutory claim did describe 16 acres in Section 5, which matches the acreage of what the Schvaneveldts owned, and that was the basis for Aston's amended statutory claim for these Section 5 lands. Testimony of Clinton Aston; Exhibit 111. However, after noting the 16 acres in the land list, the Hearing Officer found the map associated with the original claim as "clear" evidence that only the south 6-acre pasture was irrigated. Specifically, the Hearing Officer held that "[a]lthough the map submitted with the original claim for water right 13-4120 is

⁴ The Spradlins only presented argument and testimony relating to impacts to their water quality. No testimony was provided by them regarding forfeiture during the relevant time period (they moved to the area in the early 1990s, which was after the relevant time period of 1966-1986).

rudimentary, it is **clear** that the north pasture in Section 5 was not included in the depicted irrigation place of use.” *Preliminary Order* at 19 (emphasis added). Here, again, there is the map, depicting only the south pasture area as irrigated:



Both Charlotte Schvaneveldt and Shaun Schvaneveldt testified that a culvert was under the road running along the Section 5 and Section 8 section line where the mainline was run through to irrigate the south pasture. Additionally, Charlotte Schvaneveldt testified that she did not recall the north pasture being irrigated, that she actually moved the pipe on the south pasture and did not recall the mainline extending to the north pasture, and her home is located directly east of and adjacent to her house. Testimony of Charlotte Schvaneveldt. In other words, the pasture was literally located outside of her window.

Between Sid’s statutory claim map, Charlotte’s testimony and experience actually moving pipe on the south pasture, and any lack of information provided by Sid to Aston about irrigating the north pasture, the Hearing Officer was correct to conclude that the north pasture and its associated 10-acres in size was not irrigated and therefore was not originally developed under 13-4120. It is likely that Sid simply over-estimated the acreage of the south pasture depicted on the

map. Based on this, there was no initial showing of irrigation on the north pasture that would then shift the burden of proof to a proponent of forfeiture. It was therefore correct for the Hearing Officer to conclude that a beneficial use water right was established for 13-4120 for 2.80 cfs for the irrigation of 177 acres.

The same cannot be said of the portion of 13-4120 associated with the NWNW of Section 9 that was deemed forfeited, which is addressed in the next section.

D. Based on the evidence presented at the hearing, the Hearing Officer was incorrect to conclude that 30 acres under 13-4120 located in the NWNW of Section 9 were forfeited because there was an initial showing that the acres were irrigated at times between 1966 through 1986, and after burden shifting, there was not clear and convincing evidence that these acres were not irrigated.

The statutory claim was submitted to IDWR on January 18, 1980, which was during the timeframe of 1966-1986 that the Hearing Officer found to be relevant. Inconsistently, however, the map that the Hearing Officer found to be “clear” relating to the irrigation of only the south pasture was not described or cited to as clear evidence that the NWNW of Section 9 was irrigated. On this point, a proponent of forfeiture cannot have it both ways. Aston’s position is that the map should be viewed consistently for both the Section 5 lands and the NWNW of Section 9. Consistently viewed, this means that Sid Schvaneveldt described in his statutory claim—which is an affidavit with a notary signature block⁵—that irrigation had occurred at or around the 1979 irrigation season.

⁵ The notary block for the 13-4120 statutory claim is depicted here:

There is ample additional evidence that the NWNW of Section 9 was irrigated. Testimony from ElRay Balls at the hearing was that mainline was placed through a culvert under the road between the NWNW and SWNW of Section 9. Aston removed this culvert when he installed one of his pivots and had to cut a piece of aluminum mainline still in the culvert that always stayed there that was connected with an elbow. Fortunately, he took a photo (Exhibit 115):



As a side issue, but important to clarify concerning this culvert and another culvert to drain an unnamed natural spring channel, the testimony at the first hearing in February 2019 may not have been as clear as it could have been, and that was complicated by the fact that it was not

| | |
|---------------------------|-------|
| State of Idaho |) |
| |) ss. |
| County of <u>Franklin</u> |) |

Be it known that the undersigned, being duly sworn, deposes and says that he, she, they subscribed the foregoing claim to a water right, together with all attached information, and that the matters and facts therein are true to the best of the affiant's knowledge.

Sworn to before me this 28th day of December, 19 79

Libby J. Schwaner
(Claimant)

[Signature]
Notary Public
Residing at Preston, Idaho

My commission expires Lifetime

possible at that time to take photographs of the two culverts under the road because of snow. After the snow melted, Aston was able to take pictures. There are currently two culverts as depicted in this picture (Exhibit 138):



The bottom line is that the culvert on the left is a newer culvert—paid for by Franklin County—where the drain now crosses under the road. However, this is where the original culvert depicted in Exhibit 115 was at. The culvert to the right on the photo was the original drain went, but the drain had to be moved to accommodate installation of the pivot center point.

Additionally, when Aston purchased the property, he was told by Sid Schvaneveldt about the water rights with the farm, and he said that the NWNW of Section 9 was irrigated, albeit not every year and not very often because the irrigation system’s reduction in size at the end of the

system made it hard to pressurize the system properly and it would require moving the mainline and pipe to the north side of the road. Testimony of Clinton Aston. For example, here is testimony from the July hearing on this issue:

RH: So, I'm talking about both the NWNW and the SWNW, so those are both in section 9. So, did you talk to Sid about the challenges of irrigating in section 9?

CA: Yeah, it wasn't when I first bought the farm. It would have been, who knows when, maybe a year or so after we talked about it. But I could remind you if you look at my bill of sale when I bought the farm, Sid put in there, it wasn't my desire, but Sid put in there the whole water right. He wanted to keep that intact. So, he put in there a statement, I can't remember exactly what it said, but basically that the 187 acres of water right 13-4120, he was pretty adamant, he had enough water issues, and he just wanted to keep it clean. He wanted the entire water right to stay together. In his mind, that was still applicable to that point. I have talked to Jeff Beckstead after our last hearing, and somewhere after June 26th, our deadline with our forfeiture thing, somewhere between that time frame, I think it was even after July 2nd, I can't tell you exactly the date, we talked about the water. And I asked him, I said "Do you remember talking to Sid about him keeping the water?" And he said "You know, I don't remember." But Trudy Austin was there, she's a part owner with him at U & I Furniture, and she was the real estate agent for the sale of that property from Sid to Jeff Beckstead. She was working at the time as a real estate agent. And she goes "Yeah, Sid absolutely wanted to keep the water with the well." So, he was aware of that.

RH: So, just in terms of, I think you already testified of the challenges of irrigating here in the southwest northwest because of the Anker ditch and the pressure issues that you had, so I don't need you to restate those. But you did say that Jeff did buy the property in 1996.

CA: Yes.

RH: Did you discuss with Sid the northwest northwest and how it was irrigated? Did you have any discussions prior to buying the property?

CA: Not prior to buying the property.

RH: Did you have discussions with him after purchasing the property?

CA: Yes.

RH: Okay. You never irrigated this quarter quarter section?

CA: No.

RH: And that's because you didn't own it, right?

CA: Right.

RH: So, the information you have is based on conversations with Sid?

CA: Yes.

RH: Okay, so what did he tell you about how that was irrigated?

CA: Basically that they would just move the portable main line from where, I'm just going to use a reference point, from my center point where my pivot is, the main line went the other way and they would move that, and they would move it under the road through that culvert and then go north and south, and then they ran

hand lines, which I think ElRay Balls testified in the last hearing, they strung pipe out going east and west.

Hearing Recording, Part 3, 23:45-26:45.

As described above, Sid Schvaneveldt submitted the statutory claim map in January of 1980 alleging that the NWNW of Section 9 was irrigated. If it was not irrigated at the time, then Sid should not and would not have included it. It is unfortunate that Sid is no longer alive to testify of this, but what we do know is that Sid never took any action—formal or informal—to disavow the statutory claim map and its depiction of the NWNW of Section 9 as being irrigated. The veracity of this position is supported by the very same credibility given to the lands in Section 5. This, however, was not discussed in the *Preliminary Order* as evidence of irrigation in the NWNW of Section 9. Rather, in the *Preliminary Order*, the Hearing Officer relied heavily upon Charlotte Schvaneveldt's testimony. Charlotte's testimony is credible, but the substance of her testimony was summarized by the hearing officer testimony as follows: "She was personally involved in the daily irrigation activities of the farm from 1966 to 2004." *Preliminary Order* at 21. We think this overstates her testimony relative to the acres in the NWNW of Section 9. Charlotte did testify that she did not move irrigation pipe on this property, but she also testified that she did not move pipe as often later on (after she and Sid purchased the farm in 1971) and that her children did:

RH: Did you move pipe more when you owned it early on or did that change as you got older and had more kids?

CS: It was more after we bought it.

RH: And then as your kids got older, they would help more and more. Is that fair?

CS: Yeah, the girls. The boys were always younger.

Hearing Recording, Part 1 beginning at 43:20 (emphasis added). Charlotte also testified that she began working at Presto Products Company in Lewiston, Utah, in 1983. Accordingly, with her children growing up and moving pipe more frequently, and her full-time job at Presto, she would

not have been as involved with irrigation as she was previously. This is consistent with her testimony that she moved more pipe early on when the farm was first purchased.

Furthermore, the NWNW of Section 9 is not located outside of her window like the Section 5 lands are—rather, the NWNW of Section 9 is not visible from Charlotte’s home and is located approximately 1/3 to 1/2 mile away. Exhibits 100 through 103. Charlotte also testified that there was hay growing on the property at one time. Testimony of Charlotte Schvaneveldt. In our view, Sid’s statutory claim map and Charlotte’s testimony that she did not move pipe on the NWNW of Section 9 are not inconsistent. It is entirely probable and likely that Sid—whose main job at the time was farming—did irrigate this portion of the property sporadically and without notice or knowledge to Charlotte who was focused on her job and family.

As to evidence that the NWNW of Section 9 was not irrigated, some of the protestants’ witnesses offered testimony that they never saw this land irrigated. However, Jay Fonneseck moved to his home in 1982, and would not have occasion to observe this property every single day during the relevant time period. Several of the other witnesses suffer from the same evidentiary defect in that they did not observe the property every day. And because we are talking about taking a property right away, the evidentiary burden is high on this issue which certainly would require more than generally observing the property as not being irrigated.

Finally, ElRay Balls submitted a signed statement in a prior contested case stating: “That the use of this water was consistent on an annual basis until approximately years 1979 to 1985 when the weather conditions changed, and we were receiving excessive amounts of precipitation, and heaven was providing all the water we could use plus some.” Exhibit 149. While this will be discussed in more detail below, at a minimum, this statement from ElRay is beneficial in that it is evidence of above-normal precipitation that occurred between 1979 and 1985. Accordingly, it

would not have been as necessary for Sid to irrigate the NWNW of Section 9 as frequently as he may have had previously.

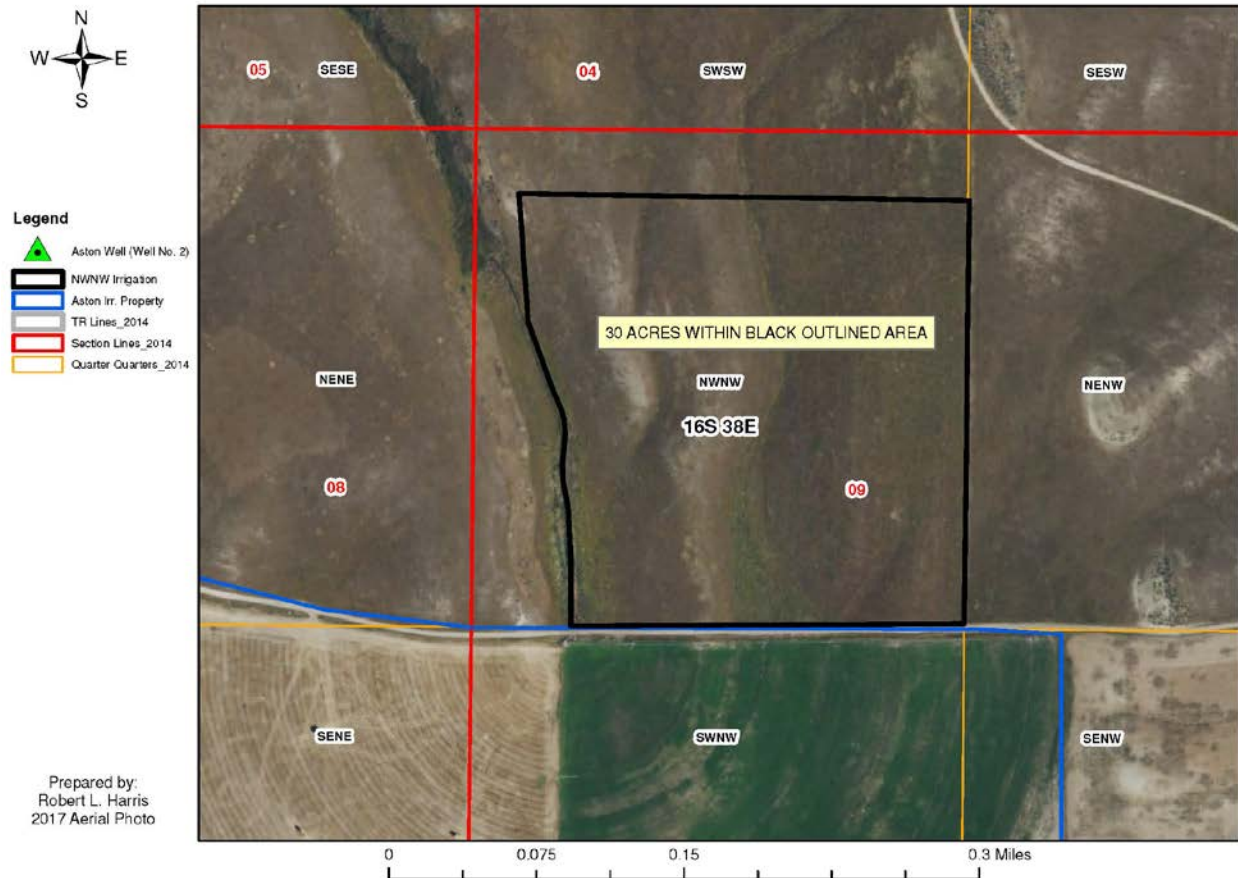
In summary, Aston has made an adequate initial showing that the NWNW of Section 9 was irrigated. This evidence is (1) from the 13-4120 sworn statutory claim and the credibility of the map associated with the statutory claim; (2) ElRay Balls' testimony that the property was irrigated and how it was irrigated; (3) that there is no evidence that Sid Schvaneveldt took any action—formal or informal—to disavow the map; (4) the existence of the culvert under the road to the NWNW of Section 9; (5) the existence of the aluminum mainline in the culvert; (6) Aston's testimony of what Sid told him about the water rights on the NWNW of Section 9; (7) the bill of sale describing the entirety of 13-4120; (8) Charlotte's testimony of her children moving more pipe as they got older; (9) the statement of ElRay Balls concerning weather conditions between 1979-1985⁶; and (10) that neither Fonnespeck nor the Spradlins advocated for forfeiture in these proceedings. This is more than sufficient evidence to now place the burden of proving forfeiture by clear and convincing evidence on the Hearing Officer.

With that burden of proof now on the Hearing Officer, the *Preliminary Order* concludes that it was “**highly unlikely** that the 36 acres in the NWNW of Section 9 were irrigated from 1966 to the present day.” Highly unlikely is not the same thing as clear and convincing evidence, which is admittedly a difficult standard to achieve. But this appears to be by design as forfeitures are disfavored because it takes away a property right. We invite the Director to carefully review the above-described evidence and render his own decision on whether a forfeiture occurred. In so doing, Aston desires to clarify that based upon the topography of the NWNW of Section 9 and the

⁶ The years 1986 and after are not discussed in this brief because the NWNW of Section 9 was placed in CRP and was therefore protected from forfeiture during this time period. These findings are not being challenged by Aston.

location of the culvert where the mainline crossed the road (close to the section line, but nevertheless off the line), the irrigated acres total 30 and that is all Aston is seeking a determination on. These 30 acres are depicted on this map are east of the spring drain channel, and if determined to be valid, will result in water rights with a combined place of use of 171 acres:

ASTON PETITION FOR EXCEPTIONS



E. Even if a forfeiture of a portion of 13-4120 occurred, there are both statutory and common law defenses to forfeiture that apply.

As described above, the absence of a defense or exception to forfeiture must be proven by clear and convincing evidence by the proponents of forfeiture:

Although the owner of the water right has the burden of raising defenses to statutory forfeiture, *Jenkins v. State, Department of Water Resources*, 103 Idaho 384, 647

P.2d 1256 (1982), **the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense.** *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) (the party asserting there was a forfeiture of a senior water right had the burden of persuasion on issue that there was no resumption of use of the senior water right before the party's appropriation). See also *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (parties alleging forfeiture of water right have burden of proof).

Sagewillow, 138 Idaho at 842, 70 P.3d at 680 (emphasis added). Accordingly, the law is clear that a proponent of forfeiture must disprove forfeiture defenses to a standard of clear and convincing.

Aston asserts that subsection (6) of Idaho Code § 42-223 applies and there is a lack of clear of convincing evidence that it does not:

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

Idaho Code § 42-223(6).

The circumstances over which Sid Schvaneveldt had no control were specific economic circumstances associated with his farm, specially the fact that his farm was only irrigated with ground water—generated with expensive electrical costs—with no access to shares that would entitle him to surface water. This was confirmed by ElRay Balls when he described how Lee Schvaneveldt sold his farm to Sid and ElRay. El Ray Balls testified at Disk 2, Section 5 at 47:45 at the February hearing as follows in response to questions from Jay Fonneseck (JF is Jay Fonneseck and EB is ElRay Balls):

JF: And was the farm you bought, the lower farm, was it considered an irrigated farm?

EB: Yes.

JF: And to make it irrigated what did Lee sell you to, so, you could irrigate the farm that you got [indiscernible] for the lower farm?

EB: **I got all the Weston Creek water** plus 1/4 interest in the well on #2 farm.

(emphasis added).

Economic considerations are clearly a circumstance envisioned and embodied under Idaho Code § 42-223(6) and defenses to forfeiture in general. In 2008, subsection (11) of Idaho Code § 42-223 was added to protect mining water rights during extended periods of nonuse “**due in whole or in part to mineral prices**” (emphasis added):

(11) No portion of any water right with a beneficial use related to mining, mineral processing or milling shall be lost or forfeited for nonuse, so long as the nonuse results from a closure, suspension or reduced production of the mine, processing facility or mill due in whole or in part to mineral prices, if the mining property has a valuable mineral, as defined in section [47-1205](#), Idaho Code, and the water right owner has maintained the property and mineral rights for potential future mineral production.

Just like with mining, agriculture can suffer from low commodity prices, and when such prices are present, a farmer must cut back on expenses and allocate and/or concentrate his resources in a manner that maximizes output. This is particularly true when irrigation can only occur when electricity is being paid for, which is what Sid Schvanaveldt had to suffer with. This is certainly a viable defense to forfeiture even under a preponderance of the evidence standard, The standard that the Hearing Officer must establish is by clear and convincing evidence that economic considerations are not a defense to forfeiture and in Sid’s case, that there is evidence in the record that either (1) electrical costs are not an issue that would deter irrigation activity or (2) that the commodity prices were such at the time for a small-time hay farmer that sufficient profit would occur with the utilization of electricity. There is no such evidence. Indeed, the evidence supports precisely the opposite.

There is ample evidence in the record about the difficulty of irrigating the NWNW of Section 9 as described by ElRay Balls and the testimony of others that the ground in the NWNW is hilly and higher in elevation above the gravel road that runs along its southern border. While anything is possible with unlimited resources, Lee and Jerry Schvaneveldt had limited resources, and it was too much work to continue to haul handlines back and forth on the farm to irrigate the NWNW of Section 9. Those work resources had to be concentrated where they would produce the most benefit for the time expended, and they were concentrated on other, more productive parts of the farm.

At the July hearing, Charlotte Schvaneveldt testified of the meager economic circumstances she was under farming, such as living on \$150 per month when she first moved to the farm, only a few years of profitability with the farm, the need to sell the NWNW of Section 9 in 1996, her need to obtain a job with Presto, Sid taking a second job with Presto in 1987 to make ends meet, and constant concern with electrical costs:

RH: Did anyone ever come to you and indicate that you were forfeiting your water rights?

CS: No.

RH: By concentrating water on other parts of the farm, was it your intent to forfeit water rights?

CS: No.

RH: Why did you eventually decide to sell the farm?

CS: Because of Sid's health for one reason, and it was getting a little more than we could handle, the 2 of us.

RH: Is it fair to say that the farm did not make you rich?

CS: No, not even close.

RH: Was that a difficult way to make a living?

CS: Yes, it is.

RH: And the biggest cost you had to deal with was the electricity?

CS: Yes.

RH: and you actually paid some of those bills and actually wrote checks to pay some of those power bills?

CS: Yes.

RH: Is that why you and Sid had to take a second job?

CS: Yes.

Hearing Recording, Part 1, 1:18:45 through 1:19:36 (emphasis added); See also testimony of Clinton Aston from February hearing describing state of farm and necessity for upgrades Disc 1, Section 2: Beginning at 56:20).

In short, relative to the 40 acres associated with the NWNW of Section 9, there is insufficient evidence in the record to support a finding by clear and convincing evidence that economic considerations did not factor into Sid's farming decisions to not farm these acres, and as a result, during the time period that the Hearing Officer found forfeiture, there was no forfeiture because a statutory exemption applied. Even Fonnesebeck agrees that economics are considered when deciding which farming practices to undertake:

RH: What was your observation of the farming of Schvaneveldt farm since you lived there in 1982? Would you consider it well-farmed, or do you think there were things that Sid could have done different?

JF: Can I choose option B and be very emphatic about it?

RH: Sure.

JF: He could have done a lot of things different.

RH: Like what?

JF: Like sometimes just get his ass out of bed in the morning and go farm.

RH: Do you think economics factored into his decisions on the farm?

JF: I think that that farm he had was a very good farm, and if he would have managed it, he would have been just fine.

RH: Do you have any financial statements or other evidence that shows that farm was profitable?

JF: Why would I?

RH: I'm just asking if you do.

JF: I don't.

RH: Do you have any evidence that is contrary to Charlotte's statement that they were profitable only a couple years on the farm? Do you have any reason to dispute that?

JF: Up in our area, turn around to your right, see that piece of property you're looking at? Where your pointer is right now, and you go up and over in that area. You don't have to move anything. Get your pointer back to the left. That property right in there is probably some of the best property in all of the valley up there. He was sitting on some of that

bottom ground right there, the soil is deeper than probably any other place up the creek and that piece of ground economically probably some of the best ground up there.

RH: He farmed that property.

JF: No, he wasn't farming. He, Sid, liked horses, and he didn't work the farm very good.

RH: Were you aware that both Charlotte and Sid had second jobs in order to support themselves?

JF: Oh yes.

RH: Did you have a second job while you farmed?

JF: Well, I'm farming right now and no.

RH: And your farm is mostly supported by Weston Creek irrigation company water?

JF: For the most part.

RH: And you occasionally use the well because of the delivery capacity issues, you don't exercise the water right very often?

JF: Well, for my farming operation, the well up there has always been a supplemental source of water, it's never been a primary source of water.

RH: So, you've never had to deal with power bills?

JF: Oh yes, I have.

RH: For what?

JF: I've had to run that well sometimes for 10, 12 days in a row and have to pay the power bill.

RH: Okay, but for the most part you've had surface water delivered that you can irrigate without paying a pump bill?

JF: Well, don't think that surface water is for nothing. It costs pretty dearly to have that surface water.

RH: Right, paying assessments on your shares?

JF: Right, and improvements, and pipe, and a lot of stuff.

RH: And so, economics does factor in to how you farm, you're trying to be as efficient as you can?

JF: Sure.

Hearing Recording, Disc 2, Part 1 at 25:50 through 29:33 (emphasis added).

Further, even if there is not a specific delineation of a defense to forfeiture for farmers because of economic considerations—like miners have—the absence of such a specific exemption does not mean the exemption does not apply as Idaho Code § 42-223 did not delineate all forfeiture defenses:

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.

It is important for all non-farmers to remember that there is no guaranteed outcome or profit when it comes to farming. Worrying about irrigating all acres just to cover them to avoid a forfeiture argument is surely not an area of concern for a farmer who is worrying about providing for his wife, children, themselves, their animals, and all others that depend on him or her. In addition to the many challenges associated with farming, the law should not be structured to take away their property rights when there is no economic benefit obtained from irrigating land that does not produce sufficiently or where the water so applied to those lands could be used elsewhere much more efficiently.

In the *Preliminary Order*, the Hearing Officer relied upon a decision from the SRBA (*Memorandum Decision and Order on Motion for Summary Judgment*, In Re SRBA Case No. 39576 (Subcase Nos. 63-02446, 63-02489, 63-02499) (Monarch Greenback, LLC) (2009) (hereinafter “*Monarch*”) concerning the interpretation of the scope of Idaho Code § 42-223(6). *Preliminary Order* at 22-23. In *Monarch*, an SRBA Special Master addressed a motion for summary judgment regarding the possible adjudication of three claimed mining water rights. The claims were objected to by numerous persons and entities, including the United States (all of whom were denoted in *Monarch* as “Bray *et al.*” (hereinafter “*Bray*”). Bray asserted that the three claimed mining water rights derived from surface water sources had been forfeited. *Monarch* addressed the interplay of forfeiture, the then newly-enacted defense to forfeiture for mining water rights found at Idaho Code § 42-223(11), an existing defense to forfeiture (§ 42-223(6)), and the resumption of use doctrine from *Sagewillow*. Special Master Booth held that Section 42-223(6) is

limited to “circumstances beyond the control of the water user in their use of the water, i.e., disruptions in the available supply of water or acts of others that wrongfully interfere with water use.” *Monarch* at 14.

Monarch is distinguishable from Aston’s situation because *Monarch* involved three surface water right claims, and did not involve ground water rights. Ground water is not automatically available from a well, and unless electricity is used to compel water from the well to be pushed up the well, it is not available for use by the water user. Accordingly, there is a disruption in the available supply of water in this case because of not only the need for electricity to pump it in the first place, but the high cost of electricity and the fact that Aston’s farm is the only sole source ground water farm in the Weston area. In other words, ground water is a water supply that is unavailable unless electricity is used to pump it. That circumstance relates to where the water is unavailable to the users and is consistent with the principles from *Monarch*. For these reasons, *Monarch* is distinguishable, and the Director should find that Idaho Code § 42-223(6) should apply to Aston’s specific situation.

Finally, the Hearing Officer noted in the *Preliminary Order* that “there are more than 200 times as many irrigation water rights as mining water rights. Despite the significant number of irrigation rights in the state, the legislature has never adopted a statutory defense to forfeiture based on agricultural economics.” *Preliminary Order* at 24. The Hearing Officer additionally asserts that Aston has not cited to cases where this exception has been applied. Aston is requesting that this be the case where it is recognized for the first time. Furthermore, as to why no statutory defense for agricultural economics has been enacted, we do not view that as relevant in any way. The precatory language to Idaho Code § 42-223 makes it clear that it is not an exhaustive list, and that other common law defenses can apply. The mining exception found in subsection (11) supports a

conclusion that economic considerations should apply in non-mining circumstances as well at common law—otherwise, why would the Idaho Legislature have included this at all? And the fact that there are more than 200 times as many irrigation rights as mining water rights, *Preliminary Order* at 24, actually tends to support Aston’s position. This is because most irrigation water right users already have a form of forfeiture defense already, primarily under Idaho Code § 42-223(7). These users already have a defense to forfeiture, even though Idaho courts have held that canal company shares, for example, are conveyed even if a deed does not specifically mention water rights.⁷ It seems that only individual ground water right holders are subject to a harsh legal

⁷ In terms of the appurtenancy of water rights, it makes no difference whether the water right is evidenced through a private water right, shares in a canal company, or acres owned within an irrigation district.

Idaho court decisions hold that as an appurtenance to land, irrigation water rights beneficially used on real property—such as the Company’s water delivered by virtue of share ownership—are presumed to be included in a sale of the property unless the water right or water entitlement is expressly reserved in the deed or it can be clearly shown that it was known to both parties that the water right was not intended to be conveyed. This has been confirmed as recently as 2010:

Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention ‘appurtenances.’

Bagley v. Thomason, 149 Idaho 799, 241 P.3d 972 (2010) (citing *Joyce Livestock Co. v. United States*, 144 Idaho 1, 56 P.3d 502 (2007)).

As a general matter, stock certificates are personal property. **However**, when the stock certificates evidence a right to receive water, they become part of the real property and go with the land. Shares in a mutual irrigation or ditch company “represent the water right,” and subject to reasonable and equitable regulations of the ditch company as reflected in the articles and/or bylaws, they represent the shareholder’s right to delivery of the water right to the property to which it is appurtenant. Idaho court decisions hold that where water is delivered to a particular parcel (i.e., the shares are associated with and beneficially used on a particular piece of land), the water right represented by the shares is appurtenant to the land where used. Idaho decisions have held that “the stock certificate is inseparable from the water right represented thereby.” *Andrews v. N. Side Canal Co.*, 52 Idaho 117, 12 P.2d 263 (1932); *Leland v. Twin Falls Canal Co.* 51 Idaho 204, 3 P.2d 1105 (1931); *Milner v. Leland*, 51 Idaho 214, 4 P.2d 665 (1931).

In *Ireton v. Idaho Irrigation Co., Ltd.*, 30 Idaho 310, 164 P. 687 (1917) the Idaho Supreme Court held that:

While shares of stock in an ordinary corporation, organized for profit, are personal property . . . and while this court has held shares in an irrigation company to be personal property. . . the fact must not be lost sight of that a water right is, as heretofore shown, real estate, and that in case of a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but

doctrine while most other irrigation right holders have their defense in an ever-growing list of forfeiture exceptions. This is the very reason why ground water users such as Aston should be entitled to claim the common law economic consideration defense to forfeiture.

Additionally, the common law defenses asserted by Aston that were rejected by the Hearing Officer as described on pages 23-25 of the *Preliminary Order*. We ask that the Director review the Hearing Officer's reasoning set forth on these issues, as Aston's position is that these are likewise adequate common law defenses to forfeiture. On these common law defenses, Aston asserts that the statement from ElRay Balls speaks for itself: "That the use of this water was consistent on an annual basis until approximately years 1979 to 1985 when the weather conditions changed, and we were receiving excessive amounts of precipitation, and heaven was providing all the water we could use plus some." Exhibit 149. There is no qualifying language in this statement as to the source of "all the water we could use plus some." Based on this statement, there was adequate precipitation between 1976 and 1985 and as a result, an adequate defense to forfeiture.

Finally, if Aston is subject to forfeiture law while other users are not, this raises a constitutionality question. Idaho's forfeiture law found at Idaho Code § 42-222 should be deemed unconstitutional as applied to Aston. Other water users enjoy exceptions to forfeiture why he does not, and yet the only different is the type of water right he holds. See *AFRD#2* (outlining requirements for as-applied challenge to statute).

incidental to ownership of a water right. . . . **and ownership of [the stock certificates] passes with the title which they evidence.**

Id. (emphasis added)(citing *In re Thomas' Estate*, 147 Cal. 236, 81 P. 539 (1905); *Berg v. Yakima Valley Canal Co.*, 83 Wash. 451, 145 P. 619 (1915); internal citations omitted.

III. CONCLUSION

For the reasons set forth above, the Director should amend the *Preliminary Order Approving Transfer* to allow for the irrigation of a combined 171 acres.

DATED this 19th day of August, 2019.



Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2019, I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by the method indicated below.

DOCUMENT SERVED: **ASTON'S EXCEPTIONS TO PRELIMINARY ORDER APPROVING TRANSFER**

ORIGINAL VIA EMAIL

AND FIRST-CLASS MAIL TO: Gary Spackman, Director
Rosemary DeMond, Administrative Assistant
Idaho Department of Water Resources
P O Box 83720
Boise, ID 83720-0098
Gary.Spackman@idwr.idaho.gov
Rosemary.DeMond@idwr.idaho.gov

ATTORNEYS AND/OR INDIVIDUALS SERVED:

James Cefalo
Hearing Officer
Idaho Department of Water Resources
900 N. Skyline Dr., Suite A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov


- ☐ Regular Mail
- ☒ Hand Delivery
- ☐ Courthouse Box
- ☒ Email

Shelly and William Spradlin
6995 W. 2200 S.
Weston, ID 83286
westoncreek@aol.com

- ☒ Regular Mail
- ☐ Hand Delivery
- ☐ Courthouse Box
- ☒ Email

Jay Norman Foncesbeck
6022 W. Hwy 36
Weston, ID 83286
jnfonnes@gmail.com

- ☒ Regular Mail
- ☐ Hand Delivery
- ☐ Courthouse Box
- ☒ Email



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.