

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

IN THE MATTER OF APPLICATION FOR)	ORDER REMANDING
TRANSFER NO. 82640 IN THE NAME OF)	CONTESTED CASE
<u>CLINTON K. ASTON</u>)	

BACKGROUND

On August 5, 2019, the hearing officer James Cefalo (“Hearing Officer”) issued a *Preliminary Order Approving Transfer* (“Preliminary Order”) regarding Clinton Aston’s (“Aston”) *Application for Transfer 82640* (“Application”).¹

In the Preliminary Order, the Hearing Officer concluded Aston satisfied all statutory elements required under Idaho Code § 42-222(1). However, to prevent enlargement, the Hearing Officer limited Water Rights Nos. 13-4120 and 13-8026 to the irrigation of 141 acres with a combined diversion rate of 2.82 cfs and a combined annual volume limit of 493.5 acre-feet. *Preliminary Order* at 29.

On August 17, 2019, Shelly and William Spradlin (“Spradlins”) filed the *Spradlin Exceptions to Preliminary Order Approving Transfer* (“Spradlin Exceptions”). On August 19, 2019, Aston filed both his *Petition for the Director to Review Preliminary Order Approving Transfer* and his *Exceptions to Preliminary Order Approving Transfer* (collectively referred herein as “Aston Exceptions”). On September 3, 2019, Jay Fannesbeck (“Fannesbeck”) filed his *Petition for Review & Response to Exceptions* (“Fannesbeck Exceptions”). Aston filed a *Response to the Spradlin Exceptions* (“Aston Response to Spradlin”) on September 3, 2019. Aston then filed his *Motion to Dismiss Fannesbeck Petition for Review and Response to Exceptions of Preliminary Order for Transfer No. 82640* (“Aston Motion to Dismiss”) on September 16, 2019.

The Director reviewed the filings on exceptions. Prior to the issuance of a Final Order in this matter, however, the Director concludes that an evidentiary matter is unresolved, and, therefore, the Preliminary Order must be remanded to the Hearing Officer for additional analysis. *See* IDAPA 37.01.01.730.02.d.

ANALYSIS

The evidentiary matter at issue is whether the Hearing Officer applied the proper evidentiary standard—the clear and convincing standard—in his forfeiture analysis.

¹ For a summary of the procedural history in this matter see the *Preliminary Order*, at pages 1-3.

In the Preliminary Order the Hearing Officer discusses the clear and convincing standard as follows:

Pursuant to Idaho Code § 42-222(2), any water right, including beneficial use water rights recorded under Idaho Code § 42-243, "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...." Forfeiture must be proven by clear and convincing evidence. *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001). "Clear and convincing evidence is generally understood to be evidence indicating that the thing to be proved is highly probable or reasonably certain." *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006) (quotation marks and citation omitted). A portion of a water right may be lost to forfeiture through non-use, even if the remaining portion of the water right is regularly used. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 94 P.2d 400 (1997).

In the Aston Exceptions, Aston states the standard as follows:

[T]he 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 *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) [citations omitted]. 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.

Aston Exceptions at 10. See also *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003).

Aston continues, stating "[c]lear 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) [citations omitted], and "[i]t 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 Director concludes the Department or the protestant's bear the burden to disprove forfeiture and its defenses by the clear and convincing evidentiary standard.

Aston notes the Preliminary Order's forfeiture analysis sections state "[b]ased on the evidence in the administrative record, it is *highly unlikely* that the NWNW of Section 9 was ever irrigated between 1966 and the present day." *Preliminary Order* at 21 (emphasis added). And again, in its Summary of Irrigated Acres, the Preliminary Order concludes "[i]t is highly unlikely

that the 36 acres in the NWNW of Section 9 were irrigated from 1966 to the present day.” *Id.* at 25.

Aston argues the hearing officer’s application of the clear and convincing standard is not equivalent to the clear and convincing evidence standard described above. *Aston Exceptions* at 23. Aston argues it is “critical to correctly decide the issues of forfeiture, as this decision is sure to be legal precedent for the claims filed in the forthcoming Bear River Basin Adjudication.” *Id.* at 25.

While the Director generally agrees with the Hearing Officer’s, and Aston’s, characterizations of the evidentiary burden, the use of the words “highly unlikely” in the Preliminary Order does create evidentiary uncertainty. The issue is whether the Hearing Officer properly applied the clear and convincing evidentiary standard in his analysis of the record as it relates to forfeiture by non-use.

Forfeiture of water rights is disfavored in Idaho, and, therefore, in this case, the Department or the protestants must establish by clear and convincing evidence Aston forfeited water rights appurtenant to the relevant acreage and disprove any defense by the same standard. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2003). The Director concludes that due to inconsistencies in the Preliminary Order, as it relates to the clear and convincing evidentiary standard, the contested case should be remanded to the Hearing Officer to address and correct the evidentiary inconsistency/uncertainty.

ORDER

IT IS HEREBY ORDERED that this matter is REMANDED to the hearing officer to conduct additional evidentiary analysis related to the forfeiture by non-use under the clear and convincing evidentiary standard.

Dated this 25th day of October 2019.



Gary Spackman
Director

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October 2019, I emailed and also mailed a true and correct copy of the foregoing *Order Remanding Contested Case*, with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below:

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