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

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| **IN THE MATTER OF APPLICATION FOR** | **)** | **MOTION TO DISMISS AND CANCEL** |
| **TRANSFER NO. 82640 IN THE** | **)** | **TRANSFER APPLICATION 82640** |
| **NAME OF CLINTON K. AND ESTELITA ASTON** | **)** | |
| | **)** | |
| **CLAIMANT** | **)** | **PROTESTANT** |

COMES NOW, protestant, Jay Norman Fonnesbeck, having had the opportunity to review ORDER REMANDING CONTESTED CASE filed by Director Gary Spackman, dated the 25th of October, 2019, hereby moves to dismiss and cancel Transfer Application No. 82640 submitted by Clinton and Estelita Aston for providing false and misleading information in the application process and also during the contested hearing proceedings.

This motion is filed pursuant to the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), 304 which states that "Defective, insufficient, … pleadings may be returned or dismissed", and the statement immediately preceding signature of applicant found on page 2 of APPLICATION FOR TRANSFER OF WATER RIGHT PART 1 which reads as follows:

> **"The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in rejection of the application or cancellation of an approval."**
>
> Signed by Mr. Clinton Aston 8/13/18.

An astute Director, Mr. Gary Spackman in reviewing the filings on exceptions prior to the issuance of a Final Order in this matter, concluded 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. In very polite and politically correct terminology, the Director is giving the Hearing Officer the opportunity to review and correct inconsistencies he has observed as part of his review of the record thus far.

In particular, he has pointed out a concern toward whether the Hearing Officer has applied the proper evidentiary standard—the clear and convincing standard—in his forfeiture analysis. Both the Hearing Officer and Counsel for Aston have declared for the record the standard for forfeiture and these can be found in the Analysis section of the Director's Order.

**Validity vs. Forfeiture**

Fonnesbeck adamantly asserts that the cart is before the horse, that before we concern ourselves so heavily with the standard for forfeiture…we have yet to meet the standard for validating the elements of a Statutory Claim to a Water Right 13-4120 in which Aston has consumed more time and energy in trying to fabricate, manufacture, and construe… when this hearing and matter could be over by just producing "clear and convincing" evidence.

I have to complement the Hearing Officer for the speed and efficiency which he possesses to work through the hours of testimony and the enormous amount of documentation while juggling his time with other water department matters and cases. I see it as a monumental task to keep everything in correct order and interpreted correctly, but with so much going on, the Hearing Officer has confused some important exhibits and interpretations which he has felt validated the record for 13-4120. Referring to page 6, paragraph 16 is an example. ( Ex. 113, 310, and 323) the well described in Permit G-29935 was completed in 1962 is purely conjecture and speculation. No direct support from these exhibits. Testimony of ElRay Balls is not very helpful because while he was being questioned, he could not remember clearly and leaned more toward the years 1963 or 64 as what he meant as the early 60's.

ElRay declared under oath that he cannot remember dates…. Yet the Hearing Officer and Counsel for Aston have treated what little we got from him as the winning field goal.

If the well went into operation in June of 1962, I highly doubt that the first priority for water use was to put it on the NWNW of section 9. No one in our area starts irrigating in March and therefore, it is reasonable and certain that the NWNW of section 9 was not irrigated prior to March of 1963. Children of Jerry Schvaneveldt remember they were still flood irrigating when they left the farm in the spring of 1964. Testimony or Reta Lynn Braker, Jerry and Barbara Schvanevedt's oldest daughter who was born in 1953.

The Hearing Officer in this matter held a second hearing for the sole purpose of allowing additional evidence to consider defenses to forfeiture, but during the hearing, the Aston camp still had no evidence supporting that 13-4120 was even a valid statutory claim.

To my surprise, a seasoned water attorney such as Mr. Harris, has characterized the statutory claim as a perfected water right, and has chosen to defend it as such.

The "clear and convincing" evidence and what we should consider as telling us the correct story already existed in the administrative record before the hearing ever convened. No discovery was conducted prior, and what minimal negotiation that could have taken place was ignored by Aston. Fonnesbeck email.

On pages 1-16 of exhibit 338, which is the backfile for 13-2209, is evidence that is "clear and convincing". The hearing officer and counsel for Aston both went on the attack to diminish the credibilty of the Examiner Report even after counseling me at the beginning of the second day of the first hearing of what constitutes a collateral attack on a water right. Aston 2, track 1, first 12 minutes., Febuary hearing, Aston 4, toward end of recording, July 17 hearing, page 14, Analysis, 3rd paragraph, amended preliminary order.

Special attention should be given to page 24, of backfile 13-2209, where we find the signature of Mr. Lee Schvaneveldt who is attesting to the facts of the place of use and acres being irrigated. If Mr. Aston does not agree with the results, the time to change the license and certified acres being irrigated on his farm was within the appeal window some fifty years ago. Cefalo pg. 17

**Misrepresentation**

There existed in the Administrative Record of the Department, sufficient evidence enough to prevent a reasonable person from filing for this particular transfer to begin with. But for Aston, he has worked himself into a corner where a successful transfer application has become his hope of escape. He applied and was granted Federal EQIP funds to construct a center pivot on lands that had no water rights (Ex. 352) but he did so, providing falsified information to government employees in the development stage for the application to be considered. Had he provided true and correct information to begin with, his project would never have qualified. Aston and NRCS employees have been scrambling since to cover this embarrassing mistake. It may have just been allowed to pass, but the memory of how Mr. Aston chose to remind us, his neighbors, and others in the community of how smart he is, and how much more he knows about farming, and his experience as a water commissioner in Utah, and acquiring these funds that others have not been able to qualify for. When asked several times during the hearings why the motivation for the transfer at this time, he has consistently responded that it is to correct his water rights before the adjudication comes around, even when IDWR personnel, and in particular, Mr. James Cefalo, has advised that this type of matter would be cleaned up in an adjudication. We should wait for the adjudication.

With NRCS documentation in his hands to read and the document stating that the funds were dispersed for the construction of a mainline and center pivot, Aston continues to declare under oath that none of the funds were for a center pivot. (Ex. 352)

He declares under oath that the land he intends to irrigate with the new pivot was irrigated years ago with Weston Creek Irrigation surface water when no such thing has happened or has supporting evidence. Produces names of those who irrigated it, but can't verify it.

Aston declares that the irrigation system when he bought it had 12" mainline and produces a document that establishes the mainline to be 10". (Ex. 114) Declares that I am wrong when I personally inspected the system when I was considering buying the property in 2003, and working with ElRay Balls to try to determine how we would trade water or get water from well #2 to his property. Aston whose property

boarders Bill Spradlin, and whose well and mainline is less than 10 ft. from the property line declares that Bill is wrong in assuming that it was 10 " mainline that he observed for ten years while Sid Schvaneveldt operated his farm prior to Aston coming in and tearing it out and stacking it next to the fenceline bordering Spradlin. Shame on Bill for taking the time to measure it. Testimony of Spradlin.

Applicant Aston claimed and stated on page 4 section g. of the TRANSFER APPLICATION that:

> **"40 acres of ground Twp 16S Rng 38 E. Section 9 was placed in Soil Bank in 1983, irrigation was discontinued, it was placed in CRP program in 1985, In 1996 CRP contract expired and ground was put back in production. In 1998 the ground was placed back in CRP program until present. Groundwater right is protected from nonuse while under CRP contract. This property has not had 5 years of nonuse without being in CRP."**

**Conclusion**

During the additional hearing requested by Aston and conducted by IDWR on July 16, 2019 in Preston, Idaho, for the limited purpose of accepting evidence addressing forfeiture of acres identified and located in the NWNW of Section 9, Aston presented exhibits that contradicted his own statements made above. Aerial photographs submitted by Aston and prepared by the NRCS and used by the Farm Service Agency, clearly stated that the first CRP contract to idle these acres was awarded in 1987.

Testimony of witness and previous owner of these acres, Charlotte Schvaneveldt, testifying on behalf of Aston, stated that she was unaware that these acres were ever irrigated in the first place, and could not say why these acres were listed on claim 13-4120. She also testified that she knew of no time that any of these acres were enrolled in the Soil Bank Program which essentially made no further enrollments after 1960. She stated that she has lived on the farm which controlled these acres beginning in May of 1966.

There are other issues and misrepresentations which can be included, but this should suffice for a cancellation of Transfer 82640.

The Administrative Record contains all the information that was necessary to have correctly determined the outcome of this transfer application. The record speaks for itself. Aston should have never filed for a transfer and should have been happy with the acres that were irrigated at the time he purchased the Schvaneveldt farm. Without pursuing the transfer, he was already irrigating 40 bonus acres that should not have been irrigated after 1966. The administrative record is "clear and convincing" and provides the evidence that 13-4120 is an invalid water claim. That 87 acres which were proved up and perfected under water right 13-2209 is all that should be irrigated at this time. And the record clearly shows that if

Aston wants to irrigate more acres than 87, that the correct process and avenue to follow is to apply to reopen permit G-29935 and finish perfecting that application.

To prevent any further unneeded labor by the IDWR or the Protestants, I present this motion for your acceptance.

Dated this 12th day of November, 2019

Jay Norman Fonnesbeck

**Certification of Service**

I hereby certify that on the 12th day of November, 2019, I personally served a copy of this motion to the individuals indicated below by email.

Mr. James Cefalo, Hearing Officer, Idaho Department of Water Resources

Mr. Robert Harris, counsel for Aston

William and Shelley Spradlin, Protestant

Mr. Gary Spackman, Director, IDWR