BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 82640 IN THE NAME OF CLINTON K. ASTON	**ORDER DENYING MOTION TO DISMISS; FINAL ORDER ON EXCEPTIONS**

PROCEDURAL HISTORY

On October 29, 2019, hearing officer James Cefalo issued his *Amended Preliminary Order Approving Transfer* ("Order Approving Transfer") in this matter.

On November 12, 2019, Clinton K. Aston ("Aston") filed *Aston's Petition for the Director to Review Amended Preliminary Order Approving Transfer* and supporting *Aston's Exceptions to Amended Preliminary Order Approving Transfer* (collectively "Aston Exceptions") with the Director of the Idaho Department of Water Resources ("Department"). On November 12, 2019, Jay N. Fonnesbeck ("Fonnesbeck") filed a *Petition for Review and Response to Ammended* [sic] *Preliminary Order for Transfer No. 82640* ("Fonnesbeck Exceptions") and a second *Motion to Dismiss and Cancel Transfer Application 82640* ("Second Motion to Dismiss").[1]

On November 26, 2019, Fonnesbeck filed his *Response to Aston Exceptions* ("Response to Aston Exceptions") and an additional *Petition for Review and Response to Amended Preliminary Order for Transfer No. 82640.*[2] On November 26, 2019, Aston filed a *Response to Fonnesbeck's Petition for Review and Response to Amended Preliminary Order for Transfer No. 82640* ("Response to Fonnesbeck Exceptions"). Aston also filed a *Response to Second Motion to Dismiss and Cancel Transfer Application 82640* on November 26, 2019 ("Response to Second Motion to Dismiss").

After carefully considering the arguments filed on exceptions, the Director: (1) denies Fonnesbeck's Second Motion to Dismiss; and (2) adopts the hearing officer's Order Approving Transfer in full as a Final Order. The Director discusses the various arguments raised in the parties' exceptions below but the discussion does not affect the Director's adoption of the Order Approving Transfer as a Final Order.

[1] On July 16, 2019, Fonnesbeck provided an initial Motion to Dismiss ("First Motion to Dismiss") directly to the hearing officer. The First Motion to Dismiss was denied by the hearing officer on August 5, 2019.

[2] The second petition for review appears to be identical to the first petition for review.

ANALYSIS

I. Signatures on Documents Filed with the Department

Aston argues the Second Motion to Dismiss and Fonnesbeck's Exceptions should be dismissed because they were not signed by Fonnesbeck pursuant to Rule 300 of the Department's Rules of Procedure (IDAPA 37.01.01.300).

Aston's Argument

Aston argues the Second Motion to Dismiss and Fonnesbeck's Exceptions should be dismissed pursuant to Rule 304 ("defective, insufficient, or late pleadings may be returned or dismissed") because they were not properly signed. *Aston Response to Fonnesbeck Exceptions* at 2. Rule 300 states "the Department will accept electronic signatures and electronically signed communications complying with the requirements of Rules 306 through 311." *Id. quoting* IDAPA 37.01.01.300. Rule 306 states "[f]or an electronic signature to be valid for use by the Department, it must be created by a technology that is accepted for use by the Department," and Rule 307 describes the criteria the Department uses to determine acceptability of the electronic signature. *Id. quoting* IDAPA 37.01.01.306 and 307.

Aston argues Fonnesbeck's pleadings were filed by email and contained only the typed name "Jay Norman Fonnesbeck." *Aston Response to Second Motion to Dismiss* at 2; *Aston Response to Fonnesbeck Exceptions* at 2. Aston argues the documents did not include an electronic version of Fonnesbeck's signature as required by the Department's Rules of Procedure 300, 304 and 306-309. *Id.* Aston asserts a typed name is too easily replicated, not capable of verification, and that signature requirements are not unique to the Department's contested cases, but common to all pleadings submitted in legal actions governed by the Idaho Rules of Civil Procedure. *Aston Response to Second Motion to Dismiss* at 3; *Aston Response to Fonnesbeck Exceptions* at 3.

Director's Conclusion

Rule 5.22 of the Department's Rules of Procedure defines "[s]igner" as "[a] person who signs a communication, including an electronically signed communication with the use of an acceptable technology to uniquely link the message with the person sending it." IDAPA 37.01.01.005.22. Rule 300 states "[t]he Department will accept electronic signatures and electronically signed communications complying with the requirements of Rules 306 through 311 . . . for all communication, filings and transactions with the Department." IDAPA 37.01.01.300. Rule 306 states "[f]or an electronic signature to be valid for use by the Department, it must be created by a technology that is accepted for use by the Department." IDAPA 37.01.01.306. Rule 307 contains the Department's criteria for acceptable electronic signature technology. IDAPA 37.01.01.307.

The Director acknowledges and reiterates the importance of filing signed documents with the Department. However, in this specific case, the Director will liberally construe IDWR's rules on signatures in order "to secure just, speedy and economical determination of all issues presented to the agency." *See* IDAPA 37.01.01.052. Prior to remand in this matter, Fonnesbeck

filed *signed* versions of substantially similar documents in response to the hearing officer's issuance of the Preliminary Order. Additionally, IDWR can trace Fonnesbeck's unsigned filings to his personal email address. This furthers the effect of uniquely linking the filings to the person sending them. *See* IDAPA 37.01.01.005.22. The Director accepts and recognizes the Second Motion to Dismiss and the Fonnesbeck Exceptions without a handwritten or electronic signature.

II. The Second Motion to Dismiss

Fonnesbeck's Argument

Fonnesbeck argues Transfer Application No. 82640 ("Application") should be "dismissed or canceled" pursuant to Rule 304 of the Department's Rules of Procedure "for providing false and misleading information in the application process and also during the contested hearing proceedings." *Second Motion to Dismiss* at 1.[3]

First, Fonnesbeck asserts Aston was untruthful when he stated in the 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." *Id.* at 3. Fonnesbeck argues "[a]erial 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." *Id.* Second, Fonnesbeck argues Aston made false and misleading statements in the application he made for federal funds to build a center pivot on certain lands. *Id.* at 3 *and see* Exhibit 352.[4]

Aston's Response

Aston argues the Second Motion to Dismiss (Transfer Application No. 82640) "should be dismissed as a legal matter because it is not a prehearing motion under Rule 565 as it has been filed after the hearings on 82640 have concluded." *Aston Response to Second Motion to Dismiss* at 13. Alternatively it should be dismissed because "the Motion itself does not provide sufficient justification to wholly dismiss 82640" rather "the question is whether 82640 is defective, insufficient, or late based on the facts and argument asserted by Fonnesbeck." *Id.* at 3. Aston asserts the Application is none of those things, rather, he argues the Second Motion to Dismiss asserts only that because "there are disputes of fact—which are completely normal and typical in a contested case" Application 82640 should be dismissed. *Id.*

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[3] In the Second Motion to Dismiss Fonnesbeck also repeats numerous statements challenging the validity of Water Right 13-4120 and states that "it is reasonable and certain that the NWNW of Section 9 was not irrigated prior to March of 1963" and, therefore, there was no basis for a statutory claim. *Id.* These arguments are more properly addressed in the exceptions analysis and will be addressed below.

[4] Portions of Fonnesbeck's Motion to Dismiss contain conjectural accusations, which will not be addressed here.

If the Second Motion to Dismiss is considered by the Director, Aston argues it must be analyzed as a motion for summary judgment. *Id.* at 4-6. Idaho Rule of Civil Procedure ("IRCP") Rule 56(b)(1) states "motion[s] for summary judgment 'must be filed at least 90 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.'" *Id.* Aston argues because the Second Motion to Dismiss was filed after the hearing, it is untimely under IRCP Rule 56(b)(1). *Id.* at 5.

Aston argues the Application was submitted to the best of his knowledge at that time. *Id.* Aston asserts he had no knowledge of any CRP maps denoting the NWNW of Section 9 as being in CRP beginning in 1987 at the time of the Application and, therefore, the mistaken misrepresentation cannot be construed as willful. *Id.*

Director's Conclusion on the Motion to Dismiss

Rule 304 relates to "[d]efective, insufficient or late pleadings." IDAPA 37.01.01.304. Here the pleading, specifically the Application, was not late. The Application was also not defective or insufficient—plainly meaning flawed or inadequate—to prevent it from being processed and analyzed by the Department and intervenors. That factual disagreements remain at this late stage is normal in contested case proceedings before the Department.

The Director agrees with the hearing officer on the issue of misrepresentation related to CRP dates. The hearing officer concluded that while the Application may have been inaccurate in relation to the year of initial CRP enrollment, "Aston testified at hearing that he did not obtain exact dates for the CRP enrollment until after the application was filed." *Order Denying Motion to Dismiss* at 2. Therefore, Aston did not willfully misrepresent facts; he presented facts in his Application to the best of his knowledge at the time of filing.

The Director will not consider Fonnesbeck's arguments as they relate to misrepresentation by Aston on "Federal EQIP funds to construct a center pivot on lands that had no water rights." *Second Motion to Dismiss* at 3. This issue is not relevant to the approval or denial of the Application. Conjecture as to the reasoning for Aston's submittal of the Application does not govern whether the Application and transfer may be approved or denied under the Department's authority.

Finally, a motion to dismiss is a pre-trial motion meant to end litigation prior to—in fact to avoid—hearing or trial. IDWR Rule of Procedure 260 states motions to dismiss, not directed to an answer, "may be filed at any time upon compliance with Rule 565." IDAPA 37.01.01.260.03. Rule 565, *Procedure on Prehearing Motions*, limits motions to dismiss to being filed prehearing: "The presiding officer may consider and decide *prehearing motions* with or without oral argument or hearing." IDAPA 37.01.01.565 (emphasis added). Motions to dismiss under IDWR's Procedural Rules, and in civil litigation generally, are filed prior to the hearing to avoid excessive litigation costs.

For the reasons stated above, the Director denies the Second Motion to Dismiss.

III. The Exceptions

a. *Ownership of Water Right No. 13-2209*

Fonnesbeck's Argument

Fonnesbeck asserts the portion of Water Right No. 13-2209 appurtenant to Aston's property was traded to the Fonnesbeck family, by verbal agreement, prior to it being licensed. Fonnesbeck supports this claim by reference to the "2004 Agreement." *Fonnesbeck Exceptions* at 3. The 2004 Agreement appears to be an attempt to document the verbal agreement made in the 1960's between Lee Schvaneveldt and Norman and Myron Fonnesbeck. Fonnesbeck argues the 2004 Agreement describes the conveyance of Water Right No. 13-8026 from Schvaneveldt to Norman and Myron Fonnesbeck in exchange for Fonnesbeck's ownership interest in the Aston Well. *Id.*[5]

In response to the hearing officer's conclusion that the verbal agreement, if one existed, violates Idaho's statute of frauds, Fonnesbeck argues a writing was not necessary because the defenses of admission and part performance rendered a written agreement unnecessary. *Id.* at 3-4. In support, Fonnesbeck argues the admission defense can be asserted because Fonnesbeck, Balls, and Charlotte Schvaneveldt admitted at hearing the 2004 Agreement was valid and true. *Id.* Fonnesbeck argues the defense of part performance is also applicable because, in 1966, the Fonnesbecks became the exclusive users of Well #1, and the Schvaneveldts and Balls exclusive users of the Aston Well. *Id.*[6]

Aston's Response

Aston argues "Fonnesbeck has continually attempted to collaterally attack the license for 13-2209 in an effort to have him declared as the proper owner of the portions of 13-2209 appurtenant to the Aston property." *Response to Fonnesbeck Exceptions Petition* at 3. Aston agrees with the hearing officer: "To allow a water right license to be challenged years after the license is issued creates significant uncertainty for the owner of the water right." *Id. quoting Preliminary Order* at 3. Aston also agrees with the hearing officer's conclusion that the 2004 Agreement was not a conveyance and, even if it was, the Agreement was signed four months after the Schvaneveldts conveyed the relevant property, along with appurtenant Water Right No. 13-8026, to Aston. *Response to Fonnesbeck Exceptions Petition* at 4.

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[5] The operative portion of the "2004 Agreement" states: "[T]he use of the well water and water right, as evidenced in License No. 13-2209 and appurtenant to the land owned by said Schvaneveldt is section 8, 10, and 11 T16S R38E in Franklin County, Idaho, has been transferred to other lands owned by the Fonnesbecks, and to D. Glade Schvaneveldt, a nephew, and the present use needs to be updated and documented with the State of Idaho."

[6] Fonnesbeck also argues that because the Fonnesbeck's have applied the water associated with these acres to the Fonnesbeck land located in Section 16 and 21 there was a valid "Accomplished Transfer" under Idaho Code § 42-1425. *Id.* Idaho Code § 42-1425 is inapplicable here as Application 82640 was made to comply with Idaho Code § 42-222, not avoid it. Neither will the water rights at issue here be adjudicated in the Snake River Basin Adjudication or the North Idaho Adjudication. *See* Idaho Code § 42-1425(2).

Director's Conclusion as to Ownership of Water Right No. 13-2209

The Director concludes the portion of Water Right No. 13-2209 (13-8026) appurtenant to property owned by Lee Schvaneveldt at the time of licensing has not been separated from the underlying property and is owned by Aston. *See Bagley v. Thomason*, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010) (unless expressly reserved in the deed, appurtenant water rights pass with the conveyance, even if not mentioned in the deed). Subsequent deeds conveying the underlying 87 irrigated acres did not withhold or reserve that water right to previous owners, or to the Fonnesbecks.

The Director agrees with the hearing officer that any prior verbal agreements fail under the statute of frauds. Fonnesbeck's "admission" defense was not analyzed in the Amended Preliminary Order. Fonnesbeck appears to argue that because he, El Ray Balls, and Charlotte Schvaneveldt admitted at hearing that the 2004 Agreement was valid, a defense to the statute of frauds exists. *See e.g. Peterson v. Shore*, 146 Idaho 476, 479, 197 P.3d 789, 792 (Ct. App. 2008) (One cannot both admit to the existence of an unwritten contract and then attempt to rely upon the statute of frauds to claim the contract had to be written). However, the 2004 Agreement *is written* and, therefore, the statute of frauds is not the issue. The issue is that the 2004 Agreement cannot convey what was already conveyed to Aston four months prior to the signing of the 2004 Agreement.

The Director agrees with the hearing officer's analysis related to the doctrine of part performance. There is a lack of substantial evidence of part performance of the alleged verbal agreement to exchange water rights in the 1960s. First, it was not possible to develop a ground water irrigation right through only beneficial use in 1966. Second, there was no action taken by Lee Schvaneveldt, or his successors in interest, nor any objection from Fonnesbeck to contest the license during issuance. Next, there was no attempt by Myron or Norman Fonnesbeck to change the place of use of Water Right No. 13-2209 or to have Lee Schvaneveldt's name removed from ownership records. Finally, Fonnesbeck has never attempted to move Water Right No. 13-2209 to his property. *See Amended Preliminary Order* at 16-17.

There is no viable evidence in the record of, and the Director refuses to recognize, a verbal exchange of water rights under these facts. The opportunity to attack underlying issues related to permitting, place of use, and ownership has passed and the finality of water right licensing is essential to assuring ownership of water rights. *See In re CSRBA Case No. 49576*, 165 Idaho 489, 447 P.3d 937, 940 (2019) (collateral attack of water right licensing is barred as it creates uncertainty of ownership and undermines water adjudications). In this case there was mostly inaction by parties related to the alleged 1960's verbal agreement and the events described in the 2004 Agreement. The license should have been challenged over 50 years ago. No parties took any recognizable legal action to update their water rights to reflect any prior verbal agreements.

b. Validity and Ownership of Water Right No. 13-4120

Fonnesbeck's Argument

Fonnesbeck argues against the validity of Water Right No. 13-4120, concluding the 40 acre northern portion of the right (NWNW of Section 9) was never irrigated. *Fonnesbeck Exceptions* at 5. As evidence Fonnesbeck cites to: (a) the date of manufacture of the pumps and evidence related to power supply cannot establish a priority date; (b) the makeshift culvert section in Aston Exhibit 115 appear to be meant to protect the underlying aluminum piping and not a remnant of the irrigation mainline; (c) the testimony of El Ray Balls "did not include any mention of actually seeing water applied to the ground or of himself moving pipe while it was supposedly being irrigated" or any relevant dates; (d) El Ray Balls' memory is failing him; (e) Charlotte Schvaneveldt could not recall irrigation of the NWNW of Section 9; and (f) "[e]vidence in the administrative record clearly pointed out that irrigation was not taking place north of the county road prior to or on July 15, 1966, nor was any irrigation taking place on the SWNW [sic] 9 as per examination by IDWR." *Id.* at 6-7.

Fonnesbeck also argues the remainder of Water Right No. 13-4120 was conveyed by the Frederickson's to El Ray and Janice Balls by letter ("Frederickson Letter") in April of 2005, and cannot now be claimed by Aston. *Id.* at 5. Fonnesbeck argues the Fredrickson Letter constitutes a conveyance of Water Right No. 13-4120 under the doctrines of part performance and promissory estoppel because Zayne Fredrickson testified he intended to convey to El Ray Balls the portion Water Right No. 13-4120 appurtenant to the 36-acre parcel, previously conveyed to Zayne and Teri Fredrickson in 2002 by Jeffrie and Kay Beckstead. *Id.* Additionally, Fredrickson testified that he communicated with Farm Land Reserve, Inc. ("FLI"), prior to FLI becoming the new owner of the 36 acres, stating to FLI that his portion of Water Right No. 13-4120 was conveyed to El Ray Balls. *Id.*

Aston's Response

Aston argues the hearing officer also correctly decided the Fredrickson Letter was not a valid conveyance of Water Right No. 13-4120. *Aston Response to Fonnesbeck's Exceptions* at 5.

Director's Conclusion as to the Validity and Ownership of Water Right No. 13-4120

The Director also agrees with the hearing officer's analysis related to Water Right No. 13-4120 and was not persuaded by the exceptions. Contrary to Fonnesbeck's arguments, there is substantial evidence in the record to conclude Water Right No. 13-4120 is a valid water right, owned by Aston. *See A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012). The Director further disagrees with Fonnesbeck's conclusions related to the irrigation of the NWNW of Section 9. There is sufficient evidence in the record to show that the NWNW of Section 9 was irrigated in the early 1960s.

The Director also agrees with the hearing officer's conclusion related to the Frederickson Letter. *See Amended Preliminary Order* at 18. The Frederickson letter is not a conveyance of Water Right No. 13-4120. The letter confirmed permission to transfer the water right appurtenant to

the Frederickson's property. This permission was further extended to Aston by FRI in June of 2018. *Id.* Therefore, Aston has the authority to transfer the entirety of Water Right No. 13-4120.

c. Forfeiture of a Portion of Water Right No. 13-4120 for Non-use

Aston's Argument

Aston argues the hearing officer was incorrect to conclude that 30 acres under Water Right No. 13-4120, located in the NWNW of Section 9, were forfeited. Aston claims he made an initial showing (or a defense to forfeiture is present) that these acres were irrigated at times between 1966 and 1986 but the Department failed to show these acres were not irrigated from 1966 to 1986 through clear and convincing evidence. *Id.* at 12. Therefore, Aston argues, the hearing officer's findings and conclusions related to forfeiture of 30 acres in the NWNW of Section 9 are invalid because they are not based on clear and convincing evidence. *Id.*

As evidence of non-forfeiture, Aston asserts Sid Schvaneveldt told him the NWNW of Section 9 was irrigated at the time Aston purchased the property in 2004. *Id.* at 19. Aston asserts that Sid Schvaneveldt stated to him the NWNW of Section 9 was not irrigated every year, or very often, due to a mainline size reduction at the end of the system. As a result, the place of use had been intermittently irrigated as it required moving the mainline to the north side of the road. *Id.* at 21. Moreover, Sid Schvaneveldt "submitted the statutory claim map in January of 1980 claiming that the NWNW of Section 9 was irrigated" and never acted "to disavow the statutory claim map and its depiction of the NWNW of Section 9 as being irrigated." *Id.* at 21-22.

Even if a portion of Right No. 13-4120 was forfeited, Aston argues statutory and common law defenses apply. *Id.* at 30. Aston argues Idaho Code § 42-223(6)[7] applies because economic factors, such as electricity rates, commodity pricing, and cost of maintenance, qualify as circumstances beyond the control of the water user. *Id.* More specifically, Aston argues a forfeiture defense of "agricultural economics" should, for the first time, be recognized in this case "that would be analogous to the statutory defense to forfeiture for mining water rights" in Idaho Code § 42-223(11). *Id.* at 30-32, 38. Aston argues ground water is a water supply that is unavailable unless electricity is used to pump it and, therefore, the disruption of electricity and electricity's high cost should qualify under an agricultural economic defense to forfeiture. *Id.* at 30-32.

Aston also asserts El Ray Balls signed a statement in a prior case that water use on the NWNW of Section 9 was consistent on an annual basis until 1979 to 1985. *Id.* Based on Mr. Balls' testimony, weather conditions changed during that period of time and there were "excessive amounts of precipitation." *Id.* Therefore, Aston asserts it would have been unnecessary for Sid Schvaneveldt to irrigate the NWNW of Section 9 during that time. *Id.* at 27. Aston argues that because "there was adequate precipitation between 1976 and 1985" a common law defense of "adequate precipitation" should apply. *Id.* at 39.

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[7] Idaho Code § 42-223(6) states: "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."

Fonnesbeck Response

As described above, Fonnesbeck argues the NWNW of Section 9 was never irrigated.

Director's Conclusions on Forfeiture

The Director agrees with the hearing officer. The portion of Water Right No. 13-4120 appurtenant to the NWNW of Section 9 has been forfeited by non-use. The Director recognizes that the 36 acres in the NWNW of Section 9 was irrigated in the early 1960s but it is highly probable and reasonably certain that the NWNW of Section 9 was not irrigated between 1966 and now. While the non-use from 1987 to 1996 (for enrollment in CRP) and from 1997 to 2008 (due to circumstances beyond the control of the water user, namely access) is accounted for, the Director also agrees with the hearing officer that there are no viable defenses to forfeiture for the period of non-use from 1966-1986.

The Director also declines to recognize the novel "agricultural economics" defense to forfeiture Aston proposes. The legislature enacted an explicit exception to forfeiture for mining; it has not done so for the cost of electricity of pumping groundwater. Neither has a common law defense developed in Idaho case law been cited to. The Director agrees with the hearing officer and concludes no "agricultural economics" defense to forfeiture exists in Idaho.

Finally, there is no evidence in the record that Sidney and Charlotte Schvaneveldt were not able to access Water Right No. 13-4120 between 1966 and 1986. The Director agrees with the hearing officer and finds ambiguity in Mr. Balls statement related to adequate precipitation. If El Ray Balls was referring to winter precipitation resulting in high flows in Weston Creek, these same weather conditions would have no impact on the Schvaneveldt farm, which was irrigated solely from groundwater. Mr. Balls was not asked about his prior statement on precipitation at hearing and there is insufficient evidence in the record to support this defense to forfeiture.

In summary, the Director agrees with and adopts the hearing officer's analysis, findings, and conclusions in the Amended Preliminary Order as his Final Order.

IV. Aston's As-Applied Constitutional Challenge

Finally, Aston's Exceptions raise an as-applied, or facial, constitutional challenge related to Idaho Code § 42-222. Aston argues it is unconstitutional to subject him to provisions of Idaho Code § 42-222, when other water users are not. *Id.* In other words, certain water users enjoy exceptions to forfeiture that, as a sole user of ground water, he cannot. *Id.*

Director's Conclusion

The Director has no authority to decide the constitutionality of the statutes Aston references in his as-applied challenge. The ability of the Department to consider constitutional issues is limited. *See* IDAPA 37.01.01.415. If Aston believes a legislatively enacted statute is somehow invalid, or otherwise unconstitutional, he may seek relief in the courts.

ORDER

IT IS HEREBY ORDERED that Fonnesbeck's *Motion to Dismiss and Cancel Transfer Application 82640* is **DENIED**.

IT IS FURTHER ORDERED that the hearing officer's *Amended Preliminary Order Approving Transfer* is adopted as a Final Order pursuant to Idaho Code § 67-5246 and IDAPA 37.01.01.740.

Dated this 31st day of January 2020.

Gary Spackman
Director

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January 2020, I emailed and mailed a true and correct copy of the foregoing Order Denying Motion to Dismiss; Final Order on Exceptions, with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below,

Robert Harris
Holden Kidwell Hahn & Crapo PLLC
1000 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, ID 83405
rharris@holdenlegal.com

Jonas A. Reagan
Barker Rosholt & Simpson, LLP
163 Second Ave. West
P.O. box 63
Twin Falls, ID 83303-0063
jreagan@idahowaters.com

Jay N. Fonnesbeck
6022 West Highway 36
Weston, ID 83286
jnfonnes@gmail.com

William and Shelly Spradlin
6995 West 2200 South
Weston, ID 83286
westoncreek@aol.com

Kimberle English
Kimberle English

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or
(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.