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 PETITION FOR RECONSDIERATION**

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 Petition for Reconsideration.* This petition is filed in response to the Director's *Order Denying Motion to Dismiss; Final Order on Exceptions* issued on January 31, 2020 (the "*Order*").

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] Application for Transfer No. 82640 (hereinafter simply "82640") is a contested case before the Idaho Department of Water Resources ("IDWR" or "Department"). Idaho Code § 67-5243 and Rule 740 allows parties to a contested case fourteen (14) days after the service date of a final order to file a petition for reconsideration. *Aston's Petition for*

[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.

Reconsideration is being filed within this timeframe. *See also* Idaho Rules of Civil Procedure 11.2(b) ("A motion to reconsider any order of the trial court entered before final judgment may be made at any time prior to or within 14 days after the entry of a final judgment.").

Aston petitions the Director to reconsider his analysis and conclusions contained in Section III.c. of the *Order* entitled "*Forfeiture of a Portion of Water Right No. 13-4120 for Non-use.*" Order at 8-9. Aston does not request reconsideration of any other portions of the *Order*.

On November 12, 2019, Aston filed exceptions to the *Amended Preliminary Order Approving Transfer* issued on October 29, 2019, (hereinafter, "*Preliminary Order*") by Hearing Officer James Cefalo (hereinafter, the "Hearing Officer"). In considering these exceptions, 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.

Despite the foregoing, after summarizing Aston's argument on why there is no partial forfeiture of acres in the NWNW of Section 9, the Director summarily concluded that "[t]he Director agrees with the hearing officer." *Order* at 9. This analysis did not contain any discussion about the burdens of proof for proving forfeiture as Aston requested in his exceptions, nor does it appear that the record Director considered the matter *de novo*. Rather, it appears that the Director simply deferred to the Hearing Officer's conclusions.

The Department has jurisdiction to evaluate water right forfeiture as part of its review of a transfer application. *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003) ("Ordinarily, issues of forfeiture or abandonment are not adjudicated in a transfer proceeding, although they can be."). However, this jurisdiction to evaluate water right forfeiture does not mean that the Department is exempt from the standard under Idaho law by which forfeiture must be proven. Because a determination of water right forfeiture takes away a property right[2], 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). 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

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[2] 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.").

must do so to a clear and convincing evidence standard.

Aston acknowledges that there remains an initial burden on him as the transfer applicant to provide some evidence showing that irrigation occurred on the NWNW of Section 9 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.").

Based on this initial showing of water use, the Director correctly "recognize[d] that the 36 acres in the NWNW of Section 9 was irrigated in the early 1960s . . ." Order at 9. At this point, the burden now completely shifts to those who desire to prove forfeiture for land in the NWNW of Section 9—in Aston's case, the protestants and the Department—by clear and convincing evidence.

Nevertheless, after recognizing that a water right was developed, the *Order* simply and immediately thereafter concludes "but it is highly probably and reasonably certain that the NWNW of Section 9 was not irrigated between 1966 and now." *Id.* Unfortunately, the *Order* provides no clear and convincing evidence to back up this conclusion. Before the Director adjudicates away this property right, there must be clear and convincing evidence of forfeiture.

The burden of proving forfeiture for the NWNW of Section 9 is now on the Department, not on Aston. There is no evidence in the record from individuals who observed the property every day during the irrigation season between 1966 and 1986 and that it wasn't irrigated. There is no evidence of lack of irrigation infrastructure. There are no aerial photos from the relevant time

period clearly showing lack of irrigation. There is no evidence that the Sid Schvaneveldt indicated, stated, or suggested to anyone that the NWNW of Section 9 wasn't irrigated. In fact, the opposite of such forfeiture evidence was presented at the hearing: Sid's statutory claim map submitted with his statutory claim—which is an affidavit—was submitted in 1979 indicating irrigation as of that time period. There is irrigation infrastructure present (the culverts). And Aston testified about what Sid told him that this areas 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 pressure the system properly and it would require moving the mainline and pipe to the north side of the road. *Aston's Exceptions to Amended Preliminary Order* at 21. Even Jay Fonnesbeck—the primary protestant in the contested case—asserted that he was not arguing for forfeiture once the right was established:

> 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 Fonnesbeck; and JC is Hearing Officer James Cefalo) (emphasis added).[3]

The Director should not consider Aston's thoroughness at the hearing in providing evidence of non-forfeiture as a concession from Aston that Aston continues to bear the burden of disproving forfeiture. He does not. The Department (and the protestants) bear that burden. The *Order* does not address this burden or proof issue, and on reconsideration we invite the Director to reconsider and address whether the Department and the protestants have met their burden of proving forfeiture by clear and convincing evidence.

Furthermore, we ask the Director to reconsider whether defenses to forfeiture exist if the 36-acre portion of 13-4120 was actually forfeited (which, as described above, we believe it was not forfeited). The Director's *Order* suggests that because the legislature has not enacted an agricultural economics statutory defense, or because there is no case law for it, then the Director cannot recognize it as though he does not have jurisdiction to rule on this issue. We disagree. As stated above,

> **[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.

Jenkins, v. State, Dep't of Resources, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (emphasis added). The Director has the right to develop law on this issue and can recognize this defense.

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[3] 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).

Furthermore, language from the defenses to forfeiture statute—Idaho Code § 42-223—is crystal clear that its provisions are not a complete enumeration of all defenses to forfeiture and that "administrative recognition" of additional defenses is not precluded:

> 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.

Just because "the legislature enacted an explicit exception to forfeiture for mining" and "has not done so for the cost of electricity of pumping round water" (*Order* at 9) does not mean the Director cannot recognize this defense to forfeiture in this contested case. He clearly can. Upon reconsideration, he should not consider himself bound in a manner where he cannot administratively recognize this defense and should rule after considering the merits and analogous economic circumstances in the mining exception found in Idaho Code § 42-223. The Director is acting just like a judge in the adjudication of Aston's legal rights. In our view, he should recognize this exemption, but at a minimum, if he does not, the Director should explain why not to aid others in the development of forfeiture law and to aid any appellate court in their possible review of this matter. Aston has expended significant time and resources to defend his small family farm in this matter, and at a minimum, if this defense to forfeiture is not recognized, he should receive a more in-depth explanation of why it should not apply.

As described above, the Director should reconsider Section III.c. of the *Order* and find that the burden to prove forfeiture is on the Department (and the protestants who are advocating for forfeiture) and that there is no clear and convincing evidence of forfeiture. "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).

Alternatively, even if the Director maintains that a partial forfeiture occurred, the Director should reconsider his decision to not recognize the agricultural economics defense to forfeiture and administratively recognize such a defense.

DATED this 13th day of January, 2020.

Robert L. Harris

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

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2020, 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 PETITION FOR RECONSIDERATION**

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 Fonnesbeck 6022 W. Hwy 36 Weston, ID 83286 jnfonnes@gmail.com	☒ Regular Mail ☐ Hand Delivery ☐ Courthouse Box ☒ Email

Robert L. Harris

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

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