

**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 PETITIONS
FOR RECONSIDERATION**

BACKGROUND

On December 31, 2019, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued an *Order Denying Motion to Dismiss; Final Order on Exceptions* (“Final Order”) in this matter. The Order adopted the Hearing Officer’s findings of fact and conclusions of law from the hearing officer’s *Amended Preliminary Order Approving Transfer* (“Amended Preliminary Order”) issued October 29, 2019.

On February 13, 2020, Clinton Aston (“Aston”) timely filed with the Department *Aston’s Petition for Reconsideration* (“Aston Petition”). On February 14, 2020, Jay Norman Fannesbeck timely filed with the Department *Fannesbeck’s Petition for Reconsideration* (“Fannesbeck Petition”).

The Director has considered both Petitions, as addressed below, and denies both.

I. The Petitions

a. *Aston Petition*

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.’” *Aston Petition* at 2 quoting *Order* at 8-9. Aston argues the Director has the authority to review preliminary orders with “all of the decision-making power that he would have had if the agency head had presided over the hearing.” Idaho Code §67-5245(7). Instead, Aston argues, the Director “summarily concluded that ‘[he] agrees with the hearing officer.’” *Aston Petition* at 3 quoting *Order* at 9.

Aston argues the Order must be reconsidered because the Order did not address burdens of proof for a water right forfeiture analysis. *Aston Petition* at 3. Aston argues that the transfer applicant only bears the initial burden of proving “some evidence showing that irrigation occurred” before the burden shifts to the proponent of forfeiture, in this case the Department. *Id.* at 4.

Aston argues because there was some evidence of irrigation in the early 1960’s on the NWNW of Section 9, the burden shifted to the Department to prove forfeiture by clear and convincing evidence. *Id.* Aston argues “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." *Id.* Aston argues because there is no evidence related to a lack of irrigation infrastructure, no aerial photos, and no evidence Sid Schvaneveldt acknowledged the area wasn't irrigated, the Department failed to satisfy its burden of proving forfeiture by clear and convincing evidence. *Id.* at 4-5.

In rebuttal to a determination of forfeiture, Aston argues there is sufficient evidence to defeat forfeiture as a result of: (a) Sid Schvaneveldt's statutory claim map; (b) the presence of the culverts; (c) Aston's testimony that the area was occasionally irrigated; and (d) Fannesbeck arguing irrigation never actually took place in the NWNW of Section 9. *Id.* at 5-6.

Even if the right to irrigate the NWNW of Section 9 is forfeited, Aston argues for an "agricultural economics" common law defense to forfeiture. *Id.* at 6. Aston states the defense would be analogous to the statutory defense to forfeiture for mining water rights codified at Idaho Code § 42-223(1). Aston concludes "[t]he Director has the right to develop law on this issue" even though the Idaho legislature has not enacted the proposed defense to forfeiture, and no case law recognizes a defense to forfeiture for "agricultural economics." Aston cites Idaho Code § 42-223, in pertinent part, as support for his argument:

[The legislature does not intend] 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.

Id. at 7.

Aston argues the Director must "act like a judge" in his consideration of the proposed forfeiture defense of agricultural economics, and, if he does not recognize the forfeiture exception (again, akin to the mining exception in Idaho Code § 42-223), he "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." *Id.*

b. The Director's Analysis and Conclusion Related to Aston's Petition

Forfeiture

The Director adopted the hearing officer's Amended Preliminary Order as his Final Order after reviewing it pursuant to Idaho Code § 67-5246. The Director reviewed the Amended Preliminary Order under his statutory authority. The Director analyzed and then adopted the well-reasoned analysis and conclusions of the Amended Preliminary Order.

The Director disagrees with Aston's argument that burdens of proof for forfeiture were not sufficiently addressed. The Amended Preliminary Order concisely but accurately summarized the burdens of proof and burden shifting when forfeiture of a water right is being considered. *See Amended Preliminary Order* at 20-22. The hearing officer and Director determined clear and convincing evidence established the NWNW of Section 9 was not irrigated for the requisite period of time, and any water rights appurtenant to the NWNW of Section 9 were forfeited.

For Aston's benefit, the Director will restate the evidence that led him to this conclusion: There is clear and convincing evidence in the record that the use of public waters on the NWNW of Section 9 was forfeited by non-use. The testimony of Charlotte Schvaneveldt—Sid Schvaneveldt's wife, who, together, owned or irrigated the relevant property during the relevant timeframe¹—is first hand, personal, clear and convincing evidence of forfeiture. Ms. Schvaneveldt testified at hearing that she was personally involved in the day-to-day operations of the Schvaneveldt farm, which farm land included the NWNW of Section 9. Ms. Schvaneveldt lived on the property during the relevant timeframe of 1966 to 1986. She moved irrigation pipe during all the years she lived on the farm. Ms. Schvaneveldt knew the irrigated areas of her farm, and those areas that were not irrigated. Ms. Schvaneveldt testified that the NWNW of Section 9 was not irrigated between 1966 and 1986 and her unimpeached testimony was persuasive. In addition to Ms. Schvaneveldt, Kevin Olson, and Paul Campbell—who helped with the farm during the time Sidney and Charlotte Schvaneveldt owned it—testified that the NWNW of Section 9 was not irrigated. Brian Balls also testified that when he worked on the property in the early 1970s, the NWNW of Section 9 was not irrigated.

Aston refers to Jay Fannesbeck's testimony that the NWNW of Section 9 was never irrigated, and argues against forfeiture because Fannesbeck testified "[y]ou can't forfeit something that never existed." *Aston Petition* at 5. Fannesbeck's familiarity and proximity to the Schvaneveldt farm bolsters the conclusion that it is highly probable and reasonably certain water was not used to irrigate the NWNW of Section 9 from 1966 to the present day.

While the Director found some evidence that the NWNW of Section 9 was irrigated in the early 1960's, clear and convincing evidence established it was not irrigated from 1966 to 1986.

Forfeiture Defense

Aston continues to argue that even if the right to irrigate the NWNW of Section 9 has been forfeited, the Director may develop a new forfeiture defense. The Director lacks authority to develop defenses on his own.

Idaho Code § 42-223, in relevant part, states:

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

¹ We know from Ms. Schvaneveldt's testimony that she and Sidney Schvaneveldt moved to the Lee Schvaneveldt farm in 1966 and helped with farming operations until they purchased a portion of the farm in 1971. They then owned and operated the farm associated with Water Right No. 13-4120 between 1971 and 2004. Therefore, Charlotte Schvaneveldt was actively involved in the irrigation of the Schvaneveldt farm. She was very familiar with the method of irrigation, the limitations of the irrigation equipment and the extent of irrigation between the relevant time period of 1966-1986.

the existence or validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.

(Emphasis added). Idaho Code § 42-223 allows administrative recognition “of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code.” The Director interprets this section to mean that he may recognize Idaho case law (common law) and other statutes in the Idaho Code for valid defenses to forfeiture.

The Director will not recognize an “agricultural economics” defense to forfeiture. Aston has cited no Idaho case law related to it. The Director is likewise independently unaware of the existence of any common law agricultural economic defense to forfeiture.

Similarly, the Director cannot, and will not, recognize an agricultural economic defense to forfeiture based on Idaho Code § 42-223(11).

Aston’s Petition is denied.

c. Fannesbeck’s Petition

Fannesbeck’s Petition, is, at base, a restatement of his arguments offered at hearing and on exceptions. Fannesbeck asserts the Director “has arrived at certain conclusions without out [sic] providing any support other than to defer back to the Hearing Officer in this case.” *Fannesbeck Petition* at 1. Fannesbeck argues the Director erred and was inconsistent in his interpretations in the Final Order. *Id.*

Ownership of Water Right No. 13-2209

Fannesbeck again asserts the portion of Water Right No. 13-2209 appurtenant to Aston’s property was traded to the Fannesbeck family, by verbal agreement, prior to it being licensed. Fannesbeck supports this claim by reference to the “2004 Agreement.” *Fannesbeck Petition* at 3.

Validity and Ownership of Water Right No. 13-4120

Fannesbeck’s Petition again argues against the validity—and even the existence—of Water Right No. 13-4120, concluding the 40 acres NWNW of Section 9 were never irrigated. *Fannesbeck Petition* at 6.

d. The Director’s Analysis and Conclusions Related to Fannesbeck’s Petition

The Director acknowledges that Fannesbeck and various parties may have worked hard to establish the correct lineage, ownership, and records of Water Right No. 13-2209.² However, the Director reiterates his conclusion(s) from the Order: The opportunity to contest issues related to water permitting, place of use, and ownership has passed and the finality of Water Right No. 13-2209 (License G-28818) is essential to assuring ownership of water rights. *See In re CSRBA Case No. 49576*, 165 Idaho 489, ___, 447 P.3d 937, 940 (collateral attack of water right licensing is barred as it creates uncertainty of ownership). While parties or successors in interest to the alleged

² The Director directly analyzed this issue in the Final Order at pages 5-6. The hearing officer directly analyzed this issue in the Amended Preliminary Order at pages 4-5, and pages 14-17.

verbal agreement may have taken certain actions, including consulting with the Department, they did not take any recognizable legal action to update their water rights to reflect any prior verbal agreements. The Director has no authority to assign water rights based on 50-year old verbal agreements or on agreements that are not proper water right conveyances. The Director is not persuaded by Fannesbeck's Petition.

Contrary to Fannesbeck's arguments, there is also substantial evidence in the record to conclude Water Right No. 13-4120 is a valid water right and it is owned by Aston.³ *See Final Order at 7; Amended Preliminary Order at 6-7 and 18.* There is substantial evidence in the record to further conclude that Aston has the authority to transfer the entirety of Water Right No. 13-4120. *See Final Order at 7-8; Amended Preliminary Order at 18.*

Fannesbeck's Petition is denied.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Aston Petition and Fannesbeck Petition are both DENIED.

Dated this 5th day of March 2020.



GARY SPACKMAN
Director

³ The Director directly analyzed this issue at pages 7-8 of the Final Order. The hearing officer directly analyzed this issue at pages 18-20 of the Amended Preliminary Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March 2020, I emailed and mailed a true and correct copy of the foregoing Order Denying Petitions for Reconsideration, with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below,

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Kimberle English

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

(To be used in connection with actions when a hearing was held)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, Idaho Code.

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.