

the Court Trial, the Court ordered that the parties submit post-trial submissions, including proposed findings of fact and conclusions of law and separate closing arguments, with Campbell presenting rebuttal closing argument.² See Minute Entry and Order issued on April 7, 2021. The parties complied with the Court's post-trial submission schedule. Upon receipt of the parties' post-trial submissions, the Court took this matter under advisement and now issues its Findings of Fact, Conclusions of Law and Memorandum Decision and Order ("FFCL & MD&O").

SUMMARY OF CASE

This litigation involves a dispute between Campbell and Fonnesbeck concerning Campbell's asserted water right to one-third (1/3) of the water in Black Canyon Creek. The property at issue is an approximately 100 acre parcel of property ("Campbell Property") located in Franklin County, Idaho. The Campbell Property was acquired by Campbell's brother, Paul Campbell ("P. Campbell"), in 1980 from Marlyn and Donna Mickelsen. P. Campbell later transferred the Campbell Property to Campbell and his wife in 2005. Campbell's First Amended Complaint ("Compl.") alleges that when he acquired the Campbell Property he also acquired a water right to one-third (1/3) of the water in Black Canyon Creek for irrigation use on the Campbell Property. He also asserts that he has a right-of-way over the property now owned by Fonnesbeck to transport this water over Fonnesbeck's Property for beneficial use on the Campbell Property.

This litigation was commenced in July 2018. The pleadings have gone through at least one iteration. Campbell's Compl. alleges four (4) separate causes of action: (1) Declaratory

²At the conclusion of the Court Trial and following discussions with the parties' counsel, it was determined that the Court's Court Reporter, Tracy Barksdale, would prepare and provide to counsel a non-certified transcript of the proceedings to assist the parties in preparing their proposed findings of fact and conclusions of law. See Minute Entry and Order issued on April 7, 2021. Recognizing that this is not a certified transcript, the Court will nevertheless cite to this transcript of the trial in support of the Court's Findings of Fact and Conclusions of Law. To assure the accuracy of these citations to the uncertified transcript, the Court has reviewed its notes maintained contemporaneously with the trial proceedings and the For the Record ("FTR") audio system. The Court's citation to the uncertified transcript of these proceedings will be as follows: Tr. Vol. I; Tr. Vol. II, and Tr. Vol. III, with each volume reflecting a separate day of the trial. If a certified transcript is later prepared, the Court is confident that although the Court's citation to the uncertified trial transcript may not be verbatim to the final certified transcript, it will be substantially and substantively accurate.

Judgment/Right-of-Way for Irrigation; (2) Interference with Easement for Irrigation; (3) Intentional Interference with Prospective Economic Advantage; and (4) Injunctive Relief.

During a status conference conducted on October 13, 2020, the Court bifurcated this proceeding. The Court determined and ordered that it would try the equitable claims of Declaratory Judgment/Right-of-Way and Campbell's claim for a Preliminary Injunction in the first bifurcated proceeding. Minute Entry and Order issued on October 20, 2020. Once the equitable claims were tried and the Court issued its Findings of Fact and Conclusions of Law on those two (2) issues, the legal causes of action, *i.e.*, Interference with Easement for Irrigation and Intentional Interference with Prospective Economic Advantage, would proceed to jury trial, if necessary.³

As required by Rule 52(a) of the Idaho Rules of Civil Procedure ("I.R.C.P."), the Court now issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT⁴

To the extent that any of the Court's Findings of Fact are deemed to be Conclusions of Law, they are incorporated into the Court's Conclusions of Law.

1. Fonesbeck is the owner of property adjacent to the Campbell Property. This property consists of Parcel Nos. RP2524.00, RP2541, RP2542, RP 2523, RP2523.01, RP 2547, RP2548, RP2546, RP2522.01, RP2545, RP2512.01 ("Fonesbeck Property"). Ex. 135; Tr. Vol. I, p. 177, LL. 5-16.

2. On November 30, 2005, Campbell and his wife were presented with a Warranty Deed "convey[ing]" a "tract of land" identified as:

Township 16 South, Range 38 East of the Boise Meridian

³If the Court rules in Fonesbeck's favor on the Declaratory Judgment/Right-of-Way for Irrigation claim, the need for a jury trial on the legal claims will be negated.

⁴The Court has attempted to cite to the record, either trial exhibits or the trial transcript, in an attempt to support its Findings of Fact. In doing so, the Court may not have accurately cited to all of the facts within the record that support the Court's findings of fact nor does the Court suggest its citation to the record is an exhaustive list of all of the facts presented at trial, either testimonial or documentary, which support the Court's findings of fact.

Section 16: Beginning at the Southwest corner of the Southeast Quarter of the Southeast Quarter of Section 16; and running thence West 80 rods; thence North 80 rods; thence East 240 rods; thence South to a point 260 feet North of the Southeast corner of the Southwest Quarter of the Southwest Quarter of Section 15, same township and range; thence West 2379 feet, more or less to the County Road; thence Southwesterly along the County Road to the point of beginning.

Together with 1/3 of decreed water rights.

This “tract of land” was transferred to Campbell by P. Campbell and his wife Shelly Campbell. Ex. 128; Tr. Vol. I, p. 120, L.25, p. 121, LL. 1-7. The Campbell Property is reflected in Exhibit 135 as Parcel Nos. RP2522.00 and RP02512.00. Tr. Vol. I, p. 103, LL. 3-24.

3. The Campbell Property was transferred from Marlyn L. Mickelsen and Donna Mickelsen to P. Campbell and his wife on April 8, 1980 by way of Warranty Deed.⁵

4. The Campbell Property and portions of the Fannesbeck Property historically were part of a larger parcel of property owned by Peter Mickelsen⁶ and known as the Mickelson Farm. Tr. Vol. I, pp. 15-17.⁷

5. On May 19, 1880, Jenson Mickelsen⁸ filed a “Public Notice” with the Oneida County Recorder. Ex. 114. The Public Notice’s stated intent was to provide notice that Jense Mickelsen

⁵While legal title of the Campbell Property was vested in P. Campbell and his wife, Campbell testified that the consideration for this transaction was that Marlyn Mickelson was conveyed a home owned by Campbell in Weston, Idaho in exchange for the Campbell Property. Tr. Vol. I, p. 103, LL. 20-24; p. 104, LL. 1-6. Campbell and P. Campbell always understood that legal title would be conveyed back to Campbell once it was no longer needed as collateral associated with financing relative to a dairy owned and operated by P. Campbell. Ex. 105; Tr. Vol. I, p. 104, LL. 16-22; p. 106, LL. 21-25; p. 107, LL. 1-8. P. Campbell’s testimony further established this understanding that while legal title was in his name, as between himself and Campbell, his brother, Campbell, owned the Campbell Property. Tr. Vol. III, p. 61, 17-25, p. 62, L. 1.

⁶Mickelsen is used interchangeably in the documents and deeds of conveyance referenced throughout these FFCL & MD&O. In some instances it is spelled “Mickelson” and other “Mickelsen” For consistency purposes, the Court will use spelling Mickelsen unless using a direct quote from a document or deed of conveyance, in which case the Court will use the spelling utilized in the document or deed of conveyance.

⁷Although the Court sustained a number of speculation objections during D. Glade Schvaneveldt’s (“Schvaneveldt”) testimony when Campbell’s counsel was attempting to establish that Marlyn Mickelsen owned the Campbell Property before Campbell, it has been clearly established that the chain of title for the Campbell Property was passed from Marlyn Mickelsen and his wife to P. Campbell and his wife, who later conveyed to the Campbell Property to Campbell and his wife. Further, the Court, as the finder of fact, finds that the Campbell property was part of what was commonly and historically known as the Mickelsen Farm and that at some point the Mickelsen Farm was divided up, presumably between the Mickelsen siblings. Portions of that property are now owned by Fannesbeck and constitute the Fannesbeck Property and portions are now owned by Campbell and constitute the Campbell Property. Tr. Vol. I, p. 16, LL. 20-25; p. 17, LL. 1-7.

⁸Except for one location in Exhibit 115, Jenson Mickelson is referred to as Jense. The Court concludes, as the finder of fact, that all references in Exhibit 115 to Jense and Jenson are to the same person. Whether Jense was short for Jenson, a nickname for

and Peter Mickelsen were publicly declaring their intent to “appropriate and claim all of the water running in that certain Creek or Stream called and known as Black Canyon Creek, or Slough in the County of Oneida and Territory of Idaho.” *Id.* The Public Notice provides “[t]hat the water hereby appropriated, is to be used for Agricultural and Domestic Purposes.” *Id.* The Public Notice identifies the land upon which the water will be used. It sets out a description of property located within “Section 21 in Township 16.” *Id.*

6. The Public Notice identifies the location where the Public Notice was posted as the point of diversion from Black Canyon Creek: “at the point where the within described ditch taps the stream known as the Black Canyon Creek or Slough.” *Id.* This point of diversion is more particularly described as being in “Section 16 Township 16.” *Id.*

7. The Court finds, as a result of the Public Notice, which operated as Jense and Peter Mickelsen’s claim to the water of Black Canyon Creek, and the fact that Jense and Peter Mickelsen had established a point of diversion from Black Canyon Creek and were transporting and utilizing Black Canyon Creek water on their property, that the Black Canyon Creek water was being put to beneficial use in approximately April or May of 1880. Ex. 114.

8. From the evidence introduced at trial, both documentary and evidentiary, this appears to be the first record of any water being appropriated from Black Canyon Creek. Ex. 113, Figure 4A; Tr. Vol. II, p. 94, LL. 2-12; p. 96, LL. 16-20; p. 97, LL. 14-25.

9. In 1883, the District Court of the Third Judicial District in and for the County of Oneida, Territory of Idaho entered a Judicial Decree (“1883 Decree”) declaring that “P. Mickelsen & J. Mickelsen are entitled to the waters of Black Canon^[9] [sic] [Canyon] Creek.” Ex.

Jenson, or a typographical error, the Court is not certain. However, based upon context, the Court finds that they are the same person.

⁹This is an obvious typographical error in the 1883 Decree and is an obvious reference to Black Canyon Creek not “Black Canon.”

115; Tr. Vol. I, p. 213, LL. 8-22. This Court makes the inference, based upon Exhibits 114 and 115, that P. Mickelsen and J. Mickelsen are the same individuals referenced in Exhibit 114 as Peter Mickelson and Jenson or Jense Mickelson, despite the use of an “o” in Mickelson in Exhibit 114. Tr. Vol. I, p. 213, LL. 4-22. The 1883 Decree does not identify or decree a specific place of use associated with the water from Black Canyon Creek. Ex. 115; Tr. Vol. II, p. 119, LL. 15-19. This absence of a place of use is not unusual when dealing with historic or “old water rights.” Tr. Vol. III, p. 3, L. 25. “[V]irtually none of the old water rights have every element that [one] would expect in a modern decree.” *Id.* p. 3, L. 25, p. 4, LL. 1-2. Some historical or old “decrees just decree the water in [the] stream and nothing more.” *Id.* p. 5, LL. 4-5.

10. The 1883 Decree is the first and only decreed water right entered into evidence at trial that specifically references Black Canyon Creek and its waters.¹⁰ Exs. 112, 113, 115; Tr. Vol. II, pp. 119-20, 189-90; Tr. Vol. III, pp. 3-5.

11. Around 1905, Peter Mickelsen acquired and owned property located along Black Canyon Creek.¹¹ Included within the property owned by Peter Mickelsen was the Campbell Property. Between 1907 and 1911, the property, which included the Campbell Property, was conveyed to Charles Mickelsen from Peter Mickelsen. Exs. 112, 113, 117, 119, 120; Tr. Vol. II, p. 84, LL. 24-25, p. 85, LL. 1-6, 18-25, p. 86, LL. 1-6, p. 88, LL. 1-16.

¹⁰There are two (2) other judicial decrees that warrant mentioning by the Court: First, in 1923, there is a Decree Quieting Title in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Franklin that quiets title as it relates to “all adverse claims of the defendants. Ex. 123. The Defendant was the Executor of the Last Will and Testament of James Peter Mickelsen, sometimes known as Peter Mickelsen, deceased. The Plaintiff in this quiet title proceeding was Charles Mickelsen. Reference is made to the complaint and adverse claims, which are obviously absent from the record, but the 1923 Decree Quieting Title provides that the adverse claims are “invalid and groundless, and [Charles Mickelsen] be and he is hereby declared and adjudged to be the true and lawful owner of the land and water described in the Complaint.” Ex. 123. And second, a judicial decree was entered in the District Court of the United State for the District of Idaho, Eastern Division, which has come to be known as the “Dietrich Decree.” This adjudication occurred in 1920 and adjudicated the rights of certain parties to the tributaries of Bear River.

¹¹The Court will refer to the Peter Mickelsen properties that were ultimately conveyed to Charles Mickelsen between 1907 and 1911 as the “Mickelsen Farm” in these FFCL & MD&O. The Court also recognizes that the Mickelson Farm was divided into various sub-units and ultimately part of what the Court characterizes as the Fannesbeck Property has its genesis in the Mickelsen Farm and the Campbell Property comes from what was originally the Mickelson Farm.

12. A system that consisted of a series of ditches for the purposes of watering portions of the Mickelsen Farm was created with water from the Black Canyon Creek pursuant to the 1883 Decree. One of these ditches was known as the “East Ditch.” The “East Ditch,” as it was described and utilized in the 1960s and 70s by Schvaneveldt, diverted water from Black Canyon Creek to the East Ditch across the Fannesbeck Property, specifically Parcel 2523.01, and over to the Campbell Property where it has historically been used to irrigate portions of the Campbell Property. Ex. 135;¹² Tr. Vol. I, pp. 19-24, 26-28, 38-39.

13. In 1913, a Judgment (“1913 Judgment”) was entered in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Oneida. The 1913 Judgment was entered by way of stipulation and provided Charles Mickelsen an easement, a “right to enter” the Fannesbeck Property for purposes of “making repairs” and maintaining the East Ditch. Ex. 121. This 1913 Judgment also granted Charles Mickelsen the right to “travel through, over, and upon said premises for purposes of making repairs upon said ditch.” *Id.* This easement or right of way to maintain the East Ditch crosses over what is reflected in Exhibit 135, Parcel No. RP02523.01. Ex. 113, Fig. 4F; Ex. 121; Tr. Vol. I, pp. 30, 33-35; Tr. Vol. II, p. 29, LL. 13-25, p. 33, LL. 9-25, p. 34, LL. 1-24, pp. 113-115.

14. The 1913 Judgment does not identify the dominant estate benefitting from the ditch or the water being transported in said ditch. However, the evidence and testimony at trial established that at the time of the 1913 Judgment establishing the easement and right of way over the Fannesbeck Property, Charles Mickelsen owned the adjacent property. Ex. 113, Fig. 4F; Tr. Vol. I, p. 115, LL. 3-16; Tr. Vol. II, p. 33, LL. 9-25, p. 34, LL. 1-24.

¹²Exhibit 135 contains a purple marker tracing, which is the depiction of the East Ditch as drawn by Schvaneveldt in his trial testimony. The red “X,” which is at the convergence of the “East Ditch,” and Black Canyon Creek, which is highlighted in brown marker, is where Schvaneveldt testified Butters was diverting water from Black Canyon Creek for purposes of irrigating the Campbell Property. Exhibit 35; Tr. Vol. I, pp. 19-24.

15. The easement or right of way created in the 1913 Judgment is in the same location where the Public Notice was posted and where the ditch's original point of diversion with Black Canyon Creek was, as described in the Public Notice. Exs. 113, 114, 211; Tr. Vol. II, p. 36, LL. 4-12; *id.* pp. 94-95, 113-114.

16. The Mickelsen Farm was eventually divided into three (3) separate properties with each of the three (3) properties exercising, claiming and utilizing its rights to one-third (1/3) of the water from Black Canyon Creek. Tr. Vol. I, p. 27, LL. 18-25, p. 28, LL. 16-25. Schvaneveldt testified that the property owners who exercised and shared the water rights to Black Canyon Creek were the Fonnesbecks, Isabella Mickelsen (Schvaneveldt and his father were leasing this property in the 1960s and 70s), and Marlyn Mickelsen (Charles Buttars was renting and operating this property in the 1960s and 70s). *Id.* The one-third (1/3) parcel of the Mickelson Farm, owned by Marlyn Mickelsen and his wife and operated by Charles Buttars in the 1960s and 70s, which is now the Campbell Property, utilized "more or less" one-third (1/3) of the water from Black Canyon Creek. Tr. Vol. I, p. 28, LL. 16-21.

17. The one-third (1/3) portion of the Mickelsen Farm owned by Charles Mickelsen is now owned by Campbell. The Campbell Property is depicted on Exhibit 135 as a nearly rectangular piece of property outlined in black marker. Ex. 135; Tr. Vol. I, p. 13, LL. 3-19, p. 15, LL. 1-22; Tr. Vol. II, pp. 85-86.

18. The deeds conveying title to the Campbell Property all reflect that the transfer included decreed water rights, with the more recent deeds of conveyance issued after the Mickelsen Farm was divided into three (3) separate parcels reflecting "together with 1/3 of decreed water right." Exs. 112, 124-128.

19. Exhibit 113, Figure I and Exhibit 124 illustrate that the July 1932 deed transferred “all decreed water rights, and water rights appurtenant thereto, and 35 shares of the capital stock of the Weston Creek Irrigation Company.” Ex. 124; Ex. 113, Fig. I; Tr. Vol II, p. 117, LL. 4-9. Exhibit 125 is a division of the property reflected in Exhibit 113, Figure F and Exhibit 124 by way of quitclaiming a smaller portion of that property to grantors or parties of the second part, Lorenzo and Cecelia Mickelson. Ex. 125. This 1954 Quitclaim Deed also provided language transferred water rights by stating: “Together with 1/3 of the decreed water right.” *Id.* The Court finds that this is the same decreed water right from Black Canyon Creek established in the 1883 Decree.

20. The 1954 Quitclaim Deed identified in Exhibit 125 and Exhibit 113, Figure J depicts the location of the deeded property. This deeded property includes what is now the Campbell Property. Ex. 113, Figure J; Ex. 124; Tr. Vol. II p. 127, LL. 17-25.

21. The 1957 Warranty Deed conveys the property identified in Exhibit 113, Figure K to Marlyn Mickelsen and his wife. Ex. 126; Ex. 113, Fig. K; Tr. Vol. II, p. 133, LL. 22-25, p. 134, LL. 1-13. The 1957 Warranty Deed also includes the same language as the previous 1954 Quitclaim Deed, “Together with 1/3 of decreed water right.” Ex. 126. The Court finds that this is the same decreed water right from Black Canyon Creek established in the 1883 Decree.

22. The 1980 Warranty Deed conveys the property identified in Exhibit 113, Figure L to P. Campbell. Ex. 113, Fig L; Ex. 127; Tr. Vol. II, p. 134, LL. 18-25, p. 135, LL. 1-16; *see also supra* Findings of Fact No. 3; *see supra* note 5; Ex. 135. Consistent with the preceding Deeds and conveyances, the 1980 Warranty Deed’s language provides, “Together with 1/3 of decreed water right.” Ex. 127. The Court finds that this is the decreed water right from Black Canyon Creek established in the 1883 Decree.

23. Finally, the 2005 Warranty Deed conveys the same parcel of property identified in Exhibit 113, Figure M, to Campbell. Ex. 113, Fig. M; Ex. 128; Tr. Vol. II, p. 13, LL. 10-19. Consistent with the earlier referenced Deeds and conveyances, the 2005 Warranty Deed's language also provides, "Together with 1/3 of decreed water right." Ex. 128. The Court finds that this is the same decreed water right from Black Canyon Creek established in the 1883 Decree.

24. Consistent with the Court's findings in Findings of Fact Nos. 18 through 23, circumstantial evidence also supports the finding that "it was common knowledge" that farmers in that locale knew that one-third (1/3) of the waters from Black Canyon Creek were being used on the Campbell Property. Tr. Vol. I, p. 30, LL. 17-25. Schvaneveldt's testimony depicts the manner in which the East Ditch was used to transport water from Black Canyon Creek across the Fannesbeck Property and applied to beneficial use on the Campbell Property in the 1960s and 70s. Ex. 135; Tr. Vol. I, p. 19, LL. 21-25, p. 20, LL. 1, 6-16, p. 21, LL. 3-25, p. 40, LL. 5-22; *see also supra* Findings of Fact No. 12; *see supra* note 12 (identifying the point of diversion from Black Creek for the East Ditch).

25. Schvaneveldt also testified that during the 1960s and 70s when he and his father ran the Isabel Mickelsen farm, only three (3) farmers used the East Ditch: the Fannesbecks, the Isabel Mickelsen farm, which he rented and ran along with his father, and Charles Buttars, who rented and ran the Campbell Property when it was owned by Marlyn Mickelsen, the farm now owned by Campbell. Tr. Vol. I, p. 41, LL. 10-22. During this same time period, the three (3) users of the East Ditch "cooperated in cleaning and maintaining them." *Id.* p. 42, LL. 12-17.

26. Between 1964 and 1981, when Schvaneveldt and his father ran the Isabel Mickelsen property, Buttars used one-third (1/3) of the Black Canyon Creek water on the Campbell

Property. Ex. 135; Tr. Vol. I, p. 27, LL. 1-4, p. 28, LL. 16-21; p. 33, LL. 9-19, p. 33, LL. 10-18, p. 34, LL. 2-22, p. 35, LL. 1-22.

27. Despite being the record owner of the Campbell Property, as between Campbell and P. Campbell, they considered the Campbell Property to be owned by Campbell. *See supra* Findings of Fact No. 3; *see supra* note 5. P. Campbell and Campbell had an agreement whereby P. Campbell farmed the Campbell Property and in return Campbell received one-third (1/3) of profits. Tr. Vol. 1, p. 111, LL. 11-20. This arrangement continued from 1980 until the Campbell Property was put into CRP in approximately 1987 or 88.¹³ Tr. Vol. p. 111, LL. 16-20, p. 117, LL. 23- 25, p. 118, LL. 1, 7-9.

28. P. Campbell diverted water, utilized the East Ditch, and irrigated the Campbell property in the same manner it had been irrigated by Buttars when he rented the Campbell Property from Marlyn Mickelsen. Ex. 135; Tr. Vol. I, p. 112, LL. 23-25, p. 113, LL. 9-25; p. 114, LL. 1-13; p. 116, LL. 10-12, p. 117, LL. 3-22, p. 170, LL. 10-16; *see also supra* Findings of Fact Nos. 25 and 26.

29. In approximately 1987 or 88, P. Campbell, with the blessing of Campbell, put the Campbell Property into CRP. Campbell testified that “it was really dry, and it was, we felt like ... we’d make more out of being in the CRP than we would [with P. Campbell] trying to farm it.” Tr. Vol I, p. 119, LL. 14-18; Tr. Vol. III, p. 43, LL. 3-6. As a result, P. Campbell quit using the East Ditch once the Campbell Property went into CRP. Tr. Vol. III, p. 43, LL. 3-6, p. 44, LL. 13-14, p. 48, LL. 1-2.

¹³CRP is the acronym for the Conservation Reserve Program. Pursuant to Rule 201(b)(2) of the Idaho Rules of Evidence, the Court will take judicial notice that the Conservation Reserve Program is a federal program that falls within the auspices of the United States Department of Agriculture and is administered by the Farm Service Agency (“FSA”). “CRP is a land conservation program administered by FSA. In exchange for a yearly rental payment, farmers enrolled in the program agree to remove environmentally sensitive land from agricultural production and plant species that will improve environmental health and quality.” *See* fsa.usda.gov.

30. Neither P. Campbell nor Campbell subjectively intended to “abandon their rights” to one-third (1/3) of the waters from Black Canyon Creek or the easement or right of way across Fonnesbeck’s Property to operate, transport Black Canyon Creek water or maintain the East Ditch.”¹⁴ Tr. Vol. I, p. 119, LL. 19-25, p. 20, LL. 1-3; Tr. Vol. III, p. 43, LL. 3-6, p. 44, LL. 9-17, p. 47, LL. 18-23, p. 50, LL. 4-6, p. 60, LL. 16-19, p. 62, L. 19-23.

31. The Campbell Property remained in CRP from approximately 1987 or 88 until 2005 when P. Campbell deeded the Campbell Property to Campbell. Tr. Vol. I, p. 120, LL. 4-9; *see also supra* Findings of Fact No. 29. Campbell continued the Campbell Property in CRP from 2005, when the Campbell Property was deeded to him, until 2012. Tr. Vol. I, p. 120, LL. 4-9. At approximately that time, Campbell began renting the Campbell Property to Schvaneveldt. *Id.* p. 50, LL. 13-15. Schvaneveldt testified that the Campbell Property had been in CRP up until that time and that “when [he] took over the [Campbell Property, he] was the one who broke the [Campbell Property] out of the CRP contract. *Id.* p. 50, LL. 19-22.

32. Between the time the Campbell Property was placed in CRP¹⁵ in 1987 or 1988 and the time it was removed from CRP, Fonnesbeck made improvements and alterations to the East Ditch, Black Canyon Creek, and the historic diversion from Black Creek to the East Ditch; he also created or modified an existing pond to store water for irrigation purposes. Ex. 215, Photograph 3; Ex. 132; Tr. Vol. I, p. 23, LL. 18-25, p. 24, LL. 1-2; p. 55, LL. 12-25, p. 65, LL.

¹⁴On cross-examination, P. Campbell was presented with Ex. 209. This was a document drafted by Fonnesbeck and signed by Fonnesbeck and P. Campbell. The document uses the term abandonment. P. Campbell’s trial testimony was sufficient to convince this Court that it was never his intent to abandon, in the legal sense, the ditch or the one-third (1/3) decreed water right in the waters of Black Canyon Creek. *See* Tr. Vol. III, p. 44, LL. 9-18. Rather, he quit or discontinued use of the Black Canyon Creek water because of the difficulty of using said water at that point in time due to a scarcity of water and this discontinuation of use also coincided with placing the Campbell Property in CRP.”

¹⁵Fonnesbeck claims that the improvements began prior to the time the Campbell Property entered CRP, but after P. Campbell “had quit using the ditch and quit irrigating.” Tr. Vol. I, p. 192, LL. 14-20. Fonnesbeck began to make improvements and changes in the fall of 1985. Ex. 209. It appears that P. Campbell discontinued serious attempts at irrigating the Campbell Property with water from Black Creek Canyon during or at the conclusion of the 1986 crop season and placed the Campbell Property into CRP in 1987 or 1988. Ex. 209; *see also supra* Findings of Fact Nos. 29 and 31.

8-19, p. 67, LL. 12-21, p. 95, LL. 3-19, p. 170, LL. 17-25; *id.* pp. 171-72; *id.* p. 191, LL. 8-10, p. 192, LL. 4-16, 25, p. 193, LL. 1-18.

33. Between roughly 1986 and the time the Campbell Property was removed from CRP, Fannesbeck made some “serious improvements”¹⁶ to the irrigation system that existed prior to 1986: (1) he created or improved and modified a pond located on his property; (2) installed a concrete head gate adjacent to the pond; (3) removed the culvert that transported water beneath Black Canyon Road; and (4) installed a new culvert and pipe that allowed water to be diverted from Black Canyon Creek into the East Ditch. Ex. 132; Ex. 215, Photographs 2, 3, and 5; Tr. Vol. I, p. 54, LL. 3-15, p. 55, LL. 12-25, p. 66, LL. 18-25, p. 67, LL. 7-19, p. 147, LL. 5-12, p. 171, p. 172, LL. 1-22, p. 192, LL. 14-20, 24-25, p. 193, p. 194, LL. 1-16; Tr. Vol. III, p. 72, LL. 22-25, p. 73, p. 74, LL. 1-2, p. 83, LL. 11-25.

34. The diversion point of waters from Black Canyon Creek, as it existed prior to 1986, was modified or entirely done away with by Fannesbeck, and he installed a cement head gate adjacent to his pond for diversion into his pond. *See supra* Findings of Fact No. 33. The location where Schvanveldt attempted to divert waters from Black Canyon Creek in 2012 is approximately fifty (50) feet downstream from the pre-1986 diversion point. Ex. 135; Tr. Vol. I, p. 23, LL. 18-25, p. 24, LL. 1-9, p. 93, LL. 7-19, p. 95, LL. 3-19, p. 157, LL. 17-24, p. 159, LL. 12-20; Tr. Vol. II, p. 174, LL. 21-24, p. 175, LL. 8-9, p. 177, LL. 7-10, p. 183, LL. 23-25.

35. It is significant that Fannesbeck’s improvements and modifications to the diversion point of waters from Black Canyon Creek, as it existed prior to 1986, contemplated a time in the future when Campbell would again demand use of his one-third (1/3) of decreed water rights in

¹⁶Tr. Vol. I, p. 192, L. 15.

Black Canyon Creek.¹⁷ Ex. 215, Photograph 5; Tr. Vol. I, p. 171, LL. 8-21, p. 172, LL. 1-21, p. 193, LL. 16-25, p. 194, LL. 1-13; Tr. Vol. III, p. 72, LL. 22-25, p. 73, p. 74, LL. 1-2.

36. In 2005 when Campbell was deeded the Campbell Property, *see supra* Findings of Fact No. 23, the Campbell Property continued in the CRP until the property was rented to Schvaneveldt in 2011. Tr. Vol. I, p. 50, LL. 13-15. On Campbell's instruction, Schvaneveldt removed the Campbell Property from CRP. Schvaneveldt testified that it was him "who broke the property out of the CRP contract." *Id.* LL. 20-24. Schvaneveldt testified that Campbell wanted to again irrigate the property and that Campbell "was concerned about maintaining his right of way through there." *Id.* p. 51, LL. 2-3. Campbell's testimony was consistent with Schvaneveldt's concerning a desire to "preserve my water rights" in Black Canyon Creek. *See also* Tr. Vol. I, p.123, LL. 20-25, p. 124, L. 1, p. 125, LL. 6-8. Campbell asked Schvaneveldt to reopen the East Ditch and commence irrigating the Campbell Property. *Id.* p. 51, LL. 19-25, p. 52, L. 1, p. 123, LL. p. 123, 18-22.

37. In either 2011 or 2012, Schvaneveldt re-opened the East Ditch, diverting water from Black Canyon Creek through the new culvert and pipe Fonnesbeck had installed¹⁸ into the East Ditch and transporting the diverted water from Black Canyon Creek to the Campbell Property for irrigation purposes. Ex. 215, Photograph 3; Tr. Vol. I, p. 52, LL. 13-25, p. 53, LL. 1-10, 22-25, p. 54, LL. 1-5, p. 67, LL. 22-24, p. 68, LL. 1-8, p. 124, LL. 7-13. This brief period of diversion and irrigation usage occurred for a period of roughly five (5) to seven (7) days. Tr. Vol. I, p. 53, LL. 10-12. Schvaneveldt testified that once the East Ditch was re-opened, it was actually Campbell

¹⁷The precise language supporting this Finding of Fact is a conversation between Fonnesbeck and Steve Butters. Butters testified as follows:

[H]e [Fonnesbeck] was just on my side digging and forming up the thing. I asked him what he was doing. And he said, one day Boyd Campbell's going to want the water, and I've got to have a place for him to do it.

Tr. Vol. I p. 171, LL. 18-21.

¹⁸*See supra* Findings of Fact Nos. 33, 35; *see supra* note 17.

who closed the head gate diverting Black Canyon Creek water into Fonnesebeck's pond, allowing the water to proceed down Black Canyon Creek and to the point of diversion created by Fonnesebeck into the East Ditch. Tr. Vol. I, pp. 50-55. Due to the dryness of the year in 2011 or 2012, the dryness of East Ditch's ditch bed and bank, and the fact that Schvanveldt, who lived in Preston, did not want to pursue irrigation that year, the Campbell Property was only irrigated for that brief five (5) to seven (7) day period in 2011 or 2012. Tr. Vol. I, p. 56, LL. 20-25, p. 57.

38. No evidence was introduced concerning any effort or attempt to irrigate the Campbell Property with Black Canyon Creek water or by means of the East Ditch during 2013 or 2014.

39. In 2015, Campbell leased the Campbell Property to Randy Atkinson ("Atkinson"). Tr. Vol. I, p. 127, L. 25, p. 128, LL. 1-2. It was Campbell's intention to have Atkinson irrigate the Campbell Property with "whatever water was there," referring to Black Canyon Creek water. Tr. Vol. I, p. 128, LL. 3-9.

40. Sometime during 2015, Atkinson attempted to open or "clean" the East Ditch with a ditcher hooked to his tractor. Tr. Vol. I, p. 128, LL. 1, 11-17. While Atkinson was driving on the Fonnesebeck Property, Fonnesebeck pulled a vehicle in front of the tractor and told Atkinson and Campbell that "you're not going to clean it, or if you do, I'll fill it right back in." *Id.* LL. 14-20. Campbell testified that Fonnesebeck physically blocked Atkinson and his tractor/digger from digging the ditch. Tr. Vol. I, p. 129, LL. 2-8; p. 130, LL. 7-9. Campbell testified that Fonnesebeck also physically threatened him. *Id.* p. 130, LL. 2-4.

41. Campbell made another attempt to clean out the East Ditch in 2017 with his grandson. Tr. Vol. I, p. 131, LL. 21-25, p. 132, LL. 1-4. Campbell relates that Fonnesebeck "pulled in front of the backhoe just where the ditch comes out of ... the culvert" with his four

wheeler. Tr. Vol. I, p. 132, LL. 2-4. Campbell testified that Fonnesbeck again stated that “he wasn’t going to allow us to open that ditch.” *Id.* LL. 8-10.

42. Campbell initiated this lawsuit, specifically seeking declaratory relief from the Court on the issues of: (1) whether Campbell “hold[s] and possess[es] the right to use water from the Black Canyon Creek as set forth in the Water Claims and the Decreed Right;” and (2) whether Campbell “hold[s] and possess[es] a privilege, estate, and/or interest in [the Fonnesbeck Property] relative to the East Ditch established under Idaho Code § 42-1102; alternatively whether Campbell “hold[s] and possess[es] a privilege, estate, and /or interest in [the Fonnesbeck Property] relative to the East Ditch under common law principles of implied easement, easement by agreement, easements by prescription or other principles of law and equity.” Compl., p. 4, ¶¶ 18-20.

CONCLUSIONS OF LAW

To the extent that any of the Court’s Conclusions of Law are deemed to be Findings of Fact, they are incorporated into the Court’s Findings of Fact by reference.

1. Idaho Code §10-1201 provides as follows:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

2. Idaho Code §10-1202 provides as follows:

Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

3. Pursuant to the foregoing, this Court has the authority and jurisdiction to declare the rights of Campbell concerning his claim of a decreed water right from a portion of the waters of Black Canyon Creek and a decreed easement to transport water from Black Canyon Creek to his property over and across the Fonnbeck Property.

4. The Court concludes from the evidence adduced at trial and by a preponderance of the evidence accepted and found to be compelling by the Court, the finder of fact in this proceeding, that Campbell does have a decreed water right to one-third (1/3) of the waters from Black Canyon Creek, which is appurtenant to the Campbell Property, pursuant to the 1883 Decree. Consistent with the discussion of a decreed water right in *Crow v. Carlson*, 107 Idaho 461, 465-66, 690 P.2d 916, 920-21 (1984) (“*Crow*”), this Court concludes that Campbell’s water right “is conclusive proof of diversion of the water and application of the water to beneficial use, *i.e.* the decree is *res judicata* as to the water rights at issue herein.” Both “a water right and a ditch right for the conveyance of water is recognized as a property right apart from and independent of the right to the use of the water conveyed therein.” *Mullinix v. Killgore’s Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P. 3d 286, 294 (2015) (“*Mullinix*”). In *Mullinix*, the Idaho Supreme Court (“ISC”) continued, noting that “[o]rdinarily water and the ditches through which the same is conveyed to lands, become appurtenant to the land when used upon or in connection with such land.” *Id.* (quoting *Molony v. Davis*, 40 Idaho 443, 448-49, 233 P. 1000, 1001 (1925)). In this case, the Court’s Findings of Fact establish that the water from Black Canyon Creek has historically and consistently been transported from a point of diversion in Black Canyon Creek over and through the Mickelsen Farm and what later became the Fonnbeck Property, and has been used in connection with what was historically part of the Mickelsen Farm and has subsequently come to be the Campbell Property. As a result of this beneficial “use[] in

connection with the Campbell Property,” the Court concludes that one-third (1/3) of the water right decreed in the 1883 Decree is appurtenant to the Campbell Property. *See id.*

5. The Court concludes that as the Mickelsen Farm was divided, the 1880 Decree and the decreed water right “continue[d] with the property even [when] divided.” *Id.* “A division of a tract of land to which water is appurtenant, without segregating or reserving the water right, works a division of such water right in proportion as the land is divided.” *Id.* In this case, as the properties which comprised the Mickelsen Farm and the water put to beneficial use arising from the original 1883 Decree and the decreed water right were divided, the water right was also divided in proportion to how the Mickelsen Property was divided: one-third (1/3) to the Fannesbeck Property, one-third (1/3) to the Isabel Mickelsen Property, and one-third (1/3) to the Campbell Property. *See supra* Findings of Fact No. 16. As the property is currently owned and deeded, two-thirds (2/3) of the waters of Black Canyon Creek are appurtenant to the property owned by Fannesbeck and one-third (1/3) of the waters of Black Canyon Creek are appurtenant to property owned by Campbell, the Campbell Property.

6. The evidence presented at trial established, by a preponderance of the evidence, this decreed water right to the waters of Black Canyon Creek. Specifically, the 1883 Decree provided “that P. Mickelsen and J. Mickelsen are entitled to **the** waters of Black Canyon Creek.” Ex. 115 (emphasis added); *see supra* Findings of Fact No. 9.

7. The Court recognizes that the 1883 Decree does not identify a place of use or a specific amount of water.

8. Relative to the amount of water, the evidence at trial established that Black Canyon Creek is a small “creek or slough” as described in the 1880 Public Notice. *See supra* Findings of Fact Nos. 5, 6. The Public Notice also establishes that it was the demonstrated intent of P.

Mickelsen and J. Mickelsen to appropriate and apply to beneficial use “all of the water running in that certain Creek or stream called and known as Black Canyon Creek or Slough.” *See supra* Findings of Fact No. 5.

9. Therefore, based upon the 1880 Public Notice, which purports to appropriate “all” of the waters from Black Canyon Creek, and the 1883 Decree, which provides no limitations or restrictions on the amount of water to be appropriated from Black Canyon Creek but instead contains the all inclusive language “the waters of Black [Canyon]¹⁹ Creek,” the Court concludes that the historical place of use for one-third (1/3) of this decreed Black Canyon water right is the Campbell Property.

10. Relative to the place of use, the Court determines that the deeds of conveyance within the Campbell Property chain of title,²⁰ along with the evidence introduced at trial related to the historical beneficial use of the waters of Black Canyon Creek, which were originally on the larger Mickelsen Farm, and continued as the Mickelsen Farm was divided into three (3) smaller parcels, with one of those smaller parcels being the Campbell Property, establish that the Campbell Property was one of the historical places of use for this water. The Court accepts the testimony of Dr. Tuthill that “virtually none of the old water rights have every element that [one] would expect in a modern decree” and that many historical and old “decrees just decree the water in [t]he stream and nothing more.” *See supra* Findings of Fact No. 9.

¹⁹*See supra* note 9.

²⁰The Court recognizes that the conveyance deeds conveying property from Peter Mickelsen to Charles Mickelsen do not expressly mention the Black Canyon Creek water rights, although the 1908 Deed does convey “all water rights thereto” and a later paragraph conveys “all and singular tenements, hereditaments thereunto belonging or in anywise appertaining.” *See* Exs. 112, 119, 120. However, viewing the chain of title in its totality, all subsequent conveyances in the chain of title either mention water rights in their totality or, as the property was divided into smaller parcels, mention one-third (1/3) of decreed water rights. Exs. 122, 124, 125, 126, 127, 128. This, coupled with the custom and practice of the title owners of property and their respective lessees, leads this Court, as the finder in fact, to reach, what this Court believes to be the only reasonable inference: that the conveyance deeds between Peter Mickelsen and Charles Mickelson included the appurtenant rights to the waters of Black Canyon Creek as decreed in the 1883 Decree.

11. As early as 1880, Peter and Jense Mickelsen had diverted water from Black Canyon Creek and were applying that water to beneficial use.²¹ See Ex. 114. It is equally clear that as early as 1880, Peter and Jense Mickelsen had a ditch whereby they transported water from Black Canyon Creek to portions of their property and applied it to beneficial use, both domestic and agricultural. *Id.* The ditch is described in the 1880 Public Notice as “1/2 mile long 6 feet wide at the top 5 feet wide on bottom and 2 ½ feet deep, with a fall of 2 inches to the rod.” *Id.* Subsequent testimony provided by various witnesses in this proceeding and as outlined in the Court’s Findings of Fact, establish that as the years progressed and as the property was divided, a system of ditches was developed for purposes of applying both Black Canyon water and Weston Creek water to beneficial use upon the Mickelsen Farm. One of these ditches was the East Ditch. In 1913, Charles Mickelsen and Peter J. Fønnesbeck, by way of stipulation and Judgement, established an express easement granting “Charles Mickelsen, his heirs, his agents and servants ... the right to enter upon [the land of Peter J. Fønnesbeck] ... for the purpose of making repairs of the water ditch used by [Charles Mickelsen], and situated upon said premises, and [Charles Mickelsen], and his heirs, agents or servants may also travel through, over, and upon said premises for the purpose of making repairs upon said ditch.” Ex. 121.

12. Based upon the evidence, testimonial and documentary, this Court concludes that the 1913 Judgment is an express easement permitting Charles Mickelsen to transport water through the East Ditch as well as maintain the East Ditch. This Court further concludes that the East Ditch was utilized by Charles Mickelsen for this purpose. Therefore, the Court concludes that the

²¹There are certainly questions concerning precisely where this water was being transported and put to beneficial use. Exhibit 114 appears to describe the point of diversion as Section 116 and the place of use as Section 21. Witnesses testifying on behalf of Campbell suggest that this place of use identified in Exhibit 114 may have been a mistake. While the Court is not necessarily convinced of this testimony, it is clear that later property owners and possessors of the water right were conveying the water right from Black Canyon Creek as an appurtenance to Section 16.

East Ditch is an appurtenance to the land upon which beneficial use of the waters of Black Canyon Creek have been established.

13. As noted in *Mullinix*, “ditch rights and water rights are separate and independent from one another.” 158 Idaho at 277, 346 P.3d 294. The ISC continued its analysis of ditch rights and water rights in *Mullinix* as follows:

[A]lthough a water right and a ditch right are separate and independent, the right to a ditch and the right to water are both appurtenances to the land. *Molony v. Davis*, 40 Idaho 443, 448-49, 233 P. 1000, 1001 (1925). ... Similar to a water right, a ditch conveying water to land is appurtenant to the land and transfers with the conveyance of the property.

The water and ditch rights continue with the property even if the property is divided. “A division of a tract of land to which water is appurtenant, without segregating or reserving the water rights, works a division of such water right in proportion as the land is divided. *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984) (quoting *Hunt v. Bremer*, 47 Idaho 490, 493, 276 P. 964, 965 (1929)). Such water or ditch rights may be conveyed separate and apart from the land only if “such was the intention of the parties to the conveyance.” *Molony*, 40 Idaho at 449, 233 P. at 1001.

158 Idaho at 277, 346 P.3d at 294.

14. The Campbell Property is one of the parcels of property that historically and consistently has benefited from the water transported via the East Ditch. As such, the ditch rights in the 1913 Decree established an easement or a right of Charles Mickelsen and those who took title to the property after him to use and maintain the East Ditch for the purpose of transporting water to the places of its historical and consistent use. Additionally, the ditch rights in the East Ditch and the right to convey Black Canyon Creek water over the Fonnesbeck Property for the purpose of applying it to beneficial use is an appurtenance to the properties. One of those properties is the Campbell Property.

15. Therefore, the Court concludes that Campbell, as owner of the Campbell Property, possesses a valid easement over the Fonnesbeck Property for purposes of transporting

Campbell's one-third (1/3) right to the waters of Black Canyon Creek. This Court further concludes that this easement and ditch right established by the 1913 Decree, as well as by the historic and consistent use of the East Ditch is appurtenant to the Campbell Property.

16. During trial and the presentation of the parties' argument, there was discussion about the "Dietrich Decree." *See supra* note 10. This Court concludes that the Dietrich Decree did not adjudicate any water rights to Black Canyon Creek, did not include as defendants the owners and possessors of the 1883 Decree and the decreed water rights thereunder, and therefore, does not supersede the 1883 Decree or dispossess the owners of the 1883 Decree of the decreed water rights to the waters of Black Canyon Creek.

17. The Court's Conclusion of Law No. 13 is consistent with the holding in *Crow*, 107 Idaho at 465, 690 P.2d at 920. It is also consistent with the "judicial policy" addressed in *Crow* that "the presumption of accuracy of the decree is in keeping with the judicial policy of deterring the reopening of judgment long after cases are decided and the files are closed." *Id.* (citing *Water Supply & Storage Co. V. Larimer & Weld Irrigation Co., et al.*, 24 Colo. 322, 51 P. 496 (1897)). This Court also finds the discussion in *Reynolds Irr. Dist. v. Sproat et al.*, 65 Idaho 617, 151 P.2d 773 (1944) ("*Sproat*") to be both persuasive and controlling. In *Sproat*, the ISC was considering an attempt "to restrain the defendants ... from diverting any water from Warm Springs Creek or its tributaries" by means of injunctive relief. 65 Idaho at ___, 151 P.2d at 773-74. The plaintiffs sought injunctive relief pursuant to their decreed right, which they obtained in judicial proceedings, against a party that was not a party to the original judicial proceedings that resulted in the decreed right. *Id.* at ___, 151 P.2d at 774. The ISC, in reversing the trial court's order granting plaintiff's injunction, held as follows:

There is nothing, however, in the record, indicating that the Sproats were ever parties to the original action or privies to any person or persons who were parties

to that action. It is an elementary principle of justice that, in order to bind a party by a judgment, he must have his day in court and his opportunity to present his case.

65 Idaho at ____ 151 P.2d at 774-75. The ISC continued, citing *Mays v. District Court*, 34 Idaho 200, 207-08, 200 P. 115, p. 116:

The contention that one's rights can be affected by a decree to which he was a stranger is repugnant to a fundamental principle of our jurisprudence that no one will be judged until he has had a hearing. The operation of this principle cannot be defeated by the mere fact that it will put other parties to some added trouble or expense. *Idaho Irr. Co. v. Dill*, 25 Idaho 711, at 720, 139 P. 714, at 717; *Simon v. Craft*, 182 U.S. 427, 21 S.Ct. 836, 45 L.Ed. 1165; *Postal Tel.-Cable Co. v. City of Newport*, 247 U.S. 464, 38 S.Ct. 566, 62 L.Ed. 1215, 1221.

Sproat, 65 Idaho 617, 151 P.2d 773, 775 (1944).

18. Consistent with the ISC's holding in *Sproat*, this Court rejects any contention by Fannesbeck that the Dietrich Decree dispossessed Charles Mickelsen or any of the subsequent property owners in his chain of title from the waters from Black Creek Canyon decreed in the 1883 Decree.

19. The Court concludes that neither P. Campbell, as the title owner of the Campbell Property between 1980 and 2005, nor Campbell, as the title owner of the Campbell Property from 2005 to present, abandoned or forfeited their appurtenant right to one-third (1/3) of the water from Black Canyon Creek, their appurtenant easement to transport said water through the East Ditch and over the Fannesbeck Property, or their appurtenant right to maintain the East Ditch.

20. Idaho Code ("I.C.") § 42-222(2) provides that:

All rights to the use of water acquired under this chapter or **otherwise** 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 and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in

section 42-223, Idaho Code. The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.

(emphasis added). As a result, a decreed water right may be forfeited by its possessor's failure to apply it to its beneficial use for a period of five (5) years.

21. The ISC has made it clear that “[n]either abandonment or forfeiture are favored ... ‘and clear and convincing proof is required to support a claim’ of either.” *Mortensen v. Berian*, 163 Idaho 47, 49, 408 P.3d 45, 51 (2017) (quoting *Crow*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984)); see also *Barnes v. Jackson*, 163 Idaho 194, 198, 408 P.3d 1266, 1270 (2018) (“[F]orfeitures are disfavored under Idaho law.” (citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999))).

22. This Court concludes that P. Campbell, the title owner of the Campbell Property from 1980 through 2005, did not intend to abandon or forfeit the one-third (1/3) decreed right to the waters of Black Canyon Creek. See *supra* Findings of Fact No. 30. This Court further concludes that P. Campbell, during the duration of his ownership of the Campbell Property, transported his one-third (1/3) share of the water from Black Canyon Creek through the East Ditch and over the Fannesbeck Property and put it to beneficial use on the Campbell Property. This continued from 1980 through approximately 1987 or 1988. See *supra* Findings of Fact Nos. 28, 29.

23. In 1987 or 1988, P. Campbell placed the Campbell Property into CRP. See *supra* Findings of Fact No. 29. The Campbell Property remained in CRP until approximately 2011 or 2012. See *supra* Findings of Fact Nos. 31, 32, 36, 37. While the Campbell Property was in CRP, Campbell became the title owner of the Campbell Property in 2005. See *supra* Findings of Fact No. 25.

24. The Court concludes that there was no abandonment or forfeiture of the one-third (1/3) decreed water right to the waters of Black Canyon Creek during the period of time that the Campbell Property was in CRP.

25. I.C. § 42-223 provides, in relevant part, that:

A right to the use of water shall not be lost by forfeiture pursuant to the provisions of section 42-222, Idaho Code, for a failure to apply the water to beneficial use under the conditions specified in any subsection of this section....

(1) A water right appurtenant to land contracted in a federal cropland set-aside program shall not be lost or forfeited for nonuse during the contracted period. The running of any five (5) year period of nonuse for forfeiture of a water right shall be tolled during the time that the land remains in the cropland set-aside program.

26. The Court also concludes that during the period of time the Campbell Property was in CRP—from approximately 1987 or 1988 until roughly 2011 or 2012—the tolling provision of I.C. § 42-223 was in effect, prohibiting those time periods from being used to determine whether the 1883 Decree and the decreed water right to one-third (1/3) of the waters from Black Canyon Creek had been forfeited or abandoned.

27. The Court further concludes that at no time has Campbell expressed or demonstrated an intent to abandon or forfeit his decreed and appurtenant water right to one-third (1/3) of the waters of Black Canyon Creek. *See supra* Findings of Fact No. 30. In fact, his objective actions and conduct demonstrate just the opposite: an intent to exercise and maintain his water right to the one-third (1/3) of the waters of Black Canyon Creek. *See supra* Findings of Fact Nos. 36, 37.

28. In 2012, Campbell and Schvaneveldt, albeit for a short period of time—approximately 5 to 7 days—did divert waters from Black Canyon Creek through the East Ditch and applied them to beneficial use on the Campbell Property. *See supra* Findings of Fact No. 37. The East Ditch was reopened by Schvaneveldt at Campbell's instruction, and Campbell himself

closed the head gate, thereby redirecting the water from Black Canyon Creek into the reopened East Ditch. *Id.*

29. Subsequent attempts by Campbell and Atkinson in 2015 and Campbell and his grandson in 2017 were met with resistance and obstruction by Fannesbeck. Despite this resistance and obstruction, this Court concludes that at all times since the Campbell Property was removed from CRP, Campbell has established a desire to exercise his right to the waters of Black Canyon Creek and his right to transport that water across Fannesbeck's Property via the East Ditch. The Court will not find an abandonment or forfeiture pursuant to I.C. § 42-222(2).

30. The Court expressly concludes that Fannesbeck has failed to establish statutory forfeiture pursuant to I.C. § 42-222(2) by clear and convincing evidence.

31. The Court similarly concludes that Fannesbeck has failed to prove, by clear and convincing evidence, the common law doctrine of abandonment by either P. Campbell or Campbell. See *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982) ("*Jenkins*").

32. In *Jenkins*, the ISC outlined the elements of abandonment as: "(1) an intent to abandon and (2) an actual relinquishment or surrender of the water right." 103 Idaho at 388, 647 P.2d at 1260. This Court, in its Findings of Fact No. 30, found that neither P. Campbell nor Campbell subjectively intended to abandon their rights to one-third (1/3) of the waters from Black Canyon Creek or the easement or right of way across Fannesbeck's Property to operate, transport or maintain the East Ditch. To the extent it is unclear in other Findings of Fact by this Court, the objective conduct and actions of P. Campbell, Campbell and Campbell's lessees, Schvaneveldt and Atkinson, do not demonstrate an intent to abandon the 1883 decreed water

right or the easement established in the 1913 Decree over the Fannesbeck Property to transport Black Canyon Creek water via the East Ditch.

33. Because Fannesbeck has not established the first element of common law abandonment by clear and convincing evidence, the Court need not concern itself with an analysis of the second element, actual relinquishment or surrender of the water right.²²

34. Campbell seeks injunctive relief against Fannesbeck and from his attempts to prevent Campbell from exercising his decreed water right to one-third (1/3) of the waters from Black Canyon Creek and an order enjoining Fannesbeck from prohibiting or preventing Campbell from exercising his right to use the East Ditch to transport Black Canyon Creek water to the Campbell Property and to maintain the East Ditch for said purpose.

35. I.R.C.P. 65(e) provides that “[a] preliminary injunction may be granted in the following cases:

(1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of acts complained of, either for a limited period or perpetually.

(2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or irreparable harm to the plaintiff.

36. This Court, in the foregoing Findings of Fact and Conclusions of Law, has concluded that Campbell is entitled to the relief requested, a declaration of his right to one-third (1/3) of the waters of Black Canyon Creek for the purposes of applying said water to beneficial use upon the Campbell Property. The Court has concluded that Campbell has a valid easement to transport that water over the Fannesbeck Property via the East Ditch pursuant to the 1913 Decree that granted that easement pursuant to stipulation and order of the Court. Additionally, that said

²²Which, as an aside, this Court does not believe has been established by clear and convincing evidence either.

stipulation and order, as outlined in the 1913 Decree, entitles Campbell to access Fannesbeck's Property to maintain the East Ditch. Therefore, the Court determines that Campbell is entitled to injunctive relief restraining and prohibiting Fannesbeck from engaging in conduct that would in any manner prevent Campbell from exercising his rights under 1883 Decree and the 1913 Judgment, pursuant to I.R.C.P. 65(e)(1).

37. Further, in *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 243, 869 P.2d 554, 560 (1993), the ISC held that "[a]n interference with the historic flow of water enjoyed by its users, which occurs following the relocation and reconstruction of a lateral ditch, causes irreparable harm to those who rely on that ditch to provide them with water to irrigate their land." This Court concludes that in much the same manner, Fannesbeck's conduct of preventing Campbell from reopening the East Ditch to transport his decreed water right from Black Canyon Creek to the Campbell Property and applying the same to beneficial use amounts to "great or irreparable harm" pursuant I.R.C.P. 65(2). As such, the Court will enjoin Fannesbeck from engaging in conduct that would in prevent Campbell from exercising his rights under the 1883 Decree and the 1913 Judgment, pursuant to I.R.C.P. 65(e)(1).

38. However, the Court, being mindful of its previous Findings of Fact and Conclusions of Law, feels a compulsion to address what this Court determines to be an unresolved issue. It appears to this Court that the point of diversion from which Campbell, Schvaneveldt and Atkinson all attempted to divert Black Canyon Creek water has changed from the original point of diversion that Campbell and his predecessors historically used prior to when the Campbell Property was placed into CRP in 1987 or 88. The Court finds no fault in Fannesbeck's act of unilaterally improving the delivery systems for the waters of Black Canyon Creek to beneficial use, especially when P. Campbell and Campbell indefinitely discontinued his use of the Black

Canyon Creek waters when he placed the Campbell Property in CRP. It appears that Fonnesebeck has moved and modified the original and historical point of diversion from Black Canyon Creek. Accordingly, it appears to this Court that it will be necessary for Campbell to effect a change in his point of diversion from the point of diversion pre-1987 or 88. I.C. § 42-222(1) provides as follows:

Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or **by decree of the court**, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

(emphasis added). This provision is clearly applicable to Campbell's decreed water right. However, this issue is beyond the scope of what the Court has been asked to address in Campbell's claim for Declaratory Judgment. Additionally, even if this issue were one properly before the Court, by the express language of the statute, this is not an issue subject to the Court's determination, but is an administrative process to be handled by the Idaho Department of Water Resources.

CONCLUSION

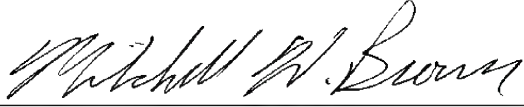
In conclusion, the Court finds in Campbell's favor, concluding that he does possess a valid decreed water right, incident to the 1883 Decree, to one-third (1/3) of the water from Black Canyon Creek, which is appurtenant to and to be used for the beneficial use of the Campbell Property. The Court also concludes that Campbell has an easement appurtenant to the Campbell Property, the dominant estate, to utilize and maintain the historic East Ditch for the purpose of transporting Black Canyon Creek water to the Campbell Property, and that the servient estate for purposes of this easement is the Fonnesebeck Property. The Court will issue an injunction, enjoining Fonnesebeck from preventing or prohibiting Campbell from exercising his rights under

the 1883 Decree and the 1913 Judgment. Accordingly, the Court will issue a Declaratory Judgment and Judgment for Preliminary Injunction providing the same.

As a final matter, the Court will set this matter for a Status and Scheduling Conference to schedule a trial on the remaining legal issues on the Court's next available law and motion day.

IT IS SO ORDERED.

Dated this 26th day of July 2021.



MITCHELL W. BROWN
District Judge



CERTIFICATE OF MAILING/SERVICE

The undersigned certifies that she caused a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Memorandum Decision and Order to be served upon the following persons in the following manner:

Attorney(s)/Person(s):

Seth Jon Tait
Candice M. McHugh
Counsel for Plaintiff

Gary L. Cooper
J. D. Oborn
Counsel for Defendant Fannesbeck

Marlin J. Grant
Counsel for Defendant Green Acre Farms and
Melvin C. Green

Method of Service:

Email: slt@oh-pc.com
cmchugh@mchughbromley.com

Email: cooperobornfiling@cooper-larsen.com

Email: grant@loganattorney.com

7/26/2021 12:12 PM
CAMILLE LARSEN, Clerk

By:

Linda Hampton
Linda Hampton, Deputy Clerk