

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

WATER SUPPLY BANK LEASE CONTRACT No. 1224

This Lease Contract ("Lease") is between the Idaho Water Resource Board ("Board"), and

LESSOR: ELAINE R SORENSEN
3871 W 2500 N
MOORE, ID 83255-8722

RECEIVED
JUL 17 2020
DEPT OF WATER RESOURCES

RECITALS

1. The Board is authorized under chapter 17, title 42, Idaho Code to operate a water supply bank and to contract with lessors to act as an intermediary in facilitating the rental of water.
2. The Lessor has filed a completed application to lease water rights described below into the Water Supply Bank on forms supplied by the Idaho Department of Water Resources and received by the Department on May 26, 2020.
3. The Director of the Idaho Department of Water Resources has reviewed the application for compliance with the Water Supply Bank rules and has approved the Lease subject to conditions listed below.

NOW, THEREFORE, in consideration of the mutual covenants and contracts herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. **WATER RIGHTS:** The Lessor shall lease and the Board shall accept into the Bank the Applicant's water rights described as follows:

Summary of Water Rights or Portions Leased to the Bank

Water Right No.	Priority Date	Source	Diversion Rate (CFS)	Diversion Volume (AF)	Acres (AC)
34-7052	11/13/1973	GROUND WATER	6.0	2,195.5	472
Combined Lease Totals			6.0	2,195.5	472

2. **COMPENSATION:** The Lessor shall accept and the Board shall pay compensation determined by the amount of water rented under the following rental rate during such times as the water is rented from the Bank over the term of this Lease.

Minimum Payment Acceptable: Current Rental Rate

3. **TERM OF LEASE:** The term of this lease shall be January 1, 2020 to December 31, 2020. This Lease shall bind the parties and take effect when both parties have signed it.
4. **WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE:** The Lessor shall abide by all terms and conditions contained in the Water Supply Bank Conditions of Acceptance, attached hereto as "Attachment A" and incorporated herein by this reference.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

WATER SUPPLY BANK LEASE CONTRACT No. 1224

5. **CHANGE OF WATER RIGHT:** This lease specifies water right elements including but not limited to: diversion rates; diversion volumes; number of acres authorized to be irrigated; places of use; points of diversion; beneficial uses; and seasons of use. During the term of this lease, if a water right is administratively changed due to a water right split and renumbering, this lease may be reduced by an equal amount to reflect the water right elements as legally defined under the water right. If a lease contract cannot be reduced sufficient to reflect the legal definition of a water right as amended through a water right split and/or water right transfer, the Board may release the water right from the Water Supply Bank.
6. **ASSIGNMENT OF CONTRACT:** This lease is between the Board and the Lessor, who is the recognized owner or designated representative of the recognized owners of water rights described herein. Should ownership of any part of a water right herein described change during the term of this lease, either through a water right split, a water right transfer, sale of property to which the water right is appurtenant, or through any other recognized water right reassignment, the lease benefits and obligations to the conditions of acceptance for any such water rights will be assigned to the new owners.
7. **DUPLICATE ORIGINAL:** This Lease is executed in duplicate. Each of the documents with an original signature of each party shall be an original.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

WATER SUPPLY BANK LEASE CONTRACT No. 1224

ATTACHMENT A WATER SUPPLY BANK CONDITIONS OF ACCEPTANCE

The water rights or portions thereof leased to the bank are described as follows:

Source and Location of Point(s) of Diversion for Water Right No(s): 34-7052

GROUND WATER	NWSWSW	Sec. 27	Twp 05N	Rge 26E	BUTTE County
GROUND WATER	NWNWNW	Sec. 26	Twp 04N	Rge 26E	BUTTE County
GROUND WATER	NWNWNW	Sec. 26	Twp 04N	Rge 26E	BUTTE County

Water Right	Beneficial Use	Season of Use			Diversion Rate (CFS)	Volume (AF)
		From		To		
34-7052	IRRIGATION	4/01	to	11/01	6.0 cfs	2,195.5 AF
Totals:					6.0 cfs	2,195.5 AF

PLACES OF USE TO BE IDLED UNDER THIS LEASE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
04N	27E	28										40	40						80
04N	27E	29									39	40	39	39	40	40	39	39	315
04N	27E	32						39	38				L4	L3			L2	L1	77

Total Acres: 472

ADDITIONAL CONDITIONS OF ACCEPTANCE

1. The water rights referenced above will be rented from the bank at the current rental rate.
2. There is no rental payment to the lessor of the water right if the right or a part thereof is not rented from the bank.
3. While a right is in the bank, the lessor may not use the right without approval of the Department even if the right is not rented from the bank. Any violation of the terms of this lease may result in enforcement procedures pursuant to Idaho Code § 42-351 for illegal diversion and use of water and may include civil penalties pursuant to Idaho Code § 42-1701B.
4. A right accepted into the bank stays in the bank until the Board releases it, or the lease term expires. A right may be released from the bank upon request, provided the Board approves the release. Unless approved by the Department, leased rights may not be immediately available for release.
5. While a water right is in the bank, forfeiture provisions are stayed pursuant to Idaho Code § 42-223(5).
6. Rental of water under this right is subject to the limitations and conditions of approval of the water right.
7. Failure of the right holder to comply with the conditions of acceptance is cause for the Director to rescind acceptance of the lease.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

WATER SUPPLY BANK LEASE CONTRACT No. 1224

IN WITNESS WHEREOF, the parties have executed this Contract on the date following their respective signatures.

LESSOR: ELAINE R SORENSEN

3871 W 2500 N

MOORE, ID 83255-8722

By Elaine R. Sorensen

Title owner

Date July 17, 2020

IDAHO WATER RESOURCE BOARD

322 East Front Street

P.O. Box 83720

Boise, ID 83720-0098

By Brian Patton
Brian Patton, Acting Administrator
Idaho Water Resource Board

Date 07/24/20

Lease approved by IDWR

TP

Date 07/24/20

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

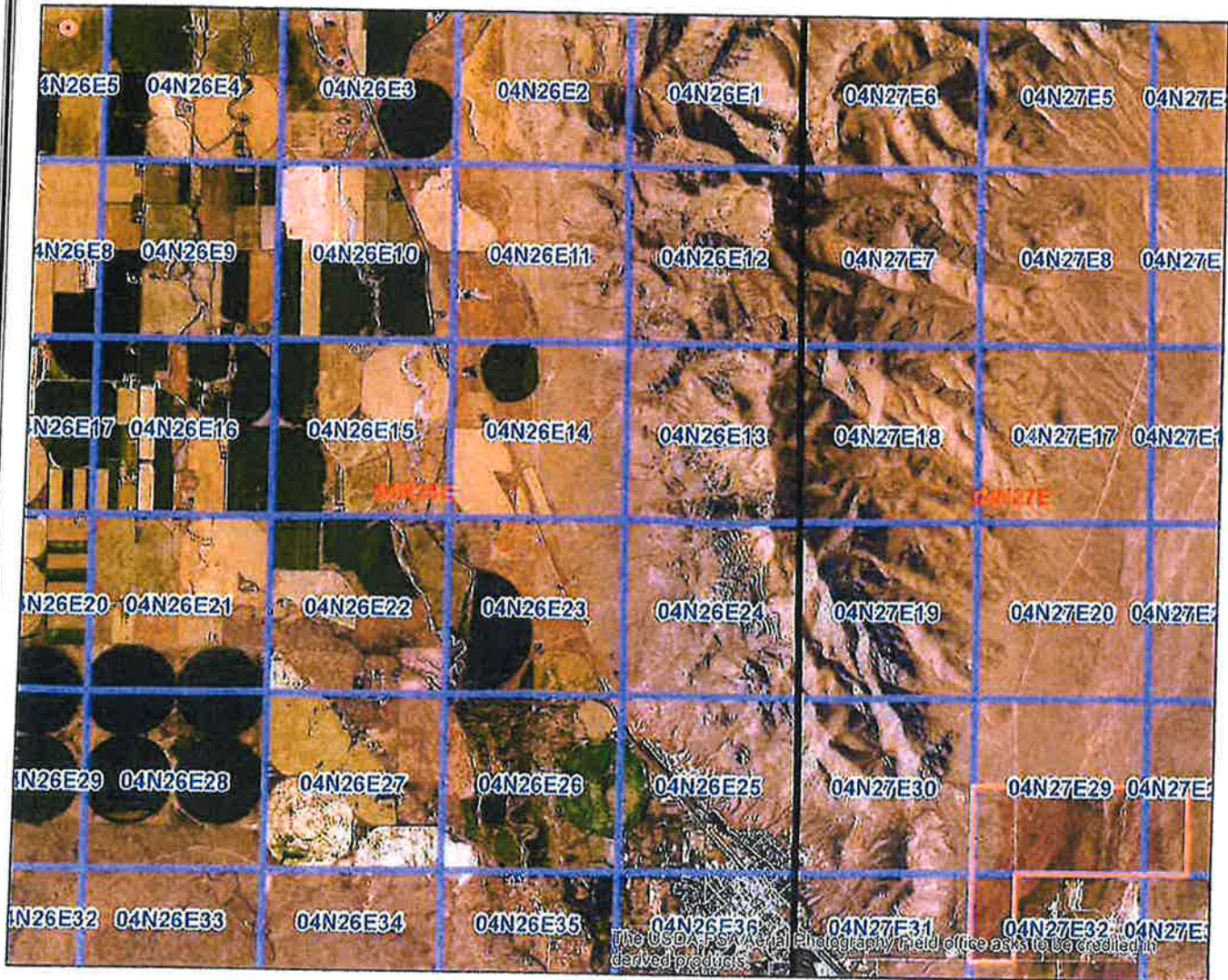
WATER SUPPLY BANK LEASE CONTRACT No. 1224

8. Acceptance of a right into the bank does not, in itself, confirm the validity of the right or any elements of the water right, or improve the status of the right including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right in any other Department application process.
9. In accordance with Idaho Code § 42-248 and § 42-1409(6), all owners of water rights are required to notify the Department of any changes in mailing address or change in ownership of all or part of a water right. Notice must be provided within 120 days of the change.
10. If a water right leased into the Water Supply Bank is sold or conveyed during the lease term, and if the leased right was rented, the rental proceeds will be disbursed in the following manner regardless of any arrangements between the buyer(s) and seller(s) to the contrary:
 - a. Rental payments will go to the lessor(s) of record at the beginning of the rental season, even if the Department processes a Notice of Change in Water Right Ownership during the rental season.
 - b. New lessor(s) of record will receive payment for any subsequent rental seasons.
11. The water right(s) is leased to the bank subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources.
12. Use of this right with right no. 34-7110 is limited to a total combined diversion rate of 13.49 cfs and to a total combined annual diversion volume of 2360 af.
13. Water is delivered through Island Canal and Arco Canal.
14. Use of this right with right no. 34-7110 is limited to the irrigation of a combined total of 472 acres in a single irrigation season.
15. Point of injection into and point of redirection from Big Lost River.
16. Pursuant to Idaho Code § 42-1412(6), these water rights are subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.
17. This water right, when combined with all other rights, shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the place of use.
18. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 34.

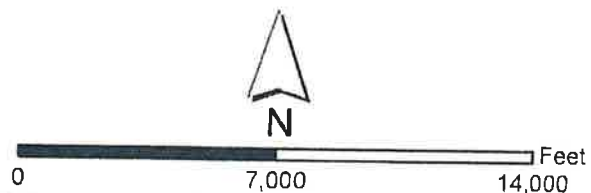
Idaho Water Resource Board
Water Supply Bank Lease Contract No. 1224

34-7052
Effective until December 31, 2020

This map depicts the **place of use to be idled** pursuant to the lease contract and is attached to the contract solely for illustrative purposes.



- ⊙ Approved Lease Point of Diversion
- Approved Lease Place of Use
- Township/Range
- Sections



Form 42-1761-1 10/15
RECEIVED
MAY 15 2020
DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO
WATER RESOURCE BOARD

RECEIVED
MAY 08 2020
Department of Water Resources
Eastern Region

**APPLICATION TO SELL OR LEASE A WATER RIGHT
TO THE WATER SUPPLY BANK**

Designated Applicant Elaine R. Sorensen **Water Right No.** 34-7052
(Select one owner – see item 1A on the application) (One water right per application)

Is this application being submitted with a rental application as a lease/rental package? Yes ☒ No ☐

This application must be prepared in accordance with the minimum requirement checklist below. Use this checklist to ensure all necessary documentation has been provided. This checklist is part of the lease application and must be included with the lease application. **Applications that do not meet the minimum requirements will not be processed and may be returned or denied.**

MINIMUM REQUIREMENT CHECKLIST

All items must be checked as either *Attached (Yes)* or *Not Applicable (N/A)*

Yes

- ☒ Completed *Application to Sell or Lease a Water Right to the Water Supply Bank*.
- ☒ Application filing fee of \$250.00 per water right. If you are submitting more than one lease application and the water rights have an overlapping, common place of use, or a common diversion rate or volume, the total fee for all water rights is \$500.00. For places of use, multiple water rights must be used to irrigate the same lands in order to qualify for the joint filing fee. Individual filing fees are required for water rights that share a common permissible place of use but which cover separate acres within the permissible place of use.
- ☒ Confirmation this form has been printed **single sided**, per requirement of the Water Supply Bank.

Attachment N/A Yes

- | | | | |
|-----------|-------------------------------------|-------------------------------------|--|
| 1A | <input checked="" type="checkbox"/> | <input type="checkbox"/> | Signatures and contact information for all owners of the water right to be leased or sold on this application. |
| 1B | <input type="checkbox"/> | <input checked="" type="checkbox"/> | An Internal Revenue Service (IRS) Form W-9 for the Designated Applicant. |
| 1C | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <i>Notice of Change in Water Right Ownership</i> form (accessible from www.idwr.idaho.gov). |
| 1D | <input checked="" type="checkbox"/> | <input type="checkbox"/> | Contact information for an authorized representative and documentary proof they are authorized to represent the Designated Applicant on this application. If the Designated Applicant is a business, partnership, municipality, organization or association, include documents identifying officers authorized to sign or act on behalf of the entity. |
| 2 | <input type="checkbox"/> | <input checked="" type="checkbox"/> | Description of a water right portion offered to the Water Supply Bank. |
| 3 | <input type="checkbox"/> | <input checked="" type="checkbox"/> | A map that clearly outlines the specific location where irrigated acres will be dried up, or where a beneficial use of water will be suspended. You have the option of printing a map using the map tool on IDWR's website at: www.idwr.idaho.gov . |
| 4A | <input type="checkbox"/> | <input checked="" type="checkbox"/> | Written consent from irrigation district or water delivery company. |
| 4G | <input checked="" type="checkbox"/> | <input type="checkbox"/> | Evidence demonstrating the water right has not been forfeited pursuant to Section 42-222(2), Idaho Code . |

Department Use Only

Fee Amount \$ <u>\$500.00</u>	Received By: <u>EA</u>	Date Received: <u>5/8/2020</u>	Receipt # <u>E045885</u>
W-9 received? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	(Route W-9 to Fiscal)	Name on W-9: <u>Elaine R. Sorensen</u>	

1728

STATE OF IDAHO
WATER RESOURCE BOARD

APPLICATION TO SELL OR LEASE A WATER RIGHT
(Continued)

1. CONTACT INFORMATION

- A. This application must be completed by a Designated Applicant who is a current owner of the water right being sold or leased to the Water Supply Bank. If there are additional current owners, those individuals must authorize the Designated Applicant to represent them on this application by completing and signing Attachment 1A of this application package.

Designated Applicant Elaine R. Sorensen

Mailing Address 3871 W. 2500 N., Moore, ID, 83213

Street

City

State

Zip Code

Email Address _____

Phone Number _____

☒ The Designated Applicant is the sole owner of the water right being sold or leased to the Water Supply Bank.

OR

☐ The Designated Applicant is representing additional water right holders who have completed Attachment 1A.

- B. Has the Designated Applicant submitted an IRS Form W-9 to this Department within the last 2 years? Yes ☐ No ☒

If no, complete the form and attach to this application (Attachment 1B).

- C. Are all applicants on this form listed in IDWR's records as the current owners of the water right? Yes ☒ No ☐

If no, attach a *Notice of Change in Water Right Ownership* form along with the required documentation and fee (Attachment 1C).

- D. Is this application being completed by an authorized representative of the Designated Applicant? Yes ☒ No ☐

If yes, representatives (includes employees of Designated Applicant companies) must complete this section and submit documentary proof of their authority to represent the Designated Applicant (Attachment 1D).

Name of Representative Luke H. Marchant

Organization Holden, Kidwell, Hahn & Crapo, P.L.L.C.

Professional Title Attorney

Email Address lmarchant@holdenlegal.com

Mailing Address PO Box 50130, Idaho Falls, ID 83405

Phone Number (208) 523-0620

☒ Send all correspondence for this application to the representative and not to the Designated Applicant.

OR

☐ Send original correspondence to the Designated Applicant and copies to the representative.

2. DESCRIPTION OF WATER RIGHT OFFERED TO THE BANK

☒ The full water right is being offered to the Bank.

OR

☐ A part of the water right is being offered to the Bank.

If a portion of the water right is being offered, **complete Attachment 2.**

3. MAP

Attach a map of the point(s) of diversion and place(s) of use proposed to be idled by this lease application. Make sure the idled place of use is outlined and annotated with legal land descriptions (Township, Range, Section and Quarter-Quarters) or with GPS coordinates. For irrigation purposes, mark the number of acres you desire to idle. If the water right proposed for lease is located within a permissible place of use (PPU) and portions of the PPU will continue to receive water from non-leased water rights, clearly outline on a map the acres within the PPU that will continue to be irrigated, as well as acres that will be idled during the lease term. Label the map **Attachment 3.**

STATE OF IDAHO
WATER RESOURCE BOARD

APPLICATION TO SELL OR LEASE A WATER RIGHT
(Continued)

4. GENERAL INFORMATION

- A. Is the diversion works or system owned or managed by an irrigation district or water delivery company? Yes ☒ No ☐
If yes, provide written consent from the company, corporation or irrigation district authorizing the proposed sale or lease (Attachment 4A).

If your water right is delivered through a canal, lateral or ditch operated by a canal company, irrigation district, or similar delivery entity, your lease request must include written consent from the company, district, or similar entity for your removal of water from its system pursuant to Section 42-108, Idaho Code and IDAPA WSB Rule 37.02.03.25.02e.

- B. Please provide a description of the current water diversion and delivery system.

Well and pump with water delivered through the Arco and Island Canals.

- C. Describe any other water rights used for the same purpose at the same place of use as the water right being offered to the Bank. Water Right No. 34-7110 is used in conjunction with this water right.

- D. Are any of the water rights identified in Section 4C stacked with the water right proposed for lease? Yes ☒ No ☐

Stacked water rights are used together to achieve a common beneficial use, such as irrigation of the same lands. Stacked water rights cannot be separated and must be jointly leased to the Water Supply Bank. Stacked water rights qualify for the multiple fee payment of \$500.

- E. Will the present place of use continue to receive water from any other source? Yes ☐ No ☒

If yes, explain the relationship between the different water sources and how enlargement of the authorized use will not occur if this water right is leased. _____

- F. Identify annual volumes and/or rates of water diverted in the last 5 years to accomplish the beneficial use authorized by this water right. The water right has been fully utilized.

- G. Has any portion of this water right undergone a period of five or more consecutive years of non-use? Yes ☐ No ☒

If yes, describe the circumstances and attach evidence to demonstrate how the water right has not been lost through forfeiture (Attachment 4G). See Section 42-223, Idaho Code for exceptions to forfeiture. Your application may be denied if forfeiture concerns are not addressed. _____

- H. Is this water right involved in any other IDWR process, such as an application for transfer or a mitigation plan?

If yes, describe.

Yes ☒ No ☐

An application for transfer is being prepared for submission which, when approved, will take the place of the actions accomplished by this application.

STATE OF IDAHO
WATER RESOURCE BOARD

APPLICATION TO SELL OR LEASE A WATER RIGHT
(Continued)

5. SALE/LEASE AGREEMENT

- A. Is the water right, or portion thereof, offered to the Idaho Water Resource Board (IWRB) for sale ☐ or lease ☒?
If lease, specify the years when the use of water will be suspended: 2020 to 2020 (maximum lease period 5 calendar years).
(Year) (Year)
- B. Show the minimum payment acceptable to the seller/lessor. The minimum payment may be shown as the "current rental rate" as established by the IWRB. Include the method of determining the minimum payment if other than the current rental rate.
Current rental rate.

I hereby assert that the information contained in this application is true to the best of my knowledge, and that I have the authorities necessary to offer this water right for sale or lease to the Idaho Water Resource Board.

The Designated Applicant acknowledges the following:

1. Payment to the Designated Applicant is contingent upon the sale or rental of the water right from the Bank.
2. While a water right is in the Bank, the seller/lessor of the water right may not use the water right, even if the water right is not rented from the Bank.
3. A water right accepted into the Bank stays in the Bank until the Designated Applicant receives written confirmation from the Board or Water Supply Bank that the water right has been released from the Bank.
4. While a water right is in the Bank, forfeiture is stayed.
5. Acceptance of a water right into the Bank does not, in itself, confirm the validity of the water right or any element of the water right.


Signature of Designated Applicant

Luke H. Marchant
Printed Name

May 8, 2020
Date

Signature of Authorized Representative

Printed Name

Date

Mail to:
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098






ATTACHMENT 3

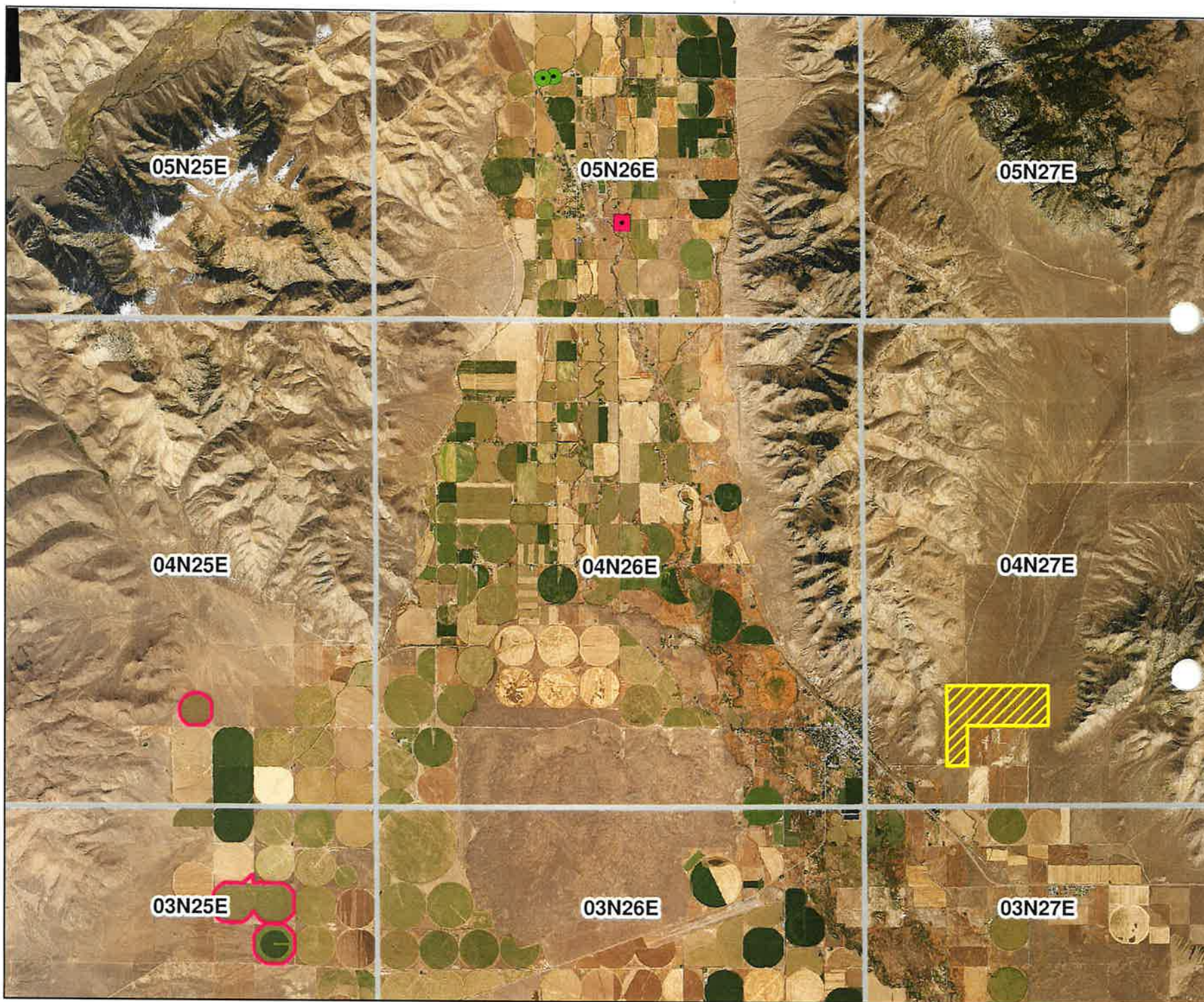
GIS Maps

SORENSEN WSB LEASE/RENTAL APPLICATION



Legend

-  34-7052 Proposed PODS
-  34-7052 Current POD
-  34-7052 Current POU
-  Proposed POU
-  TR Lines



2019 NAIP Photo



Prepared by:
Luke H. Marchant
05/08/2020

ATTACHMENT 4A
Consent from Water Delivery
Entity

Timberdome Canal Co, Inc.
Mark Telford, President
P.O. Box 511
Arco, ID 83213

To Whom It May Concern:

I am the president of the Timberdome Canal Company. Elaine Sorensen owns 800 shares in the Timberdome Canal Company. Under the direction of the water master, any water legally obtained by a member and then diverted to the Timberdome Canal is delivered to that allotted member. The Timberdome Canal Company gives consent to convey water obtained by means of Water Supply Bank, to the end that the water delivered does not exceed the allotted shares.

Dated: _____

4/16/2020

A handwritten signature in cursive script, appearing to read "Mark Telford", written over a horizontal line.

Mark Telford, President
Timberdome Canal Company



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 E Front Street, Suite 648 • PO Box 83720 • Boise ID 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700

Website: idwr.idaho.gov • Email: idwrinfo@idwr.idaho.gov

BRAD LITTLE
Governor

GARY SPACKMAN
Director

July 27, 2020

MITCHELL D SORENSEN
ELAINE SORENSEN
3871 W 2500 N
MOORE, ID 83255-8722

RE: **WATER SUPPLY BANK LEASE CONTRACT 1214 & 1224
FOR WATER RIGHTS 34-2428, 34-7035B, 34-12416, 34-7052**

Dear Lessor:

Water rights **34-2428, 34-7035B, 34-12416, 34-7052** were leased into the Water Supply Bank (Bank) as of January 1, 2020, in accordance with the enclosed executed lease contract. **Your water rights, as described on the lease contract, are considered leased into the Bank and should remain unused until they are formally released from the Bank.** More information and further restrictions placed on your water rights while leased can be found in conditions of acceptance of the lease contract. Read the conditions of acceptance carefully.

The rights will automatically be released from the Bank on **December 31, 2020**, unless the rights are released earlier by the Water Resource Board (Board). On behalf of the Board, the Department of Water Resources (Department) can evaluate an early release of the lease contract upon your request. To release the water rights from the Bank prior to the release date, submit a written request on the *Request to Release a Water Right from the Bank* form. This form is available on our public website at www.idwr.idaho.gov. **Please note your water rights may not be available for immediate release if they have been rented or are being considered for a future rental. Furthermore, it is at the discretion of the Department whether or not a water right can be released early from a lease contract.**

If you have questions regarding this matter, please contact this office at bank@idwr.idaho.gov or 208-287-4800.

Sincerely,

Water Supply Bank

Enclosure: Executed Lease Contract

c: IDWR – Eastern Region
Water District No. 34
Luke Merchant – Holden, Kidwell, Hahn & Crapo PLLC



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 E Front Street, Suite 648 • PO Box 83720 • Boise ID 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700
Website: idwr.idaho.gov • Email: idwrinfo@idwr.idaho.gov

BRAD LITTLE
Governor

July 17, 2020

GARY SPACKMAN
Director

MITCHELL D SORENSEN
ELAINE SORENSEN
3871 W 2500 N
MOORE, ID 83255-8722

RE: APPLICATION TO LEASE WATER RIGHT 34-2428, 34-7035B, 34-12416, 34-7052 TO THE
WATER SUPPLY BANK
CONTRACTS 1214 & 1224

****TIME SENSITIVE RESPONSE REQUIRED***

Dear Applicant:

The Department of Water Resources has completed its review of your application to lease the above-mentioned water right to the Water Supply Bank. I have enclosed two original Water Supply Bank Lease Contracts for your review and signature. Please sign and return ALL Lease Contracts within 14 days. Upon signature and return of the contracts, the Department will also sign the original contracts and return an executed copy to you. The Lease Contract is not considered final until you and the Department have both signed.

The right will automatically be released from the Bank on **December 31, 2020**, unless the right is released earlier by the Board, or upon your request. To release the right from the Bank prior to the release date, submit a written request on the Request to Release a Water Right from the Bank form. To propose a new lease period, submit a new Application to Sell or Lease a Water Right to the Water Supply Bank form along with applicable fees to the Department. These forms are available from any IDWR office or from our public website at <http://www.idwr.idaho.gov>. Please note your right may not be available for immediate release if it has been rented.

Please review the conditions of acceptance listed on the Lease Contract, including #3 which says: "While a right is in the bank, **the lessor may not use the right** without approval of the department even if the right is not rented from the bank. Any violation of the terms of this lease may result in enforcement procedures pursuant to Idaho Code § 42-351 for illegal diversion and use of water and may include civil penalties pursuant to Idaho Code § 42-1701B."

If you have questions regarding this matter, please contact this office at bank@idwr.idaho.gov or 208-287-4800.

Sincerely,


Water Supply Bank

Enclosures: Proposed Lease Contracts
Receipt # C108824, E045885

c. Luke Merchant – Holden, Kidwell, Hahn & Crapo PLLC

MEMORANDUM

TO: Water Right 34-7052
FROM: Cody Parker
RE: Water Supply Bank Lease Application 1738
DATE: July 15, 2020

In their review (July 7th memo) of the Water Supply Bank Lease application referenced above, Water Supply Bank staff suggest that the validity of the water right to be leased into the bank (No. 34-7052) is in question. The Department is not inclined to sign the lease of a water right which may not be valid. However, it appears that the Department's interpretation of the events leading to the lease may be different than the Water Supply Bank's interpretation. This memo is intended to summarize those events leading to the lease to explain why the Department was willing to sign the contract.

- **1997** – Right 34-7052 is decreed in the SRBA
- **1998** – The water right is sold to Potter Ranches LLC
- **2000 through 2002** – WMIS data shows that water was diverted from the POD for this water right indicating that the right was used during that period.
- **2003 through 2007** – No data demonstrating the diversion and use of water for the irrigation authorized by the water right.
- **2011** – Use of the water right is transferred to the Sorensens through a farm lease (not a lease in the Water Supply Bank). The Sorensens apply to lease the water right to the Water Supply Bank. The lease application is returned because the applicant's did not supply sufficient information to determine the validity of the water right.
- **2012** – The Sorensens re-apply to lease the water to the Bank. A representative for the Sorensens asserts in a 21-page letter with the application that the non-use resulted from circumstances beyond the water right owner's control per 42-223(6) *Idaho Code*. The owner of the right at this time is Mr. Richard Potter. The circumstances referred to included a right-of-way agreement for use of the point of diversion, which could not be renewed after 2002. The letter also states that "*[t]hese external factors, which he perceived to be outside his control, were not voluntary, and therefore, he would not have presumed that he was risking relinquishment of his rights that he had recently had decreed in the SRBA.*" This statement was in response to a suggestion that the owner could have pursued an extension of time to avoid forfeiture or a Water Supply Bank lease. The lease application was accepted to the Water Supply Bank.
- **2013** – The lease into the Bank is renewed. The Sorensens gain ownership of the water right and complete a Change in Water Right Ownership.
- **2014** – The lease into the Bank is renewed. The lease term is set to expire in 2018.
- **2018** – The 2014 lease expires.
- **2020** – An application to lease water right 34-7052 into the Bank is received by the Department.

During the review of the newest lease application, the validity of the water right was again questioned. The representative submitted the same argument referring to 42-223(6). The Water Supply Bank review memo dated July 7, 2020 suggests that the non-use from 2003 to 2011 and the 2019 irrigation season means that 10 years of non-use has occurred and the validity of the water right is questionable.

In a letter dated June 9, 2020, the representative for the applicant includes a recent Preliminary Order Approving Transfer in the Matter of Application for Transfer No. 82640 in the Name of Clinton K. Ashton. In that preliminary order the hearing officer, James Cefalo, writes that:

"The hearing officer recognizes the termination of legal access to the authorized point of diversion as a circumstance beyond the control of a water user. If, because of a division of property, a water user loses access to the authorized point of diversion, and the water user has no immediate access to the water source, non-use of the subject water right is beyond the control of the water user."

This statement seems to justify the original argument made by the representative which led to the acceptance of the water right lease into the Bank in 2012.

However, on many other occasions the Department has accepted references to 42-223(6) when the non-use resulted during a period of time when the applicants were not current owners of the water right. For instance a water right is unused for 5 years and the land is sold. The new landowners complete a change in water right ownership and submit a transfer or Water Supply Bank lease application. During review of that application it appears that the water right has not been used during the previous consecutive five year period. The applicants then claim that they could not have protected the water right from forfeiture because they did not own it during the period of non-use (i.e. the non-use resulted from circumstances out of their control).

For these reasons the Department is considering that the validity of the water right has been confirmed to a degree sufficient to sign the Water Supply Bank lease. An additional signature will need to come from the Water Resource Board at the time the lease is to be approved. The Board may decide at that time whether or not to sign the lease contract.

Buyer, Remington

From: Buyer, Remington
Sent: Wednesday, July 8, 2020 7:42 AM
To: Patton, Brian; Weaver, Mathew
Cc: Ferguson, Justin; 'Jo Ann Cole-Hansen'
Subject: Lease of 34-7052
Attachments: Draft Lease Review Memo v2.docx

Brian, Mat,

Attached is Justin and my review of the lease proposal for Sorensen water right 34-7052. We do not recommend the lease be approved.

Bank rule 25.06.C does not require that the Board deny a lease of a water right that may be subject to forfeiture. Instead, it requires that the Board must consider whether a water right has been forfeited or abandoned, as criteria for the acceptance of a lease. It would seem that the Board can lease water rights that may be subject to forfeiture.

Until we obtain definitive guidance from the IWRB regarding how they would like the Bank and the Department to apply Bank rules 25.02.C and 25.06.C on their behalf, the Department may be able to lease water right 34-7052 on behalf of the Board. We will complete a review of the rental of 34-7052 today, and get the paperwork to our Water Rights Section for finalization.

Remington

Memorandum

To: Water Right 34-7052
From: Justin Ferguson and Remington Buyer
Date: July 7, 2020
Re: Water Supply Bank Lease Application 1738

Purpose/Narrative: An application to lease water right 34-7052 into the Bank was received by the Department on May 15, 2020, as part of a lease/rental application package. The lease of water right 34-7052 into the Bank was intended to be the basis for a 508.5 acre rental, during 2020. In addition to water right 34-7052, water rights 34-428, 34-12416 and 34-7035B were also proposed for lease to the Bank. This lease memo pertains specifically to the application to lease water right 34-7052.

Water right 34-7052 is owned by Elaine Sorensen. The right authorizes a diversion of ground water from a well (IDWR well ID 388458) located in the SWSW quarter-quarter of Section 27, Township 05N, Range 26E, on land presently owned by Alvin and Gay Wheeler, for the irrigation of 472 acres, located northeast of Arco, on land owned by Potter Ranches LLC. Water right 34-7052 authorizes diversions of ground water from the well into the Big Lost River Irrigation District's (BLRID) Island Canal, which then delivers water down to the Arco Canal, from which water is then authorized to be delivered to the irrigation place of use (POU).

The POU proposed for lease under water right 34-7052 is also authorized to be irrigated with water right 34-7110, when in priority, and together they authorize a combined limited 472 acres. While they overlap the same acreage, 34-7110 is a Big Lost River surface water right with a 1975 priority date, and it is often not in priority. Water right 34-7110 is not proposed to be leased with 34-7052; although the two water rights are effectively "stacked" together, if water right 34-7110 is not used during the term of the lease of 34-7052, no enlargement should occur through this lease.

Authority to File: The applications were prepared and signed by Mr. Luke Marchant of Holden, Kidwell, Hahn & Crapo as a designated representative for Elaine Sorensen. IDWR records indicate Elaine and Mitchell Sorensen as the current water right holders, however Mitchell recently passed away. No concerns about Elaine Sorensen's authority to file the lease application.

Water Right Validity/Forfeiture Evaluation: It appears that water right 34-7052 may have become subject to forfeiture. Per Water Supply Bank Rule 25.02.C (IDAPA 37.02.03.25.02.C), the Idaho Water Resource Board (Board) must consider "*whether the information available...indicates that the water right has been abandoned or forfeited.*" It appears the Board may lease a water right, even if is subject to forfeiture.

The water right was decreed in 1997 to Eldon Jacobsen. Following the decree, in 1998, Mr. Jacobsen leased access to a well on land owned by the Wheeler's. Mr. Jacobsen then sold water right 34-7052 to Potter Ranches LLC. IDWR Water Management Information System (WMIS) data confirms 579, 621 and 467 af of water was diverted annually, during 2000, 2001 and 2002, respectively, from the Wheeler well, under water right 34-7052 (WMIS ID Number 165). However, no water is recorded as having been diverted from the well since 2002. This is consistent with water right backfile information, which states Potter Ranches LLC was unable to extend the lease agreement with Wheelers after the original lease expired in 2002.

A five year period of non-use of water under water right 34-7052 appears to have elapsed from 2003 through 2007. In 2011, Mitchell and Elaine Sorensen agreed to lease water right 34-7052 from Richard Potter and the lease included an option to purchase the water rights. In that same year, the Sorensens applied to lease water right into the Water Supply Bank. A 2011 review of water right 34-7052 found that the water right was ineligible for lease into the Bank, owing to the likelihood that the water right became subject to forfeiture in 2008, following five years of non-use. IDWR returned the lease application in 2011.

In 2012, the Sorensens resubmitted the lease application for water right 34-7052. A 21 page letter from attorney Rob Harris accompanied the 2012 lease application, and on page 19 of the letter, Mr. Harris affirmed that *"as an absentee landowner, Mr. Potter simply decided it was not worth the continual fight with BLRID"* to obtain delivery of his water right using BLRID canal infrastructure. Mr. Harris further stated *"this is why 'Mr. Potter did not take other action to protect the water right from forfeiture.'"*

This is not a compelling argument. Two administrative processes exist by which water users in Idaho can protect their water rights from becoming subject to forfeiture or abandonment through non-use. The first process involves an IDWR approval of an "Application for Extension of Time to Avoid Forfeiture of a Water Right" and the second option involves approval of an "Application to Sell or Lease a Water Right to the Water Supply Bank". Approval of either application protects a water right from becoming subject to forfeiture through non-use, for up to five years, and either form can be approved by IDWR during, or immediately following a five year period of non-use of water under a water right. Accordingly, even though Mr. Potter might have considered that circumstances were beyond his control to work with BLRID for delivery of his water, it is not evident that circumstances were beyond Mr. Potter's control, and that he was precluded him from submitting to IDWR either of the two above defense against forfeiture applications.

In 2012, IDWR's Water Allocation Bureau Chief directed the Bank to accept the lease of water right 34-7052 on the grounds that Mr. Potter could *"claim a defense against forfeiture under Section 42-223, Idaho Code."*¹ No additional consideration of water right validity was conducted. The lease was renewed in 2013 and then again in 2014, after which, it remained in the Water Supply Bank until 2018.

Standard Water Supply Bank lease contract condition number 8, which was placed on all three lease contracts, affirms: *"acceptance of a right into the Bank does not, in itself, confirm the validity of the right or any elements of the water right, or improve the status of the right including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right in any other departmental application process."* As such, though no additional period of forfeiture would have accrued against water right 34-7052 during the period of time it was leased to the Bank, the leases do not dispel the forfeiture potential that emerged prior to the leases.

In 2019, it does not appear that water was diverted from the authorized point of diversion (POD), nor was the beneficial use of irrigation accomplished at the authorized POU for water right 34-7052. As such, it appears an additional year of non-use may have elapsed under water right 34-7052 during 2019, prior the submission of the lease application in 2020. Discounting the period of 2012-2018 when the water right was protected from forfeiture by nature of prior Water Supply Bank leases, it would seem that ten years of non-use may now have elapsed under water right 34-7052, from 2003 through 2011, and during 2019.

¹ Per a 1997 IWRB resolution, the Director of IDWR is authorized to approve leases on behalf of the IWRB.

Idaho Code 42-222(2) holds that a water right “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...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.”

Per Water Supply Bank Rule 25.02.C, information about whether a water right may have become subject to forfeiture per IC 42-222(2) is required to be submitted with a lease application. It is the practice of the Water Supply Bank to find lease applications to be “incomplete” when information provided with an application is insufficient to dispel against notions of forfeiture. On June 8, 2020, the Bank notified the lease applicant that additional information was required for water right 34-7052, to dispel notions of forfeiture and if no further information was submitted for water right 34-7052, the Bank would consider the application as incomplete, and return it to the applicant.

In June 2020, the applicant’s legal representative, Luke Marchant, claimed a defense against forfeiture under IC 42-223(6), similar to the action taken in 2012. As stated above, it is unclear whether such a claim is acceptable to dispel against notions of forfeiture, since it is not apparent that circumstances were beyond the right holder’s control to submit either an Application for Extension of Time to Avoid Forfeiture of a Water Right or an Application to Sell or Lease a Water Right to the Water Supply Bank during the period of 2003 through 2008.

As such, the Bank finds that the validity of the water right 34-7052 very much remains in question.

Injury Evaluation: The water right authorizes diversions of ground water into the Island and Arco canals, operated by BLRID. If BLRID relied upon a portion of water right 34-7052 to provide account for conveyance losses in these canals, there could be an impact from the non-diversion of ground water into the canal. However, it appears that ground water has not been diverted into the canals during the last 18 years, so it does not appear that BLRID would expect for conveyance losses to be accounted for, through the lease.

Additionally, the aquifer below Big Lost River Valley is slowly losing water and petitions have been received by IDWR to designate the valley as area a Ground Water Management Area (GWMA). No injury is foreseen by the lease alone, however, if the water right is in fact subject to forfeiture, and if it is rented, and thereby used to increase ground water diversions from the aquifer, then it could have negative impacts on water users who rely upon sustainable management of the aquifer.

Enlargement of Use: Although no enlargement is evident through the lease alone, without information as to the extent of the irrigation historically accomplished through a use of surface water and ground water, a rental proposing a consumptive use of groundwater might constitute a water use enlargement. To avoid enlargement, the Department should consider whether it is appropriate for this water right to continue to be rented for a purpose that includes a significant consumptive use component. Further, because the POU can also be fully irrigated under water right 34-7110, to avoid enlargement in water use, either water right 34-7110 should also be leased to the Bank, or the water right holder must affirm that no irrigation use of the POU will be approved using water right 34-7110 during the term of the lease. Proper rental review should guard against enlargement.

Local Public Interest: Upon receipt of the applications, the Department was contacted by local water users who desired to provide comments on the lease/rental transaction. While the Bank does not for protest of Bank applications, public comments are allowed. These comments may fall under Bank Rule 25.06.i as *"other factors as determined to be appropriate by the Board."*

After a phone conversation with the water users it was determined that they would contact legal counsel to prepare a statement and, upon official receipt by the Department, that statement can be taken under advisement during the review of the application to rent water right 34-7052.

Beneficial Use/Conservation of Water Resources: Irrigation is a beneficial use. Because this lease is intended to immediately authorize a rental for irrigation from ground water, it does not appear that ground water resources will be conserved.

Department/Watermaster Comments: Watermaster and IDWR Eastern Region comments will be requested

Water Supply Bank Evaluation: Based on the information presented, staff do not recommend the application be approved.



Holden Kidwell
Hahn & Crapo P.L.L.C.
L A W O F F I C E S

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P.O. Box 50130
Idaho Falls, Idaho 83405
Tel: (208) 523-0620
Fax: (208) 523-9518
www.holdenlegal.com

lmarchant@holdenlegal.com

June 9, 2020

RE: WSB Lease Application 1738

Dear Justin:

I am writing in response to your letter dated June 8, 2020 asking for additional information regarding potential forfeiture of Water Right No. 34-7052 due to non-use for the period of 2003-2011. We are somewhat perplexed by this request as this question has already been asked and answered numerous times in previous applications processed by the Water Supply Bank. Nevertheless, we will again provide the requested information, as well as additional support from IDWR to show that Water Right No. 34-7052 has not been forfeited.

As you are aware, Idaho Code § 42-223(6) states that “[n]o portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control.” Water Right No. 34-7052 was not used during the period of 2003-2011 due to circumstances over which the water right owner at the time had no control.

Richard Potter, the owner of Water Right No. 34-7052 during the time in question, purchased his property and the appurtenant water rights in June of 1998 from Eldon Jacobsen. Prior to this, Eldon Jacobsen had entered into a lease agreement (Attached as Attachment 1) with Alvin and Gay Wheeler for the use of an irrigation well located on Alvin and Gay Wheeler’s property. The irrigation well that was the subject of this lease serves as the point of diversion for Water Right No. 34-7052. The lease provided for use of the well and for ingress and egress to the well from the public road. That lease terminated on December 31, 2002, and for reasons not known, Mr. Potter was not able to renew or renegotiate an acceptable agreement with Alvin and Gay Wheeler for the use of the well.

A copy of the expired lease between Wheelers and Jacobsens is attached along with a signed statement from Alvin Wheeler (Attached as Attachment 2) dated August 20, 2011 indicating that Mr. Potter did not have a right of access to the well that serves as the point of diversion for Water Right No. 34-7052.

We have also attached a recent decision by IDWR Eastern Region Water Resources Program Manager James Cefalo wherein he made the following determination:

The hearing officer recognizes the termination of legal access to the authorized point of diversion as a circumstance beyond the control of a water user. If, because of a division of property, a water user loses access to the authorized point of

Established in 1896

diversion, and the water user has no immediate access to the water source, non-use of the subject water right is beyond the control of the water user.

Preliminary Order Approving Transfer, pg. 21, August 5, 2019 (Attached as Attachment 3, Highlighting added to original).

Mr. Cefalo's decision recognizing that the water rights in that matter were not subject to forfeiture due to circumstances beyond the control of the water user was upheld by Director Spackman on January 31, 2020. In his decision, the Director stated in part that: "[T]he non-use...from 1997 to 2008 (due to circumstances beyond the control of the water user, namely access) is accounted for...." *ORDER DENYING MOTION TO DISMISS; FINAL ORDER ON EXCEPTIONS*, pg. 9, (Attached as Attachment 4, Highlighting added to original).

Given that the nonuse of Water Right No. 34-7052 from 2003-2011 occurred due to circumstances over which the user had no control, circumstances which IDWR has recognized as recently as January of this year, this water right has not been forfeited.

Best Regards,



Luke H. Marchant
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

Enclosures

ATTACHMENT 1

NO. 33182
RECORDED

LEASE OF IRRIGATION WELL

Five Year Term

JUN 15 1998

AM. 4:33 PM.
BUTTE COUNTY RECORDER
Carla Morgan

This Agreement, made this 15th day of June, 1998, by and between
ALVIN WHEELER and GAY WHEELER, Husband and Wife, of Butte County, Idaho,
hereinafter called "Grantors", and ELDON W, JACOBSEN, hereinafter call "Grantee:

WITNESSETH:

For value received, Grantors hereby lease to Grantee a certain irrigation well, together
with a right-of-way for ingress and egress to such well, from a public road to said well.

The description of the location of the well is as follows:

A 50' x 50' square parcel, the center point of which is an
existing irrigation well, located in the West side of the Island Canal,
near the intersection of the West Bank of the said canal and the South
right-of-way of a county road, which parcel is in the SW1/4SW1/4,
Section 27, Township 5 North, Range 26 East Boise Meridian, Butte
County, Idaho, which parcel is approximately 600 feet East of the
Northwest corner of said SW1/4SW1/4.

It is understood and agreed that the Grantee is the owner of a certain water license and ditch
asement for conveyance of the water from the well to land to be irrigated by the Grantee with the
roduction of the well. It is further understood and agreed that only the well is hereby leased and that
quipping of the well and all costs of production shall be the obligation and responsibility of the
rantee.

Consideration:

The consideration for this lease is the sum of SEVEN THOUSAND DOLLARS (\$7,000.00), payable upon execution of this lease, or at such other time as the Grantors shall direct.

Terms of Lease:

The lease of the irrigation well and water production therefrom shall begin on the date of this lease, and shall terminate on December 31, 2002.

INWITNESS WHEREOF, the parties have set their hands and seals this 15th day of June 1998.


ALVIN WHEELER


GAY WHEELER

"GRANTORS"


ELDON W. JACOBSEN

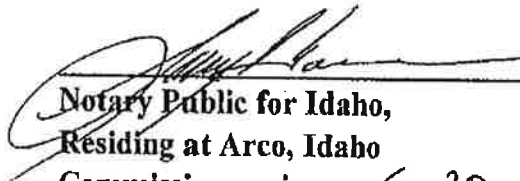
"GRANTEE"

STATE OF IDAHO)
 : ss.
County of Butte)

On this 15 day of JUNE, 1998, before me, the undersigned, a Notary Public in and for said State, personally appeared ALVIN WHEELER and GAY WHEELER, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



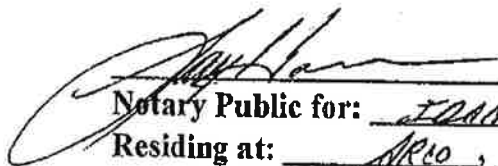

Notary Public for Idaho,
Residing at Arco, Idaho
Commission expires: 6-20-2003

STATE OF IDAHO)
 : ss.
County of BUTTE)

On this 15 day of JUNE, 1998, before me, the undersigned, a Notary Public in and for said State, personally appeared ELDON W. JACOBSEN, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.




Notary Public for: IDAHO
Residing at: ARCO, IDAHO
Commission expires: 6-20-2003

ATTACHMENT 2

STATEMENT

I, Alvin Wheeler, of 3327 West 3120 North, Moore, Idaho, 83255, in Butte County, do make the following true and correct statement.

I am the owner of the real property which the irrigation well located within NWSWSW Section 27, T5N, 26 E.B.M. (commonly known as the "Potter Well") exists.

Mr. Potter does not own, nor has ever held, any interest in this real property and has no right of access to the well located on this property.

Alvin Wheeler
Alvin Wheeler

Dated the 20 day of, August 2011

ATTACHMENT 3

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

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 82640 IN THE)	PRELIMINARY ORDER
NAME OF CLINTON K. ASTON)	APPROVING TRANSFER
<hr/>)	

PROCEDURAL HISTORY

On August 15, 2018, Clinton K. Aston ("Aston") filed Application for Transfer No. 82640 ("Application 82640") with the Idaho Department of Water Resources ("Department"). The Department published notice of Application 82640 on August 29 and September 5, 2018. Protests were filed by J & F King Farm Inc. ("King Farm"), Shelly & William Spradlin ("Spradlins"), Bob White ("White"), Kevin L. Olson ("Olson"), and Jay Norman Fannesbeck ("Fannesbeck").

The Department conducted an initial administrative hearing on February 26 and 27, 2019, in Preston, Idaho. Aston was represented at the hearing by attorney Robert Harris. The protestants represented themselves.

During the hearing, Olson and White confirmed that they no longer wanted to participate as parties to the contested case. Rule 204 of the Department's Rules of Procedure (IDAPA 37.01.01) allows any party to withdraw from the proceeding during the hearing. The hearing officer dismissed the protests filed by Olson and White. Fannesbeck identified Olson and White as witnesses and they were allowed to participate in the hearing in that capacity.

At the beginning of the hearing, Aston asked the hearing officer to prohibit King Farm and Fannesbeck from participating in the hearing unless represented by a licensed attorney. Aston asserted that Idaho law requires corporations, such as King Farm, and partnerships, such as those created by Fannesbeck to hold much of his real property, to be represented by a licensed attorney when appearing in formal proceedings before an administrative agency.

Rule 202.01 of the Department's Rules of Procedure (IDAPA 37.01.01) allows a partnership to be represented at hearing by "a partner, duly authorized employee, or attorney" and allows a corporation to be represented at hearing by "an officer, duly authorized employee or attorney," but only "[t]o the extent authorized or required by law." Idaho Code § 3-104 makes it illegal for a person to practice law in the state of Idaho without first obtaining a license from the Idaho Supreme Court. In a case interpreting Section 3-104, the Idaho Supreme Court stated: "[T]he law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before an administrative body" *Indian Springs LLC v. Indian Springs Land Investment, LLC*, 147 Idaho 737, 744-745, 215 P.3d 457, 464-465 (2009).

Relying on the *Indian Springs* decision, the hearing officer prohibited King Farm from participating in the hearing as a party unless represented by a licensed attorney. Geraldine Gunnell,

president of King Farm and non-attorney, was not present at the beginning of the hearing and only attended a portion of the proceedings. Gunnell was identified as a witness by Fannesbeck and was allowed to participate in the hearing in that capacity.

The hearing officer denied Aston's request as it pertained to Fannesbeck. According to taxlot information from Franklin County, Fannesbeck owns parcel RP02523.01 (generally located in the SESW, Section 16, T16S, R38E) in his own name. Ground water right 13-7661 is appurtenant to Parcel RP02523.01 and describes the same point of diversion as that proposed in Application 82640. Therefore, Fannesbeck had standing to pursue a protest against Application 82640 in his own name and was allowed to represent himself at the hearing.

Exhibits 100, 101, 103, 110-125, 130 and 131 offered by Aston, Exhibit 200 offered by Spradlin and Exhibits 300-303, 310-314, 316, 317, 319, 321, 323, 325, 326, 330, 333, 335, 336, 338 and 342-346 offered by Fannesbeck were admitted into the administrative record. Exhibit 102 offered by Aston and Exhibits 304-309, 315, 318, 322, 324, 327-329, 334, 337, 339 and 340 offered by Fannesbeck were excluded from the record. Exhibits 104-109, 126-129, 320, 331, 332 and 341 were not offered or were duplicative of other exhibits. The hearing officer also took official notice of certain documents found within the Department's records. These documents were identified as Exhibits IDWR1 through IDWR8.

The following individuals testified during the first hearing: Aston, Michael Eldridge, Gary Cahoon, Thomas Wood, Shaun Schvaneveldt, William Spradlin, Shelly Spradlin, Wayne Bingham, Fannesbeck, Sharalyn Fannesbeck, Kevin Fannesbeck, White, Geraldine Gunnell, Olson, Zayne Fredrickson, Brian Balls, and El Ray Balls.

The hearing officer issued a *Preliminary Order Approving Transfer* ("Preliminary Order") on April 1, 2019. Although Application 82640 was approved, the hearing officer found that portions of the subject water rights had been lost and forfeited for non-use.

On April 15, 2019, Spradlins filed a document asking the hearing officer to reconsider the *Preliminary Order*. Also on April 15, 2019, Fannesbeck filed a *Petition for Reconsideration* ("Fannesbeck Petition"). Also on April 15, 2019, Aston filed a *Petition for Reconsideration* ("Aston Petition"). The *Aston Petition* included a request to conduct an additional evidentiary hearing, in the event the petition was denied.

On May 6, 2019, the hearing officer issued an *Order Denying Petitions for Reconsideration, Withdrawing Preliminary Order and Granting Request for Additional Hearing*, wherein all of the petitions for reconsideration filed by the parties were rejected. The hearing officer concluded that an additional hearing was required to properly evaluate issues of forfeiture and possible defenses to forfeiture. Therefore, the hearing officer withdrew the *Preliminary Order* and authorized a supplemental hearing.

On June 21, 2019, at the request of the hearing officer, Aston filed a document titled *Notice of Aston's Defenses or Exceptions to Forfeiture*. Aston identified four statutory exceptions or defenses to forfeiture and three proposed common law defenses to forfeiture that, he argues, would excuse any non-use of the subject water rights.

Protestant King Farm withdrew its protest on July 9, 2019. Consequently, by the time the supplemental hearing was held, the only remaining active protests were the protest filed by Fannesbeck and the protest filed by the Spradlins.

The Department conducted a supplemental administrative hearing on July 16 and 17, 2019, in Preston, Idaho. Aston was represented by attorney Robert Harris. Protestants Fannesbeck and the Spradlins represented themselves.

Exhibits 132-152 offered by Aston and Exhibits 350, 352 and 353 offered by Fannesbeck were admitted into the record. Exhibits 351 and 355 offered by Fannesbeck were excluded from the record. The following individuals testified at the supplemental hearing: Aston, Charlotte Schvaneveldt, Shaun Schvaneveldt, Paul Campbell and Fannesbeck.

After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 82640 proposes to change the point of diversion and place of use for an 87-acre portion of water right 13-2209¹ and proposes to change the place of use for water right 13-4120. Ex. IDWR1. Water right 13-8026 (Aston's portion of water right 13-2209) authorizes a diversion rate of 0.62 cfs and the irrigation of 87 acres. The application proposes to combine water right 13-8026 and the entirety of water right 13-4120 (187 irrigated acres) to create a 187-acre irrigation place of use. *Id.*

2. The proposed point of diversion for water right 13-8026 and the existing point of diversion for water right 13-4120 is a ground water well ("Aston Well") located in the NWNE, Section 8, T16S, R38E.²

Ownership of Water Right 13-2209

3. Water right 13-2209 bears a priority date of June 13, 1960 and authorizes the diversion of 2.87 cfs and the irrigation of 403 acres. Ex. 338 at 1; Ex. IDWR7 at 1.

4. Water right 13-2209 is the end result of a permit to appropriate water (Permit G-28818) approved by the State Reclamation Engineer on June 30, 1960. Ex. 311. During the development period for Permit G-28818, it was assigned to Vereen Bingham, Stirling Bingham, Lee Schvaneveldt, Norman Fannesbeck and Myron Fannesbeck. *Id.* Aston asserts ownership of an 87-acre portion of water right 13-2209 appurtenant to the property owned by Lee Schvaneveldt at the time Permit G-28818 was developed. Ex. IDWR1 at 5-6.

¹ The 87-acre portion of water right 13-2209, for which Aston asserts ownership, has been assigned water right number 13-8026 and is identified by that number in this order.

² Unless otherwise noted, all legal descriptions in this order are within Township 16 South, Range 38 East, B.M.

5. On May 3, 1965, Myron Fannesbeck, one of the permit owners, filed an Application for Amendment Land List for Permit G-28818. Ex. 338 at 38. The document asked the State Reclamation Engineer to revise the irrigation land list for Permit G-28818 to reflect the acres that had been developed under the permit. *Id.* The amended land list included 132 acres in the NE ¼ of Section 8. *Id.*

6. On May 6 and 27, 1965, the State Reclamation Engineer published Notice of Proof of Completion of Works and Application of Water to Beneficial Use for Permit G-28818. Ex. 338 at 22. The Notice described 132 irrigated acres in the NE ¼ of Section 8. *Id.*

7. On June 1, 1965, the Department of Reclamation (now known as the Department of Water Resources) received three depositions for Proof of Application of Water to Beneficial Use and Completion of Works. Ex. 338 at 23-28. All three depositions described 132 irrigated acres in the NE ¼ of Section 8. *Id.*

8. On July 15, 1966, the Department of Reclamation conducted a field exam for Permit G-28818. Ex. 302. The examiner found 117 irrigated acres in the NE ¼ of Section 8. *Id.* 87 acres of the 117 irrigated acres were located on property owned by Lee Schvaneveldt. *Id.*

9. The State Reclamation Engineer issued a license for water right 13-2209 (identified at that time as License G-28818) on November 16, 1966. Ex. 338 at 1. At licensing, the owners of record for water right 13-2209 were Vereen Bingham, Stirling Bingham, Lee Schvaneveldt, Norman Fannesbeck and Myron Fannesbeck. *Id.*

10. In 1971, Sidney and Charlotte Schvaneveldt began purchasing portions of the Lee Schvaneveldt farm. Testimony of Charlotte Schvaneveldt. The portion of the Lee Schvaneveldt farm acquired by Sidney and Charlotte Schvaneveldt included the 87 acres in the NE ¼ of Section 8 covered by water right 13-2209. Ex. 330 at 7.

11. On July 28, 2004, Sidney and Charlotte Schvaneveldt executed a warranty deed ("Schvaneveldt to Aston Deed") conveying parcels of land in Sections 8 and 9 to Clinton and Estelita Aston. Ex. 300 at 3-5. The Schvaneveldt to Aston Deed included 81 of the 87 irrigated acres in the NE ¼ of Section 8 covered by water right 13-2209. *Id.* The Schvaneveldt to Aston Deed was recorded in Franklin County on July 29, 2004. *Id.*

12. The Schvaneveldt to Aston Deed did not include three small parcels of land in the northern part of the NWNE of Section 8. Ex. 300 at 5. One of these parcels, consisting of approximately two acres, is still owned by Charlotte Schvaneveldt. Testimony of Shaun Schvaneveldt; Ex. 117. The other two parcels, consisting of approximately four acres, are owned by Shaun Schvaneveldt. *Id.* Approximately six of the irrigated acres described in water right 13-2209 are associated with these three small parcels. Exs. 100 and 117.

13. On February 18, 2019, Charlotte Schvaneveldt executed a Correction Quit Claim Deed conveying all of her remaining interest in water rights 13-4120 and 13-2209 to Aston. Ex. 117. Also on February 18, 2019, Shaun Schvaneveldt executed a Correction Quit Claim Deed conveying all of his remaining interest in water rights 13-4120 and 13-2209 to Aston. *Id.*

14. On November 16, 2004, four months after executing the Schvaneveldt to Aston Deed, Sidney and Charlotte Schvaneveldt, Fonnesbeck, and El Ray and Janice Balls signed an agreement ("2004 Agreement") which included the following provisions:

Whereas the intention of this agreement is to document, record, honor, and defend a verbal agreement executed by our fathers in which they traded to each other their respective share in each well.

As a result of the trade, it was the intention of the respective parties, that Lee Schvanaveldt [sic] would own 100% of the well located in the NW1/4 NE1/4 Section 8 T16S R38E in Franklin County, together with any and all water rights established by or associated with the use of this particular well.

And, Norman and Myron Fonnesbeck would aquire [sic] Lee's share of the well located at the NE corner of the NE1/4 of the NE1/4 Section 36, T15S, R37E in Franklin County, together with any and all water rights established by, appurtenant to the land, or associated with the ownership and use of this particular well.

Further, as a result of the trade and agreement by our Fathers, the use of the well water and water right, as evidenced in License No. 13-2209 and appurtenant to the land owned by said Schvaneveldt in section 8, 10, and 11, T16S, R38E in Franklin County, Idaho, has been transferred to other lands owned by the Fonnesbecks, and to D. Glade Schvaneveldt, a nephew, and the present use needs to be updated and documented with the State of Idaho.

Ex. 325.

Ownership of Water Right 13-4120

15. On July 11, 1961, Jerry Schvaneveldt, Lee Schvaneveldt, Myron Fonnesbeck and Norman Fonnesbeck filed an application for permit with the Department of Reclamation, proposing to develop a ground water well in the NWNE of Section 8 to irrigate 255 acres. Ex. 112. The Department of Reclamation approved Permit G-29935 on July 18, 1961. *Id.*

16. The well described in Permit G-29935 (the Aston Well) was completed in 1962. *See* Exs. 113, 310 and 323. Water was diverted from the Aston Well for irrigation use beginning in 1962. *See* Exs. 113, 114, 310 and 323 (all supporting the proposition that irrigation from the Aston Well commenced in the early 1960s); Testimony of El Ray Balls (worked as a farm hand for Lee Schvaneveldt prior to 1964 (when Lee sold farm to Cooleys) and moved sprinkler pipe on the property); Exs. 120 and 121 (pump installed on Well #1, at the same time the Aston Well was equipped with a pump, was manufactured in 1962).

17. On November 7, 1966, the Department of Reclamation issued an Order of Cancellation for Permit G-29935 for failure of the permit holders to file proof of beneficial use. Ex. 112.

18. On January 18, 1980, Sidney Schvaneveldt filed claim 13-4120 pursuant to Idaho Code § 42-243. Ex. 110. Consistent with the elements listed in the claim, water right 13-4120 bears a priority date of June 26, 1962 and currently describes the diversion of 2.80 cfs from ground water and the irrigation of 187 acres. *Id.*

19. The point of diversion described in claim 13-4120 was the well referred to as the Aston Well in this order. Ex. 110. The place of use described in claim 13-4120 included the 87 irrigated acres described in water right 13-2209 associated with the Lee Schvaneveldt property in the NE ¼ of Section 8. Exs. 110 and 302.

20. Claim 13-4120, as originally filed, described 40 irrigated acres in the NWNW of Section 9. Ex. 110. The 2004 Schvaneveldt to Aston Deed did not include any portion of the NWNW of Section 9. Ex. 336. However, the Bill of Sale attached to the deed included the following item: "IDAHO WATER RIGHT NUMBER 13-4120 FOR 2.8 CFS." *Id.*

21. On November 6, 1996, Sidney and Charlotte Schvaneveldt conveyed approximately 36 acres in the NWNW of Section 9 to Jeffrie and Kaye Beckstead through a warranty deed. Ex. 303. The deed did not reserve water right 13-4120 from the conveyance. *Id.*

22. On October 30, 2002, Jeffrie and Kaye Beckstead conveyed the 36-acre parcel in the NWNW of Section 9 to Zayne and Terri Fredrickson through a quit claim deed. Ex. 333. The deed did not reserve water right 13-4120 from the conveyance. *Id.*

23. On April 11, 2005, Zayne and Terri Fredrickson sent a letter ("Fredrickson Letter") to the Department, signed and notarized, stating:

We are the owners of the NW1/4 NW1/4 Sec. 9 T16S R38E in Franklin County and are aware that 40 acres of Claimed Water Right 13-4120 are appurtenant to this piece of land.

It is our desire that this portion of this particular water right be transferred to property owned by El Ray and Janice Balls, as it does represent a part of the proportional amount in which they are entitled, as they do own a 25% interest in the well that is the point of diversion for this water right.

We therefore grant and convey to El Ray and Janice or their assigns our permission to transfer the claimed water right that is appurtenant to this piece of land to their own land or that of their assigns.

Ex. 300.

24. El Ray and Janice Balls have never filed an application for transfer to move water right 13-4120, or any portion thereof, from the NWNW of Section 9 to their property.

25. In 2018, Zayne and Terri Fredrickson conveyed the 36-acre parcel in the NWNW of Section 9 to Farmland Reserve, Inc. ("FRI"), who currently owns the property. Testimony of Zayne Fredrickson.

26. On July 5, 2018, at the request of Aston, FRI sent a letter to the Department stating:

Please be aware that Farmland Reserve, Inc. (FRI) does not own or claim any interest in water right 13-4120. The current place of use for this [right] includes a portion of land that FRI owns, the place of use can be modified to exclude the land that is indicated on the map attached.

Ex. 119. The letter was signed by Warren Peterson, Vice President for FRI. *Id.*

27. On January 6, 2006, Sidney and Charlotte Schvaneveldt conveyed approximately four acres of the NWNW of Section 9 to Clinton and Estelita Aston. Ex. 130. This represents the acreage in the NWNW of Section 9 which was not included in the 1996 conveyance from Schvaneveldt to Beckstead. *Id.*

Validity of Water Right 13-4120

28. On August 3, 2018, Aston filed an amended claim 13-4120, pursuant to Idaho Code § 42-243. Ex. 111. The amended claim still described a priority date of June 26, 1962, a diversion rate of 2.80 cfs, and the irrigation of 187 acres. *Id.*

29. The amended claim slightly altered the number of acres per quarter-quarter, included an updated map and was intended to more accurately depict the acres historically irrigated under water right 13-4120. Testimony of Aston. As amended, claim 13-4120 describes 76 acres in Section 9 (36 acres in the NWNW and 40 acres in the SWNW). Ex. IDWR7.

30. Charlotte 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. Testimony of Charlotte Schvaneveldt. Sidney and Charlotte Schvaneveldt owned and operated the farm associated with water right 13-4120 between 1971 and 2004.³ *Id.* Sidney Schvaneveldt died in 2017. *Id.*

31. When Sidney and Charlotte Schvaneveldt moved to the farm in 1966, the Aston Well was functioning properly. Testimony of Charlotte Schvaneveldt. In 1966, the well produced enough water to pressurize the sprinkler lines. *Id.* The Schvaneveldts had some components of the pump replaced in 1987. *Id.*

32. Charlotte Schvaneveldt was actively involved in the irrigation of the Schvaneveldt farm. *Id.* She was very familiar with the method of irrigation, the limitations of the irrigation equipment and the extent of irrigation between 1966 and 2004. *Id.*

³ As noted above, 36 acres of the NWNW of Section 9 was conveyed to Jeffrie and Kaye Beckstead in 1996.

33. The Anker Ditch (also known as the Town Ditch) formed the northern boundary of the irrigation place of use for water right 13-4120 in the NWNE and NENE of Section 8. Ex. 111; Ex. 301 (map). The ditch traversed the northeast corner of the SENE of Section 8, then passed through the middle of the SWNW of Section 9. *Id.*

34. Approximately 19 acres of the SWNW of Section 9 were located north of the Anker Ditch. Ex. 111; Ex. 301 (map). This area, referred to as the “clay hills” during the hearing, was comprised of clayey soil and was difficult to farm because of soil composition and topography. Testimony of Charlotte Schvaneveldt. The clay hills were regularly irrigated when Sidney and Charlotte Schvaneveldt owned the property. *Id.*

35. Brian Balls worked on the Sidney Schvaneveldt farm in the early 1970s. Testimony of Brian Balls. Mr. Balls helped move irrigation pipe across the clay hills. *Id.*

36. The Anker Ditch was replaced with a buried pipeline in the late 2000s. Testimony of Wayne Bingham. Since that time, the Anker Ditch has been filled in and farmed over on the Aston property. Ex. 111.

37. The clay hills area has been regularly irrigated by Aston since he purchased the property. Testimony of Aston. This area is currently irrigated by a wiper pivot. Ex. IDWR1 (map).

38. The original claim for water right 13-4120, filed by Sidney Schvaneveldt in 1980, described 40 irrigated acres in the NWNW of Section 9. Ex. 110. Water right 13-4120 still described 40 irrigated acres in the NWNW of Section 9 in 1996, when Sidney Schvaneveldt sold a 36-acre parcel in the NWNW to Jeffrie and Kaye Beckstead.

39. The NWNW of Section 9 was irrigated in the early 1960s, immediately after the Aston Well was completed. Testimony of El Ray Balls (recalled moving pipe across the NWNW of Section 9 for at least one year in the early 1960s). The 40 acres were irrigated by delivering water from the Aston Well through a portable, above-ground mainline to handlines, which were moved across the property. *Id.* After one or two years of irrigation, Lee Schvaneveldt and Jerry Schvaneveldt (Lee’s brother) stopped irrigating the NWNW of Section 9 because it was too much work to haul handlines to that ground from other areas of the farm. *Id.*

40. The NWNW of Section 9 was not irrigated during the time Sidney and Charlotte Schvaneveldt helped with or owned the farm. Testimony of Charlotte Schvaneveldt, Kevin Olson, Paul Campbell.

41. Brian Balls worked on the Sidney Schvaneveldt farm in the early 1970s. Testimony of Brian Balls. The NWNW of Section 9 was not irrigated during the time Brian Balls worked on the property. *Id.*

42. The 36-acre parcel in the NWNW of Section 9 currently owned by FRI was enrolled in the Conservation Reserve Program (“CRP”), a federal cropland set-aside program, from 1987 to 1996 and again from 1998 to 2007. Exs. 132-137.

43. The original claim for water right 13-4120, filed by Sidney Schvaneveldt in 1980, described 16 irrigated acres in the SESW of Section 5. Ex. 110. Sidney and Charlotte Schvaneveldt only owned approximately 16 acres in the SW 1/4 of Section 5. Ex. IDWR1 (1966 map depicting property owned by Lee Schvaneveldt).

44. Sidney and Charlotte Schvaneveldt referred to the acreage in Section 5 as "the pasture." Testimony of Charlotte Schvaneveldt. The pasture was divided into two sections by a fence running on a diagonal from northwest to southeast. Ex. 111 (fence line visible in map). The north pasture covered approximately 10 acres. *Id.* The south pasture covered approximately 6 acres. *Id.*

45. The south pasture was irrigated by extending portable mainline from the Aston Well, under the road through a culvert. Testimony of Charlotte Schvaneveldt and Shaun Schvaneveldt. A large portion of the south pasture benefits from high subwater and stays green throughout the irrigation season. Exs. 137 and 152 (more than half of the south pasture identified as "farmed wetland" by NRCS); Testimony of William Spradlin. The Schvaneveldts did not irrigate the south pasture every year, but did irrigate the south pasture if it was particularly dry. Testimony of Charlotte Schvaneveldt.

46. The north pasture, which is generally located in the north half of the SESW of Section 5, was never irrigated with water from the Aston Well. Ex. 110 (map prepared by Sidney Schvaneveldt did not include the north pasture); Testimony of Charlotte Schvaneveldt (confirming that she never observed irrigation of the north pasture).

47. A portion of the south pasture, approximately one acre, was conveyed to Sidney and Charlotte Schvaneveldt's daughter and son-in-law (Toinette and Dusty Roholt). Ex. 111 (Roholt parcel visible in map); Testimony of Charlotte Schvaneveldt. The south pasture, including the Roholt property, has not been irrigated from the Aston Well since 2004. Testimony of Shaun Schvaneveldt, Charlotte Schvaneveldt, William Spradlin, Wayne Bingham and Aston. Except for the parcel that was sold to Roholt, Charlotte Schvaneveldt still owns the north and south pastures. Testimony of Charlotte Schvaneveldt.

48. Since the time Sidney and Charlotte Schvaneveldt purchased the pasture ground in Section 5 in the 1970s, there have not been any surface water rights or canal company shares associated with the pasture. Testimony of Charlotte Schvaneveldt.

49. Claim 13-4120 is appurtenant to six acres associated with three small parcels located in the northern part of the NWNE of Section 8. Ex. 101. One of these parcels, consisting of approximately two acres, is owned by Charlotte Schvaneveldt and has been consistently irrigated. *Id.* The other two parcels, consisting of approximately four acres, are owned by Shaun Schvaneveldt. A two-acre pasture east of the Shaun Schvaneveldt home was occasionally irrigated with water from the Aston Well between 1999 and 2004. Testimony of Shaun Schvaneveldt. The four acres have not been irrigated from the Aston Well from July 2004 to the present day. *Id.*

Point of Diversion Change

50. The existing point of diversion for water right 13-8026 is a ground water well (Well #1) located in the NENE of Section 36, T15S, R37E. The proposed point of diversion is the Aston Well located on property currently owned by Aston in the NWNE of Section 8.

51. Water right 13-8026 has been pumped from the Aston Well since the mid-1960s. Ex. 323 at 5 (as of 1967 Norman Fannesbeck, Myron Fannesbeck, Stirling Bingham and Vereen Bingham had full control of and exclusive use of the water diverted at Well #1); Testimony of Kevin Fannesbeck (Fannesbeck family had exclusive use of Well #1 from 1969 to 1978).

52. The Aston Well was originally equipped with a 100 hp pump. Ex. 323 at 3. The well is still equipped with a 100 hp pump. Testimony of Aston.

53. The Aston Well, with the infrastructure currently installed, yields approximately 1,300 gpm (2.90 cfs). Testimony of Aston. The system has produced approximately 1,300 gpm (2.90 cfs) since Aston purchased the property in 2004. *Id.*

54. Water rights 13-4120 and 13-8026 have been diverted from the Aston Well since at least 1967. Ex. 323 at 5. These two rights, in combination, have been used to divert approximately 1,300 gpm (2.90 cfs).

55. Spradlins purchased their property in 1995. Testimony of Shelly Spradlin. They have two active wells on their property: a domestic well and an irrigation well. *Id.* Water diverted from the domestic well must be filtered multiple times to remove sand particles from the water. *Id.* Spradlins had to filter water diverted from their domestic well even before Aston purchased his property in 2004. *Id.*

56. Spradlins have not had any issues diverting the quantity of water needed for domestic use from their domestic well. *Id.* The primary issue with water from the domestic well is the amount of sand in the water. *Id.*

57. Spradlins own ground water rights 13-8035 and 13-8036 (split portions of water rights originally owned by Herbert Williams). Ex. IDWR7. Water right 13-8035 bears a priority date of July 1, 1960 and authorizes the diversion of 0.59 cfs and the irrigation of 58 acres. *Id.* Water right 13-8036 bears a priority date of March 30, 1961 and authorizes the diversion of 0.17 cfs and the irrigation of 58 acres. *Id.* In combination, water rights 13-8035 and 13-8036 authorize the diversion of 0.76 cfs (341 gpm).

58. The places of use for water rights 13-8035 and 13-8036 overlap. Ex. IDWR7. In combination, these two water rights authorize the irrigation of 58 acres. In recent years, Spradlins have irrigated approximately 55 acres on their property. Testimony of William Spradlin.

59. Spradlins own 53 shares in Weston Creek Irrigation Company. *Id.* Water delivered by the canal company is the primary source of irrigation water on the property. *Id.* Spradlins only divert ground water for irrigation when water from the canal company is not sufficient to irrigate

their property. *Id.* Spradlins do not divert water from Weston Creek and ground water at the same time. *Id.*

60. Spradlins have had difficulty pumping adequate water from their irrigation well, even during times when the Aston Well is off. *Id.* Other ground water irrigation wells, besides the Aston Well, affect the water levels in Spradlin's irrigation well. *Id.* The Campbell irrigation well, which is located approximately 2,300 feet north of Spradlin's irrigation well, can reduce water levels in the Spradlin well. *Id.*

61. Specific capacity is a metric used to compare the yield of a well to the water level drawdown occurring in the well during production. Specific capacity is often reported in gpm/ft. See Ex. 123 at 3.

62. According to a driller's report for the Spradlin irrigation well, a pump test was conducted shortly after the well was completed in 1961. Ex. 123 at 14-15. The well driller reported a diversion rate of 450 gpm and a drawdown of 25 ft. *Id.* Based on this test, the Spradlin irrigation well had a specific capacity of 18 gpm/ft in 1961. *Id.*

63. Ground water irrigation rights in the Weston Creek drainage are generally limited to a diversion rate of 0.02 cfs per acre and an annual diversion volume of 3.5 acre-feet/acre. Given these amounts, a water user would reach her annual volume limit after diverting at the authorized rate continuously for 88 days ($0.02 \text{ cfs} \times 88 \text{ days} \times 1.98 \text{ af/cfs-days} = 3.5 \text{ af}$).

64. Fonnesbeck and his wife own a home with a domestic well, located approximately one mile southeast of the Aston Well. Testimony of Sharalyn Fonnesbeck. Fonnesbeck's domestic well is 25 feet deep. *Id.* In recent years, Fonnesbecks have had to transport water to their home during winter months because their domestic well has gone dry. *Id.*

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code § 42-222(2) establishes the parameters of water right forfeiture:

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.

Idaho Code § 42-223 sets forth certain exceptions and defenses to forfeiture of water rights. The following subsections are relevant in this contested case:

- (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.
- (3) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes including, but not limited to, discharge from dairy lagoons used in combination with or substituted for water diverted under the water right.
- (4) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the reason for the nonuse of the water is to comply with the provisions of a ground water management plan approved by the director of the department of water resources pursuant to section 42-233a or 42-233b, Idaho Code.
- (6) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.
- (9) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right, as defined in section 42-250, Idaho Code.

Idaho Code § 42-220 states, in pertinent part:

[A water right license issued pursuant to Idaho Code § 42-219] shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted.

Idaho Code § 9-503 states:

No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

Idaho Code § 55-901 states:

A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. The name of the grantee and his complete mailing address must appear on such instrument.

ANALYSIS

Ownership of Water Right 13-8026 (13-2209)

Aston proposes to update the ownership records for an 87-acre portion of water right 13-2209 and move the split right entirely onto his property. Fonnesbeck asserts that the irrigation place of use described in the license for water right 13-2209 was incorrect. According to Fonnesbeck, the Lee Schvaneveldt property should not have been included in the licensed place of use. Fonnesbeck believes the Lee Schvaneveldt portion of water right 13-2209 was traded to the Fonnesbeck family prior to licensing.

Idaho Code § 42-220 states that water right licenses “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein.” The Department, therefore, is bound by previously-issued licenses. Except for clerical errors, or licenses that include a term limit or a condition authorizing subsequent review, the Department does not have the authority to reconsider the elements of a license after the appeal period has passed. The Idaho Supreme Court has declared that “finality in water rights is essential.” *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). To allow a water right license to be challenged years after the license is issued creates significant uncertainty for the owner of the water right.

Water right 13-2209 was licensed in 1966. The licensed irrigation place of use was consistent with the associated permit documents (proof of beneficial use, depositions, beneficial use exam). If any of the elements (place of use, point of diversion, etc.) of licensed water right 13-2209 were incorrect, the proper time to challenge those elements was in 1966, immediately after the license was issued. Challenging the elements of water right 13-2209 today, over fifty years after the license was issued, constitutes a collateral attack on the license and negates the finality of the licensing process. Consistent with Idaho Code § 42-220, once water right 13-2209 was licensed, a portion of the water right became appurtenant to property owned by Lee Schvaneveldt and passed with any subsequent conveyances of that property.

Fonnesbeck argues that he is the proper owner of Lee Schvaneveldt's portion of water right 13-2209, but has produced no written conveyance from Lee Schvaneveldt to Myron or Norman Fonnesbeck for the water right. Fonnesbeck relies on an alleged verbal agreement from the 1960s between Lee Schvaneveldt and Norman and Myron Fonnesbeck. This verbal agreement, if one existed, is of no effect. Pursuant to Idaho Code § 9-503, real property, including licensed water rights, can only be conveyed in writing, signed by the party making the conveyance. Idaho Code § 55-101; *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983); *Anderson v. Cummings*, 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959).

There is no evidence of a written conveyance from Lee Schvaneveldt to Norman or Myron Fonnesbeck. Therefore, Lee Schvaneveldt's portion of water right 13-2209 remained on the Schvaneveldt property and was conveyed when the irrigated property was sold to Sidney and Charlotte Schvaneveldt. Similarly, there is no written conveyance from Sidney or Charlotte Schvaneveldt to Fonnesbeck which pre-dates Schvaneveldt conveying the irrigated property to Aston. Consequently, a portion of water right 13-2209 passed from Lee Schvaneveldt to Sidney and Charlotte Schvaneveldt and then to Aston as an appurtenance to the land. See *Bagley v. Thomason*, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010) (Unless expressly reserved in the deed, appurtenant water rights pass with the conveyance of land even if they are not specifically mentioned in the deed.).

Effect of the 2004 Agreement

In the 2004 Agreement, Sidney and Charlotte Schvaneveldt attempted to record the alleged verbal agreement between Lee Schvaneveldt and Norman and Myron Fonnesbeck. The 2004 Agreement was created to "document, record, honor, and defend a verbal agreement." Ex. 325. It states, in pertinent part:

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

The 2004 Agreement was signed four months after Sidney and Charlotte Schvaneveldt conveyed the irrigated farm property to Aston. The Schvaneveldt to Aston Deed did not reserve or

exclude water right 13-2209 from the conveyance to Aston. Therefore, a portion of water right 13-2209 was included in the conveyance from Schvaneveldt to Aston. The 2004 Agreement does not affect the 81-acre portion of water right 13-2209 appurtenant to the Aston property.

The six acres of water right 13-2209 appurtenant to the properties owned by Charlotte Schvaneveldt and Shaun Schvaneveldt must be analyzed separately. It is possible that the 2004 Agreement, signed by Sidney and Charlotte Schvaneveldt, affects the ownership of the water rights appurtenant to these six acres.

In Idaho, “a written instrument purporting to convey real property must contain a sufficient description of the property.” *Garner v. Bartschi*, 139 Idaho 430, 435, 80 P.3d 1031, 1036 (2003). “A description contained in a deed will be sufficient so long as quantity, identity or boundaries of property can be determined from the face of the instrument, or by reference to extrinsic evidence to which it refers.” *Id.*

As an initial matter, the 2004 Agreement does not appear to be a conveyance. It does not include standard conveyance language. In fact, it only purports to be an agreement to “provide, defend and uphold any conveyance, transfers, or any other documentation necessary as per enforcement of this agreement.” The 2004 Agreement refers to past conveyances but does not, itself, appear to be a conveyance.

Even if the 2004 Agreement was intended to be a conveyance, it fails the specificity requirement set forth in *Garner v. Bartschi*. The 2004 Agreement refers to transfers (or conveyances) to lands owned by the Fannesbecks and D. Glade Schvaneveldt. The term Fannesbecks is not defined in the agreement and could refer to Jay Norman Fannesbeck, the Fannesbeck Family Trust, Norman Fannesbeck or Myron Fannesbeck. The 2004 Agreement does not describe what lands are owned by the Fannesbecks or by D. Glade Schvaneveldt. Further, the 2004 Agreement does not describe what portion of water right 13-2209 would be conveyed to the Fannesbecks and what portion would be conveyed to D. Glade Schvaneveldt.

Given the deficiencies of the document, the hearing officer is not willing to recognize the 2004 Agreement as a conveyance of water right 13-2209. In the absence of a document conveying water right 13-2209 off of the Charlotte Schvaneveldt and Shaun Schvaneveldt properties, water right 13-2209 continues to be appurtenant to those properties. The correction quit claim deeds conveying water right 13-2209 from Charlotte Schvaneveldt and Shaun Schvaneveldt to Aston are valid conveyances.

Doctrine of Part Performance

Fannesbeck argues that the alleged verbal exchange of water rights between Lee Schvaneveldt and Norman and Myron Fannesbeck was a legitimate conveyance based on a theory of part performance of a real estate agreement. Fannesbeck cited a 2016 Idaho Supreme Court case, *Hoke v. NeYada*, in support of his argument. *Fannesbeck Petition* at 2.

“Under the doctrine of part performance, when an agreement to convey real property fails to meet the requirements of the Statute of Frauds, the agreement may nevertheless be specifically

enforced when the purchaser has partly performed the agreement.” *Hoke v. NeYada, Inc.*, 161 Idaho 450, 453, 387 P.3d 118, 121 (2016); *see also* Idaho Code § 9-504 (“The preceding section [§ 9-503] must not be construed to . . . abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.”). “What constitutes part performance must depend upon the particular facts of each case and the sufficiency of particular acts is matter of law.” *Bear Island Water Association, Inc. v. Brown*, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994) (citations omitted).

In this case, Fannesbeck asserts that Lee Schvaneveldt and Norman and Myron Fannesbeck entered into a verbal agreement wherein Schvaneveldt conveyed his ownership interest in Well #1 and his portion of water right 13-2209 (G-28818) to Norman and Myron Fannesbeck in exchange for Fannesbecks’ ownership interest in the Aston Well and Fannesbecks’ portion of Permit G-29935. If the verbal agreement occurred, it did not take place until after March 1963, when the Idaho Code was changed to require an application for permit to be filed prior to developing a new ground water irrigation right. *See* Ex. 323 at 4 (Myron Fannesbeck asserts that a verbal exchange of water rights took place in 1966). After March 1963, it was no longer possible to develop a ground water irrigation right through only beneficial use.

Permits G-28818 and G-29935 had overlapping places of use. Permit G-28818, as amended, described 132 irrigated acres in the NE ¼ of Section 8. Permit G-29935 described 110 irrigated acres in the NWNE, SWNE and SENE of Section 8. The Lee Schvaneveldt property was covered by Permits G-28818 and G-29935. These two permits, in combination, represented a single irrigation beneficial use on the Lee Schvaneveldt property. If Lee Schvaneveldt conveyed his portion of water right 13-2209 (G-28818), including the 87 authorized irrigated acres associated with his property, to Myron and Norman Fannesbeck, he would have been required to dry up 87 acres on his farm to prevent an enlargement of use under his water rights. The 87 irrigated acres on the Lee Schvaneveldt property were not dried up, however, and continued to be irrigated.

There is some evidence supporting part performance of the verbal exchange of the ownership interests in the two wells. Fannesbecks and the Bingham family have had exclusive control of Well #1 since the mid-1960s. Exclusive control means payment of annual pumping costs, maintenance costs, and exclusive use of water from the well. Lee Schvaneveldt or his successors in interest, have had exclusive control of the Aston Well since the mid-1960s.

There is no evidence supporting part performance of the verbal exchange of water rights. Lee Schvaneveldt never attempted to change the ownership records for Permit G-29935 (prior to its cancellation) to have Fannesbecks’ names and property removed from the permit. The Fannesbecks did not object when the license for water right 13-2209 (G-28818) included the Lee Schvaneveldt property. Neither Myron Fannesbeck nor Norman Fannesbeck ever attempted to change the place of use for water right 13-2209 from the Schvaneveldt property to their own properties. Fannesbecks never sought to have Lee Schvaneveldt’s name removed from the ownership records for water right 13-2209. Similarly, Fannesbeck, who now owns property once owned by Norman and Myron Fannesbeck, has never proposed to move water right 13-2209 to his property, even though Fannesbeck has been involved in contested cases about water right 13-2209 since at least 2003. Further, on June 30, 2005, Fannesbeck and El Ray Balls filed claim 13-7661 pursuant to Idaho Code § 42-248, describing irrigation use on the Fannesbeck property out of the Aston Well. By filing this claim, Fannesbeck seeks to record a beneficial use water right diverted

from the Aston Well for irrigation use on the Fannesbeck property, the same right he now argues was conveyed off of the Fannesbeck property to Schvaneveldt through the alleged verbal exchange of water rights.

The doctrine of part performance is based on specific actions taken by parties which are consistent with the existence of an agreement. In this case, there has been mostly inaction by the parties to the alleged verbal exchange of water rights. None of the parties to the alleged verbal agreement have taken any action to update their water rights to reflect the alleged agreement. In the absence of specific, meaningful actions by the parties to the alleged verbal agreement, the doctrine of part performance does not apply.

Summary

87 acres of water right 13-2209 was appurtenant to property owned by Lee Schvaneveldt at the time water right 13-2209 was licensed. Lee Schvaneveldt was one of the owners of record listed on the license. The deeds conveying the 87 irrigated acres to successive owners did not withhold or reserve water right 13-2209 from the conveyances. Fannesbeck argues that water right 13-2209 was moved off of the Lee Schvaneveldt property through a verbal exchange of water rights. The verbal agreement, if one existed, violates Idaho's statute of frauds (I.C. § 9-503). There is insufficient evidence to support part performance of the alleged verbal agreement. Aston has provided deeds demonstrating ownership of an 87-acre portion of water right 13-2209 (which has been identified in this order as water right 13-8026).

Authority to Transfer Water Right 13-4120

The 2004 Schvaneveldt to Aston Deed included an attached bill of sale describing "IDAHO WATER RIGHT NUMBER 13-4120 FOR 2.8 CFS," which constitutes the entire water right. By 2004, however, Sidney and Charlotte Schvaneveldt no longer owned the entire place of use described in water right 13-4120. They had already conveyed approximately 36 acres in the NWNW of Section 9 to Jeffrie and Kaye Beckstead in 1996. Water right 13-4120 was not reserved from the conveyance to the Becksteads. Therefore, a 36-acre portion of water right 13-4120 remained appurtenant to the Beckstead property.

In 2002, Jeffrie and Kay Beckstead conveyed the 36-acre parcel to Zayne and Terri Fredrickson. Fannesbeck argues that the Fredricksons conveyed their interest in water right 13-4120 to El Ray and Janice Balls through the Fredrickson Letter (signed in April 2005). The Fredrickson Letter does not constitute a conveyance of water right 13-4120 from the Fredricksons to the Balls. The letter merely authorizes the Balls to change the place of use for the 36-acre portion of water right 13-4120. Stated differently, the Fredricksons only granted the "permission to transfer the claimed water right that is appurtenant to [the Fredrickson property]." Ex. 300. The Fredricksons did not convey the water right to the Balls. In 2018, the Fredrickson's sold the 36-acre parcel to FRI. On June 28, 2018, Warren Peterson, Vice President for FRI, signed a letter disclaiming any interest in water right 13-4120 and consenting to any proposal to move water right 13-4120 off of the FRI property. Ex. 119.

A small portion (approximately six acres) of the place of use for water right 13-4120 is appurtenant to properties owned by Charlotte Schvaneveldt and Shaun Schvaneveldt. Aston provided quit claim deeds from Charlotte Schvaneveldt and Shaun Schvaneveldt conveying their interests in water right 13-4120 to Aston.

The evidence available to the Department at this time supports Aston's ownership of 151 acres of water right 13-4120. The letter from FRI gives Aston the authority to transfer the remaining 36 acres of water right 13-4120 off of the FRI property. Therefore, Aston has demonstrated the authority to transfer the entirety of water right 13-4120 to his property.

Validity of Water Right 13-4120

As part of its review under Idaho Code § 42-222, the Department must confirm that each water right, or portion thereof, included in a transfer application is valid. For beneficial use claims recorded pursuant to Idaho Code § 42-243, the Department must confirm the validity of the claimed priority date and verify the accuracy of the elements of the claim. The Department must also determine the extent of beneficial use established under the claimed right and confirm that the water right, if properly established, has not been lost or forfeited through non-use. If the Department is unable to confirm that a water right is valid then the water right, or portion thereof, cannot be included in a transfer approval.

In March 1963, the Idaho Ground Water Act was amended to require an application for permit be filed prior to development for all ground water uses (except for small domestic and stockwater uses). See Idaho Code § 42-229. In other words, beginning in March 1963, it was no longer possible to create new ground water irrigation rights by merely diverting water for beneficial use. Water right 13-4120 is a claim filed pursuant to Idaho Code § 42-243, meaning it is a water right established through beneficial use. Therefore, the only portion of water right 13-4120 that can be recognized by the Department is the beneficial use occurring prior to March 1963.

The record supports the June 26, 1962 priority date claimed for water right 13-4120. Further, the Aston Well currently produces approximately 1,300 gpm (2.90 cfs). This is consistent with the diversion rate listed in claim 13-4120 (2.80 cfs). The Aston well was originally equipped with a 100 hp pump and continues to be equipped with a 100 hp pump today.

The original claim for water right 13-4120 described 187 irrigated acres, including 40 irrigated acres in the NWNW of Section 9. In August 2018, Aston filed an amended claim which only described 36 irrigated acres in the NWNW of Section 9, but still listed 187 irrigated acres in total. A small unnamed stream crosses through the southwest corner of the NWNW of Section 9. Approximately 4 acres of the NWNW are located on the southwest side of the stream channel. Approximately 36 acres of the NWNW are located on the northeast side of the channel. A county road runs between the NWNW and the SWNW of Section 9. Exs. 111, 138 and 139. When the NWNW of Section 9 was irrigated in the early 1960s, mainline was run through a culvert under the road on the east side of the stream channel. Testimony of El Ray Balls and Aston; Ex. 138. Aston owns the four acres on the southwest side of the stream channel. It is unlikely that these acres were irrigated with the portable mainline. Based on the evidence available at this time, the 36 acres

originally irrigated under water right 13-4120 were located on the northeast side of the unnamed stream.⁴

The original claim for water right 13-4120 described sixteen acres in Section 5. Although the map submitted with the original claim for water right 13-4120 is rudimentary, it is clear that the north pasture in Section 5 was not included in the depicted irrigation place of use. In August 2018, Aston filed an amended claim for water right 13-4120. Consistent with the original claim, the amended claim included sixteen irrigated acres in Section 5. The amended claim, however, included the area referred to as the north pasture.

Charlotte Schvaneveldt testified that during her involvement with the pasture property (1966 – present), the portable mainline, when used, only extended across the south pasture not the north pasture. El Ray Balls, whose testimony was critical in confirming the priority date for the right, did not testify about irrigation in the north pasture. The map included with the original claim for water right 13-4120 suggests that properties to the west of the Schvaneveldt property may have been irrigated. Besides the claim map, however, there is no evidence that Lee Schvaneveldt or Sidney Schvaneveldt ever irrigated neighboring properties from the Aston Well. Charlotte Schvaneveldt testified that neighboring properties were not irrigated from the Aston Well during her time on the property.

There is no evidence in the record that the north pasture was irrigated prior to March 1963. Therefore, the ten acres associated with the north pasture must be removed from the water right. Based on a preponderance of evidence in the record, Lee Schvaneveldt established a beneficial use water right on June 26, 1962 with a diversion rate of 2.80 cfs for the irrigation of 177 acres.

Forfeiture Analysis

The Idaho Supreme Court has confirmed the Department's jurisdiction to evaluate forfeiture as part of its review of a transfer application:

[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 injure 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 injure other water rights.

Jenkins v. State, Dep't of Water Resources, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982).

⁴ The original claim for water right 13-4120 described 40 irrigated acres in the NWNW of Section 9. The water right still included 40 irrigated acres in the NWNW of Section 9 in 1996, when Sidney and Charlotte Schvaneveldt sold approximately 36 acres of the NWNW to Jeffrie and Kaye Beckstead. The amended claim filed by Aston in 2018 described 36 acres in the NWNW of Section 9. The map provided with the amended claim shifted acres off of the Beckstead property (now owned by FRI). The map did not accurately depict the location of the 36 acres.

Pursuant to Idaho Code § 42-222(2), any water right, including beneficial use water rights recorded under Idaho Code § 42-243, “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” Forfeiture must be proven by clear and convincing evidence. *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001). “Clear and convincing evidence is generally understood to be evidence indicating that the thing to be proved is highly probable or reasonably certain.” *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006) (quotation marks and citation omitted). A portion of a water right may be lost to forfeiture through non-use, even if the remaining portion of the water right is regularly used. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400 (1997).

“Although the owner of the water right has the burden of raising defenses to statutory forfeiture, the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense.” *Sagewillow, Inc. v. Idaho Dep’t of Water Resources*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003) (citations omitted). The record must include evidence supporting any defense to forfeiture raised by the owner of the water right. *Jenkins*, 103 Idaho at 389, 647 P.2d at 1261 (noting that the record was “devoid of any evidence to indicate that any of the established defenses [to forfeiture] would be applicable even if argued”).

Acres in Section 5

As described above, the evidence only supports the existence of six of the claimed irrigated acres in Section 5. There is no evidence that the ten acres associated with the north pasture have ever been irrigated. The six acres associated with the south pasture were irrigated periodically when Sidney and Charlotte Schvaneveldt owned the Aston Well. The six acres in the south pasture have not been irrigated between 2004 and 2019. Sidney and Charlotte Schvaneveldt conveyed a one-acre portion of the south pasture to Dusty and Toinette Roholt, who moved a trailer home to the property at some time prior to 2004.

Acres in Section 8 - Shaun Schvaneveldt Property

Shaun Schvaneveldt owns two small parcels in the NWNE of Section 8 covering approximately four acres. These four acres are covered by water rights 13-4120 and 13-2209. The four acres were consistently irrigated from the Aston Well when Sidney and Charlotte Schvaneveldt owned the property. In 1999, Shaun Schvaneveldt built a house on the west side of the four acres. From 1999 to 2004, water was occasionally used to flood irrigate a small pasture on the east side of the property. Since 2004, the four acres have not been irrigated with water from the Aston Well.

Defenses to Forfeiture – Sections 5 and 8

As described above, six acres in Section 5 and four acres in Section 8 have not been irrigated from July 2004 (when Aston purchased the property containing the Aston Well) to the present day. These acres have not been irrigated for 15 years and, therefore, are subject to forfeiture for non-use. Although there is some evidence of non-use on these parcels prior to 2004, the evidence does not meet the clear and convincing threshold required to declare the acres forfeited for non-use prior to 2004.

Idaho Code § 42-223(6) states that a “water right shall not be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control.”

Circumstances beyond the control of the water user are determined on a case-by-case basis. The hearing officer recognizes the termination of legal access to the authorized point of diversion as a circumstance beyond the control of a water user. If, because of a division of property, a water user loses access to the authorized point of diversion, and the water user has no immediate access to the water source, non-use of the subject water right is beyond the control of the water user.

In 2004, after the property containing the Aston Well was sold to Aston, Sidney and Charlotte Schvaneveldt no longer had legal access to the Aston Well to irrigate the south pasture. Ex. 301 (Schvaneveldts did not reserve an easement to access the Aston Well in the Schvaneveldt to Aston Deed). Sidney and Charlotte Schvaneveldt did not have any other irrigation wells on their property. Therefore, the non-use of water on the six acres in Section 5 between 2004 and 2019 has been due to circumstances beyond the control of the water user.

The four acres in Section 8, associated with the Shaun Schvaneveldt property, was consistently irrigated prior to 1999. In 1999, the mainline from the Aston Well was routed around the Shaun Schvaneveldt property. A pressure relief line was retained in the pasture area east of the Shaun Schvaneveldt home. During times when handlines were being moved on the Sidney Schvaneveldt property, excess flow would be routed to the line in the Shaun Schvaneveldt pasture. Beginning in July 2004, after Aston purchased his property, Shaun Schvaneveldt has been cut-off entirely from the Aston Well. Therefore, the non-use of water on the four acres in Section 8 between 2004 and 2019 has been due to circumstances beyond the control of the water user.

Acres in Section 9

Water right 13-4120 currently describes 36 irrigated acres in the NWNW of Section 9. The 36 acres in the NWNW of Section 9 were irrigated in the early 1960s, shortly after the Aston Well was completed. Testimony of El Ray Balls. Even though the NWNW of Section 9 was irrigated in the early 1960s, the record includes clear and convincing evidence that the NWNW of Section 9 has not been irrigated at all from 1966 to the present day. The testimony provided by Charlotte Schvaneveldt was very persuasive. She was personally involved in the daily irrigation activities on the farm from 1966 to 2004. Other witnesses (El Ray Balls, Kevin Fannesbeck, Kevin Olson, Paul Campbell) confirmed the non-irrigation of the NWNW of Section 9. Based on the evidence in the administrative record, it is highly unlikely that the NWNW of Section 9 was ever irrigated between 1966 and the present day.

Defenses to Forfeiture – NWNW of Section 9

Idaho Code § 42-223(1) states that irrigation water rights are protected from forfeiture during the time the authorized place of use is enrolled in a federal cropland set-aside program. The 36 acres at issue in the NWNW of Section 9 were enrolled in CRP between 1987 and 1996 and again between 1998 and 2007. Exs. 133 and 136. Therefore, the 36 acres were not subject to forfeiture during those time periods.

In 1996, Sidney and Charlotte Schvaneveldt sold the 36 acres at issue to Jeffrie and Kaye Beckstead. Ex. 303. The deed did not grant the Becksteads access to or an easement for a pipeline to the Aston Well. In 1996, the Beckstead property lost its access to the Aston Well. The 36 acres became physically and legally disconnected from the authorized point of diversion. Therefore, the non-use of water on the 36 acres in the NWNW of Section 9 in 1997 and from 2008 to the present day has been due to circumstances beyond the control of the water user as described in Idaho Code § 42-223(6).

There are no viable defenses for forfeiture for the remaining years of non-use (1966 – 1986). Aston bears the burden of presenting some evidence supporting any asserted defenses or exceptions to forfeiture. The defenses identified by Aston are not viable, are not recognized by the hearing officer, or are not supported by persuasive evidence in the record. The following defenses to forfeiture have been identified by Aston:

Idaho Code § 42-223(1) – Cropland Set-Aside Program. There is no evidence in the record that the acres in the NWNW of Section 9 were placed in a federal cropland set-aside program at any time between 1966 and 1986.

Idaho Code § 42-223(3) – Irrigation from Waste Water. Section 42-223(3) protects irrigation water rights from forfeiture if the right holder is able to maintain the full beneficial use authorized by the rights through land application of water discharged from dairy lagoons or treatment plants. Section 42-223(3) is not ambiguous. It only applies to the land application of waste from dairy lagoons or treatment plants. There is no evidence in the record that the NWNW of Section 9 has been irrigated with water from a dairy lagoon or treatment plant.

Idaho Code § 42-223(4) – Ground Water Management Plan. Section 42-223(4) protects water rights from forfeiture if the non-use is the result of compliance with ground water management plans adopted by the Department. The Bear River Ground Water Management Area was created in August 2001. Ex. 150. The Bear River Ground Water Management Plan was adopted in February 2003. Ex. 151. These documents cannot be used as a defense to forfeiture for non-use occurring between 1966 and 1986.

Idaho Code § 42-223(6) – Circumstances Beyond the Control of the Water User. Aston argues that economic factors qualify as circumstances beyond the control of the water user and, therefore, protect a water right from partial forfeiture for non-use. *Aston Petition* at 13-14. Ground water was the only source of water used to irrigate the Sidney and Charlotte Schvaneveldt property. The electricity used to pump ground water for irrigation has always been very expensive. Testimony of Charlotte Schvaneveldt. In certain years, commodity prices may not have been high enough to justify the cost of irrigating additional acres in the NWNW of Section 9. *Aston Petition* at 13-19. Aston argues that economic factors influenced Sidney Schvaneveldt's decisions about which acres to irrigate and which acres to leave idle. *Id.* Aston argues that these economic factors (electricity rates, commodity prices, cost of system maintenance) were beyond the control of the Schvaneveldts and contributed to their decision not to irrigate the NWNW of Section 9. *Id.*

In 2009, the Snake River Basin Adjudication ("SRBA") Court issued a decision in subcases 63-2446, 63-2489 and 63-2499, which included an analysis of forfeiture under Idaho Code § 42-

223(6). *Memorandum Decision and Order on Motion for Summary Judgment*, In Re SRBA Case No. 39576 (*Monarch Greenback, LLC*) (2009). In *Monarch*, the water right holder argued that economic factors related to mining qualified as circumstances beyond the control of the water user pursuant to Section 42-223(6). The Special Master rejected this argument, noting that Section 42-223(6) is limited to “circumstances beyond the control of the water right holder in their use of the water.” *Id.* at 14 (underline in original). The Special Master acknowledged that economic factors such as ore prices, technology limits, and regulatory obstacles were likely beyond the control of the water right holder, but “such circumstances are not of the type that qualify as a defense to forfeiture under [Section 42-223(6)].” *Id.* at 15. The Special Master also found that Section 42-223(6) had the same scope as the common law defense it was intended to codify. *Id.* at 14.

In this case, Aston identifies economic factors related to farming (electricity rates, commodity prices, cost of system maintenance) that are beyond the control of the water right holder. While it is true that these factors are beyond the control of most water users, such factors are not within the scope of Section 42-223(6). Like the Special Master in the *Monarch* case, the hearing officer concludes that Section 42-223(6) is limited to circumstances limiting a water user’s ability to use water. There is no evidence in the record that Sidney and Charlotte Schvaneveldt were not able to access their full ground water right between 1966 and 1986. Therefore, Section 42-223(6) is not a viable defense to forfeiture for the non-use occurring during that time period.

Idaho Code § 42-223(9) – Conservation Practices. Section 42-223(9) promotes efficient irrigation. If an irrigator adopts a practice that reduces the amount of water diverted from the authorized source, but maintains the full irrigation beneficial use described in the water right, the water user is not at risk of losing the conserved portion of the water right. Aston identified a number of improvements he has made to the irrigation system to help conserve water (replacing mainline, installing center pivots, installing a variable frequency drive at the pump). Section 42-223(9) confirms that Aston’s water rights are not subject to forfeiture as a result of these conservation practices as long as he “maintains the full beneficial use authorized by the water right, as defined in section 42-250, Idaho Code.”

The full beneficial use described in the claim filed by Sidney Schvaneveldt for water right 13-4120 was 187 irrigated acres. As noted above, the evidentiary record only supports the irrigation of 177 acres. Aston and his predecessors in interest have not maintained the full beneficial use described in water right 13-4120. There is clear and convincing evidence that 36 acres in the NWNW of Section 9 have not been irrigated since 1966. Therefore, Section 42-223(9) does not protect the water right from partial forfeiture.

Agricultural Economics. Aston asserts a common law defense to forfeiture that would be analogous to the statutory defense to forfeiture for mining water rights. Idaho Code § 42-223(11) states:

No portion of any water right with a beneficial use related to mining, mineral processing or milling shall be lost or forfeited for nonuse, so long as the nonuse results from a closure, suspension or reduced production of the mine, processing facility or mill due in whole or in part to mineral prices, if the mining property has a valuable mineral, as defined in section 47-1205, Idaho

Code, and the water right owner has maintained the property and mineral rights for potential future mineral production.

Section 42-223(11) was added to the statutory defenses to forfeiture by the legislature in 2008. In Idaho, there are more than 200 times as many irrigation water rights as mining water rights. Despite the significant number of irrigation rights in the state, the legislature has never adopted a statutory defense to forfeiture based on agricultural economics. Aston has not cited any cases where this proposed defense to forfeiture has ever been recognized or applied by an Idaho Court. The hearing officer is not willing to recognize agricultural economics as a valid defense to forfeiture.

Voluntary Water Conservation. Aston asserts a common law defense that is similar to Idaho Code § 42-223(9), but does not require a water user to maintain the full beneficial use authorized under the water right. Aston argues that a water right should not be subject to forfeiture for acres that are not irrigated in an effort to maximize the beneficial use of water on more-productive acres.

Aston asserts that the acres in the NWNW of Section 9 were intentionally held unused between 1966 and 1986 to maximize the productivity on other acres. This suggests that water right 13-4120, as originally developed, was not sufficient to accomplish full irrigation productivity on 177 acres. El Ray Balls testified that Lee and Jerry Schvaneveldt stopped irrigating the NWNW of Section 9 because it was too much work to transport hand lines to that ground from other areas of the farm. In other words, irrigating the NWNW was very labor intensive. Aston now asserts that the decision not to irrigate the NWNW was not based on work effort, but was instead the result of a limited water supply. According to Aston, the 2.80 cfs of flow developed at the Aston Well, in combination with an inefficient delivery system, was not sufficient to adequately irrigate 177 acres between 1966 and 1986.

Beneficial use is “the basis, the measure and the limit” of a water right. *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 112, 157 P.3d 600, 606 (2007). Consolidation of beneficial use or reduction in beneficial use constitutes a change in the very nature of a water right. The proposed defense to forfeiture diminishes the importance of beneficial use as the measure of a water right. Therefore, the proposed defense runs contrary to Idaho water law. Aston has not cited any cases where this proposed defense to forfeiture has ever been recognized or applied by an Idaho Court. The hearing officer is not willing to recognize voluntary conservation (i.e., consolidation of beneficial use) as a valid defense to forfeiture.

Adequate Rainfall. In other proceedings, the Department has recognized a defense to forfeiture where a water right is not lost or forfeited for non-use if the water user is able to maintain the full beneficial use under the right through diversion from another authorized source. For example, if a water user has a surface water right and a ground water right covering the same irrigated acres, the ground water right is not subject to forfeiture if the water user is able to achieve the full irrigation beneficial use by only diverting her surface water right. Stated differently, a water user should not be compelled to divert water if she is able to achieve full irrigation of the property from another source.

During the hearing, Aston argued that Sidney and Charlotte Schvaneveldt did not need to irrigate the NWNW of Section 9 between 1979 and 1985 because of the remarkable amount of precipitation received during that time period. Aston did not provide any meteorological analysis, but simply referred to the following sentences in a written statement⁵ from El Ray Balls:

[T]he use of this [ground] water [from the Aston Well on the El Ray Balls farm] was consistent on an annual basis until approximately years 1979 through 1985 when the weather conditions changed and we were receiving excessive amounts of precipitation and heaven was providing all the water we could use plus some. There was no need to pump ground water during this time.

Balls asserts an ownership interest in the Aston Well. Ex. 149. At times, water from the Aston Well was pumped into the Anker Ditch and conveyed to the Balls property for irrigation use. *Id.* The Balls property is primarily irrigated with water shares from Weston Creek Irrigation Company. Testimony of Fannesbeck.

The statement from Balls is not useful. It is not clear whether Balls is asserting that the precipitation was so plentiful between 1979 and 1985 that no irrigation was required or that the excess rainfall eliminated the need to pump supplemental ground water (because canal shares were delivered in full all summer long). If Balls was referring to winter precipitation resulting in high flows in Weston Creek (and full delivery of his irrigation company shares), then the weather conditions would have no impact on the Schvaneveldt farm, which was only irrigated from ground water. Balls testified during the first hearing, but was not asked any questions about precipitation. The record does not contain sufficient evidence to support this defense to forfeiture.

Summary of Irrigated Acres

Based on a preponderance of evidence, water right 13-4120 is limited to the irrigation of 177 acres. Applicant was not able to demonstrate that ten acres in the north pasture of Section 5 were ever irrigated with water from the Aston Well. Of the 177 irrigated acres supported by the record, 46 acres have not been irrigated for a period of more than five years. Ten of these 46 acres, located in Sections 5 (six acres) and 8 (four acres), are protected from forfeiture due to circumstances beyond the control of the water users. The water users, Shaun Schvaneveldt and Charlotte Schvaneveldt, have been physically and legally disconnected from the authorized point of diversion during the period of non-use. The remaining 36 acres are located in the NWNW of Section 9. It is highly unlikely that the 36 acres in the NWNW of Section 9 were irrigated from 1966 to the present day. There are defenses to forfeiture for the non-use occurring from 1987 to the present day. However, there are no viable defenses to forfeiture which would excuse the non-use occurring from 1966 to 1986. The defenses identified by Aston are either not applicable, are not recognized by the hearing officer, or are not supported by persuasive evidence in the record. Therefore, there are 141 irrigated acres under water right 13-4120 available for transfer.

⁵ The written statement was filed by El Ray Balls in a separate contested case (Application for Transfer 70722). Ex. 149.

Validity of Water Right 13-2209

Four acres of water right 13-2209 are appurtenant to two parcels currently owned by Shaun Schvaneveldt. As described above, the acres associated with the Shaun Schvaneveldt property have not been irrigated since 2004. The non-use during this time period does not result in forfeiture of the water right, however, because Shaun Schvaneveldt has been legally and physically disconnected from the authorized point of diversion since 2004, a circumstance beyond the control of the water user. Idaho Code § 42-223(6). Shaun Schvaneveldt has conveyed his interest in water right 13-2209 to Aston. The portion of water right 13-2209 associated with the Aston property have been consistently irrigated. Therefore, there are 87 acres (which includes the Shaun Schvaneveldt acres) under water right 13-2209 available for transfer. This 87-acre portion of water right 13-2209 has been assigned water right number 13-8026.

Ownership of Aston Well

Aston has an ownership interest in the Aston Well, which is located on the Aston property. Although there was some evidence presented suggesting that El Ray Balls may also have an interest in the Aston Well, that issue is not determinative to the pending contested case. The question of whether Balls has an ownership interest in the Aston Well must be decided in a case dealing with Balls's water rights.

Injury to Existing Water Rights

Application 82640 proposes to change the point of diversion for water right 13-8026 from Well #1 to the Aston Well, a change that occurred in practice over 50 years ago.

Spradlins argue that the Aston Well already has a significant impact on their ability to divert ground water from their irrigation well. According to Department records, the following ground water diversions are located within a one-mile radius of the Spradlin irrigation well (not including domestic or stockwater wells):

Well Owner	Right	Priority Date	Diversion Rate	Distance from Spradlin Well
City of Weston (Well 1)	13-7453	7/11/1988	2.00 cfs	2,500 ft
City of Weston (Well 2)				2,900 ft
Richard Lemmon	13-2237	6/12/1961	0.42 cfs	4,700 ft
Paul & Shelley Campbell	13-7695	5/4/1977	0.74 cfs	2,300 ft
Paul Campbell	13-7696	5/4/1977	0.37 cfs	2,300 ft
Clinton Aston	13-4120	6/26/1962	2.80 cfs	1,100 ft

Spradlin's water rights (13-8035 and 13-8036) are senior to all of these water rights. Based on evidence in the record, it is likely that the Aston Well has an impact on the pumping level in the Spradlin irrigation well. Spradlins testified that they notice a change in the amount of sand in the outflow from their irrigation well during times when the Aston Well is operating. It is also possible, however, that other wells in the area have a similar or greater impact on the pumping level in the Spradlin irrigation well.

Spradlins' assertion that diversion from the Aston Well is already injuring their senior water rights should be raised in the context of a delivery call. Only within a delivery call proceeding can the Department properly weigh the effects of all ground water diversions in the area on the Spradlin wells. Requiring Aston to evaluate the drawdown effects of all ground water pumping in the area is beyond the scope of the transfer process. Idaho Code § 42-222 does not require a transfer applicant to respond to claims of existing injury under existing water rights. An applicant must only demonstrate that the proposed change will not injure existing water rights.

The transfer approval will not result in a diversion rate that is significantly different than has been historically pumped from the Aston Well. Aston testified that the system produced approximately 1,300 gpm (2.90 cfs) when he purchased the well in 2004. As noted above, water rights 13-4120 and 13-8026, in combination, will be limited to 141 irrigated acres. Consequently, the water rights, in combination, must also be limited to 2.82 cfs (0.02 cfs/acre).

Injury between ground water irrigation rights is governed by Idaho Code § 42-226: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided." The Department has not established reasonable pumping levels for the Weston Creek drainage. Therefore, reasonable pumping levels must be determined on a case-by-case basis.

Prior to Application 82640, water right 13-4120 authorized the diversion of 2.80 cfs. Aston has demonstrated, through a preponderance of evidence in the record, that the claimed diversion rate of 2.80 cfs is valid. Transfer 82640 would limit water rights 13-4120 and 13-8026 to a combined diversion rate of 2.82 cfs. The additional 0.02 cfs authorized for diversion from the Aston Well through Transfer 82640 is negligible when compared to the 2.80 cfs that was authorized to be diverted from the well prior to the transfer. This amount only equates to a one percent increase over the diversion rate already authorized at the Aston Well. Further, this amount results in a decrease to the 2.90 cfs which has been diverted from the Aston Well since at least 2004.

As noted above, the Spradlin irrigation well has a specific capacity of 18 gpm/ft. This means that for every additional 18 gpm diverted at the Spradlin irrigation well, there would be approximately one foot of additional drawdown within the well. If the Aston Well were to have a similar specific capacity (18 gpm/ft), diverting an additional 0.02 cfs (9 gpm) at the Aston Well would result in an additional 0.5 feet of drawdown within the Aston Well. The amount of drawdown experienced at the Spradlin irrigation well, as a result of diverting an additional 0.02 cfs at the Aston Well for 88 days continuously, would be far less than 1.0 feet. See Ex. 123 at 16 (after 88 days, the potential drawdown at the Spradlin wells is only one-tenth of the drawdown in the Aston Well). Diverting an additional 0.02 cfs from the Aston well will not violate the reasonable pumping level standard set forth in Idaho Code § 42-226.

Fonnesbecks also assert that diversion from the Aston Well diminishes the water levels in their domestic well. The Fonnesbeck domestic well is only 25 feet deep. The Fonnesbeck domestic well is located much farther away from the Aston Well than is the Spradlin wells, over one mile to the southeast. The City of Weston diverts ground water from two wells located directly between the

Aston Well and the Fannesbeck domestic well. In recent years, Fannesbecks domestic well has run dry during the winter months. The Aston Well only diverts water for irrigation during the summer months. The City of Weston wells, on the other hand, divert water for municipal use and operate throughout the entire year.

If the Fannesbeck domestic well is being impacted by existing diversions, the proper forum to evaluate impact would be a delivery call. A delivery call would include other ground water users in the basin (such as the City of Weston), who are not parties to the pending contested case. Idaho Code § 42-222(1) does not require the Department to evaluate existing well interference under existing water rights, but only to evaluate whether the proposed change would injure other water rights. As noted above, the transfer approval will only result in the authority to divert an additional 0.02 cfs above and beyond the water rights currently associated with the Aston Well. Diverting an additional 0.02 cfs from the Aston Well will not violate the reasonable pumping level standard set forth in Idaho Code § 42-226.

Enlargement

Water rights 13-4120 and 13-8026 have historically been used to irrigate the same acres. Aston does not propose to separate or unstack these two water rights. The transfer approval will include a condition combining these rights on the same acreage.

As described above, the transfer approval will be limited to 141 irrigated acres. Ten acres that will be added to the Aston system have been protected from forfeiture. According to aerial photos, approximately 132 acres have been irrigated on the Aston property in recent years. See Ex. IDWR1 (transfer map). Approval of this transfer will not result in the enlargement of use under water rights 13-4120, 13-2209 or 13-8026.

Conservation of Water Resources

Aston proposes to irrigate with center pivots and sprinklers. This is an efficient means of irrigation and is consistent with the conservation of water resources within the state of Idaho.

Local Public Interest

Local public interest is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3).

Water users in a community benefit from certainty and finality in water rights. A water user not only benefits from knowing the extent of his own water rights, but also the extent of the water rights held by his neighbor. A general adjudication of water rights is one way to bring certainty and finality to the water rights in a basin. Unfortunately, ground water rights in the Weston Creek drainage have never been part of a general adjudication.

The testimony offered at hearing confirms that there has been a long-standing dispute about the ownership of water rights 13-2209 and 13-4120. Testimony of Sharalyn Fannesbeck, Jay

Fonnesbeck, El Ray Balls and Shelly Spradlin. This transfer addresses the ownership of an 87-acre portion of water right 13-2209 and settles all ownership questions related to water right 13-4120. Further, the transfer clearly defines the place of use for water rights 13-4120 and 13-8026. This transfer approval brings additional certainty and finality to some of the water rights in the basin and is, therefore, in the local public interest.

CONCLUSIONS OF LAW

A preponderance of evidence in the record supports the existence of a beneficial use water right (13-4120) with a priority date of June 26, 1962, a diversion rate of 2.80 cfs and the irrigation of 177 acres. A 36-acre portion of water right 13-4120 has been lost and forfeited by non-use. Aston has satisfied all of the elements of review under Idaho Code § 42-222(1) for the remaining water rights included in the transfer. To prevent enlargement, water rights 13-4120 and 13-8026 will be limited to the irrigation of 141 acres and will carry an overall combined diversion rate of 2.82 cfs and a combined annual volume limit of 493.5 acre-feet.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 82640 in the name of Clinton K. Aston is APPROVED as set forth in the approval document issued in conjunction with this order.

Dated this 5th day of August 2019.



James Cefalo
Water Resource Program Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August 2019, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

Document Served: Preliminary Order Approving Transfer (82640)

**Clinton Aston
PO Box 35
Weston, ID 83286**

**Robert Harris
Holden Kidwell Hahn & Crapo PLLC
1000 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, ID 83405**

**Jay Fannesbeck
6022 West Highway 36
Weston, ID 83286**

**William or Shelly Spradlin
6995 West 2200 South
Weston, ID 83286**

Courtesy Copy sent via standard US Mail:

**Kevin Olson
7806 West 300 South
Weston, ID 83286**

**Bob White
7026 West 2200 South
Weston, ID 83286**

**J&F King Farm Inc.
8169 West Highway 36
Weston, ID 83286**



Sharla Cox
Administrative Assistant

ATTACHMENT 4

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

**IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 82640 IN THE
NAME OF CLINTON K. ASTON**

**ORDER DENYING MOTION TO
DISMISS; FINAL ORDER ON
EXCEPTIONS**

PROCEDURAL HISTORY

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

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

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

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

¹ On July 16, 2019, Fannesbeck provided an initial Motion to Dismiss (“First Motion to Dismiss”) directly to the hearing officer. The First Motion to Dismiss was denied by the hearing officer on August 5, 2019.

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

ANALYSIS

I. Signatures on Documents Filed with the Department

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

Aston's Argument

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

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

Director's Conclusion

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

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

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

II. The Second Motion to Dismiss

Fannesbeck's Argument

Fannesbeck argues Transfer Application No. 82640 ("Application") should be "dismissed or canceled" pursuant to Rule 304 of the Department's Rules of Procedure "for providing false and misleading information in the application process and also during the contested hearing proceedings." *Second Motion to Dismiss* at 1.³

First, Fannesbeck asserts Aston was untruthful when he stated in the Application that "40 acres of ground Twp 16S Rng 38 E. Section 9 was placed in Soil Bank in 1983, irrigation was discontinued, it was placed in CRP program in 1985, in 1996 CRP contract expired and ground was put back in production." *Id.* at 3. Fannesbeck argues "[a]erial photographs submitted by Aston and prepared by the NRCS and used by the Farm Service Agency, clearly stated that the first CRP contract to idle these acres was awarded in 1987." *Id.* Second, Fannesbeck argues Aston made false and misleading statements in the application he made for federal funds to build a center pivot on certain lands. *Id.* at 3 *and see* Exhibit 352.⁴

Aston's Response

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

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

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

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

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

Director’s Conclusion on the Motion to Dismiss

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

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

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

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

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

III. The Exceptions

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

Fonnesbeck's Argument

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

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

Aston's Response

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

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

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

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

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

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

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

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

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

Fonnesbeck's Argument

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

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

Aston's Response

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

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

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

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

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

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

Aston's Argument

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

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

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

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

⁷ Idaho Code § 42-223(6) states: "No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis."

Fonnesbeck Response

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

Director's Conclusions on Forfeiture

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

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

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

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

IV. Aston's As-Applied Constitutional Challenge

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

Director's Conclusion

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

ORDER

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

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

Dated this 31st day of January 2020.

A handwritten signature in black ink, reading "Gary Spackman", written over a horizontal line.

Gary Spackman
Director

CERTIFICATE OF SERVICE

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

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Kimberle English

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

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

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

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

PETITION FOR RECONSIDERATION

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 E Front Street, Suite 648 • PO Box 83720 • Boise ID 83720-0098

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BRAD LITTLE
Governor

GARY SPACKMAN
Director

June 8, 2020

ELAINE SORENSON
3871 W 2500N
MOORE, ID 83255

RESPONSE DEADLINE:
July 8, 2020

RE: Action Required on WSB Lease Application 1738

Dear Applicant,

Applications were received on May 15, 2020 offering portions of water rights 34-7052, 34-2428, 34-7035B, & 34-12416 for lease to the Water Supply Bank for 2020. Per the information provided for 34-7052 in application 1738, the Department has determined that, at this time, additional information is required to complete our review of the lease proposal. Specifically, the Department is requesting from you:

- any additional information that you may have available to affirm that water right 34-7052 was not subjected to forfeiture through non-use for the period of 2003 through 2011.

Review of information associated with water right 34-7052 suggests a full period of non-use may have elapsed from 2003 to approximately 2011, prior to the water right being leased into the Water Supply Bank during 2012. As part of the 2012 lease review of water right 34-7052, it was documented that the prior owner, Mr. Richard Potter, did not use water under water right 34-7052 during the period of 2003 through 2011, because Mr. Potter perceived that circumstances were beyond his control, since he could not resolve differences with the owner of the land on which the point of diversion for his water right was situated, and because it would be problematic to work with the Big Lost River Irrigation District (BLRID) to establish transport agreements and/or account for conveyance losses in their canals, which would be used to carry his water from the POD to his authorized place of use.

At this time, the Department is seeking from you any additional information that you might have, beyond what has already been provided, to affirm that water right 34-7052 may not have become subject to forfeiture through non-use, per Idaho Code 42-222(2), based on non-use during the period of 2003-2011

Our office is requesting this information, subject to application review requirements of Idaho Code 42-1762 and Water Supply Bank Rule 25.02.C (IDAPA 37.02.03.25.02.C). Our office requests that you provide this information within the next thirty days, prior to July 8, 2020, so that we might timely resume processing of your application. If we do not receive from you the requested information prior to the deadline specified above, lease application 1738 may be considered as incomplete and deficient, after which, it will be returned to you and a refund of the filing fee for the lease will be issued to you in a separate mailing.

If you have any questions, please contact me at (208) 287-4936.

Regards,

Justin Ferguson
Water Supply Bank Specialist
CC: Luke Marchant – Holden, Kidwell, Hahn, & Crapo