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	))))	**AMENDED PRELIMINARY ORDER APPROVING TRANSFER**

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 Fonnesbeck ("Fonnesbeck").

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. Fonnesbeck 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 Fonnesbeck 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 Fonnesbeck 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 Fonnesbeck and was allowed to participate in the hearing in that capacity.

The hearing officer denied Aston's request as it pertained to Fonnesbeck. According to taxlot information from Franklin County, Fonnesbeck 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, Fonnesbeck 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 Fonnesbeck 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 Fonnesbeck 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, Fonnesbeck, Sharalyn Fonnesbeck, Kevin Fonnesbeck, 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, Fonnesbeck filed a *Petition for Reconsideration* ("Fonnesbeck 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 Fonnesbeck 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 Fonnesbeck and the Spradlins represented themselves.

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

On August 5, 2019, the hearing officer issued a second *Preliminary Order Approving Transfer* ("2nd Preliminary Order"). The Spradlins filed *Exceptions to Preliminary Order Approving Transfer* on August 17, 2019. Aston filed *Exceptions to Preliminary Order Approving Transfer* on August 19, 2019. Fonnesbeck filed a *Petition for Review & Response to Exceptions* on September 3, 2019. Aston filed a *Motion to Dismiss Fonnesbeck Petition for Review and Response to Exceptions of Preliminary Order for Transfer No. 82640* on September 16, 2019.

On October 25, 2019, the Director issued an *Order Remanding Contested Case*. The Director determined that certain words used in the forfeiture analysis section of the *2nd Preliminary Order* were ambiguous and were not consistent with the clear and convincing evidentiary standard. The Director remanded the contested case to the hearing officer and instructed him to complete the forfeiture analysis by applying the clear and convincing evidentiary standard.

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 13-2209[1] 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.*

[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. 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 Fonnesbeck and Myron Fonnesbeck. *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.

5. On May 3, 1965, Myron Fonnesbeck, 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 Fonnesbeck and Myron Fonnesbeck. *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.

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

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.*

<u>Validity of Water Right 13-4120</u>

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.*

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.

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

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 Fonnesbeck, Myron Fonnesbeck, Stirling Bingham and Vereen Bingham had full control of and exclusive use of the water diverted at Well #1); Testimony of Kevin Fonnesbeck (Fonnesbeck 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 cfs x 88 days x 1.98 af/cfs-days = 3.5 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. 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 Fonnesbecks and D. Glade Schvaneveldt. The term Fonnesbecks is not defined in the agreement and could refer to Jay Norman Fonnesbeck, the Fonnesbeck Family Trust, Norman Fonnesbeck or Myron Fonnesbeck. The 2004 Agreement does

not describe what lands are owned by the Fonnesbecks or by D. Glade Schvaneveldt. Further, the 2004 Agreement does not describe what portion of water right 13-2209 would be conveyed to the Fonnesbecks 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

Fonnesbeck argues that the alleged verbal exchange of water rights between Lee Schvaneveldt and Norman and Myron Fonnesbeck was a legitimate conveyance based on a theory of part performance of a real estate agreement. Fonnesbeck cited a 2016 Idaho Supreme Court case, *Hoke v. NeYada*, in support of his argument. *Fonnesbeck 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, Fonnesbeck asserts that Lee Schvaneveldt and Norman and Myron Fonnesbeck 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 Fonnesbeck in exchange for Fonnesbecks' ownership interest in the Aston Well and Fonnesbecks' 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 Fonnesbeck 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 Fonnesbeck, 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. Fonnesbecks 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 Fonnesbecks' names and property removed from the permit. The Fonnesbecks did not object when the license for water right 13-2209 (G-28818) included the Lee Schvaneveldt property. Neither Myron Fonnesbeck nor Norman Fonnesbeck ever attempted to change the place of use for water right 13-2209 from the Schvaneveldt property to their own properties. Fonnesbecks never sought to have Lee Schvaneveldt's name removed from the ownership records for water right 13-2209. Similarly, Fonnesbeck, who now owns property once owned by Norman and Myron Fonnesbeck, has never proposed to move water right 13-2209 to his property, even though Fonnesbeck has been involved in contested cases about water right 13-2209 since at least 2003. Further, on June 30, 2005, Fonnesbeck and El Ray Balls filed claim 13-7661 pursuant to Idaho Code § 42-248, describing irrigation use on the Fonnesbeck property out of the Aston Well. By filing this claim, Fonnesbeck seeks to record a beneficial use water right diverted from the Aston Well for irrigation use on the Fonnesbeck property, the same right he now argues was conveyed off of the Fonnesbeck 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. Fonnesbeck 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 statue 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. Fonnesbeck 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.

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

[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.

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).

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 Fonnesbeck, 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 probable or reasonably certain that the NWNW of Section 9 was not 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 <u>in their use of the water</u>." *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 about of precipitation received during that time period. Aston did not provide any meteorological analysis, but simply referred to the following sentences in a written statement[5] 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.

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

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 Fonnesbeck.

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 probable or reasonably certain that the 36 acres in the NWNW of Section 9 were not irrigated from 1966 to the present day. In other words, the record contains clear and convincing evidence that the NWNW of Section 9 was not irrigated from 1966 to the present day. The record supports 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.

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.

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 0.5 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 Fonnesbeck domestic well. In recent years, Fonnesbecks 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 Fonnesbeck 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 Fonnesbeck, 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. The forfeiture determination was supported by clear and convincing evidence in the administrative record. 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 29th day of October 2019.

James Cefalo
Water Resource Program Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October 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: Amended 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 Fonnesbeck
6022 West Highway 36
Weston, ID 83286

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

Christina Henman
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

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

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> 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.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.