

SEP 09 2019

DEPARTMENT OF
WATER RESOURCES

Robert L. Harris (ISB #7018)

rharris@holdenlegal.com

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

1000 Riverwalk Dr., Ste. 200

P.O. Box 50130

Idaho Falls, Idaho 83405

Telephone: (208) 523-0620

Facsimile: (208) 523-9518

Attorneys for Clinton Aston

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

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

**ASTON'S RESPONSE TO SPRADLIN'S
EXCEPTIONS TO PRELIMINARY ORDER
APPROVING TRANSFER**

Applicant Clinton Aston, (hereinafter "Aston" or the "Applicant"), by and through his attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits *Aston's Response to Spradlin's Exceptions to Preliminary Order Approving Transfer*. IDAPA 37.01.01 "contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of Idaho." Rule 001.02.¹ Transfer No. 82640 (hereinafter "82640") is a contested case before the Idaho Department of Water Resources' ("IDWR" or "Department").

Protestants Shelly and William Spradlin² filed an untitled document with the Department on August 19, 2019 which appeared to challenge the *Preliminary Order Approving Transfer* issued

¹ Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

² The document filed by the Spradlins also states that the findings in the *Preliminary Order* are being challenged by Jay Norman Fannesbeck. However, the document was not signed by Mr. Fannesbeck and will be

on August 5, 2019 (hereinafter, "Preliminary Order") by Hearing Officer James Cefalo (hereinafter, the "Hearing Officer"). In subsequent correspondence from the Department, the Spradlins requested that the document be treated as exceptions to the Director of IDWR under Rule 730.01.d. Accordingly, the document was deemed to be exceptions submitted to the Director of the Idaho Department of Water Resources, Gary Spackman, (hereinafter, the "Director").

Opposing parties, such as the applicant Aston, "shall have fourteen (14) days to respond to any party's appeal within the agency." *Id.* Fourteen (14) days after Spradlin's exceptions were filed is September 2, 2019, which is a Labor Day, a legal holiday. Accordingly, under Rule 056, where the last day to act under the Department's procedural rules is a legal holiday, "the act may be done on the first day following that is not Saturday, Sunday or a legal holiday." As a result, this response from Aston is due on Tuesday, September 3, 2019, by 5:00 p.m. MST.

I. PROCEDURAL HISTORY

The procedural history associated with the 82640 contested case is well described on pages 1-3 of the *Preliminary Order*. Aston does not desire to add any additional detail to this procedural history.

II. BACKGROUND

Clinton Aston purchased the land to which Water Right No. 13-4120 (hereinafter "13-4120") and an 87-acre portion of Water Right No. 13-2209 (hereinafter "13-2209" for entire water right, and "13-8026" for the 87-acre portion of this water right associated with Aston's property) are appurtenant in July of 2004. *Testimony of Clinton Aston*;³ IDWR Exhibit 1. These are the water rights subject to 82640.

referred to herein as only the Spradlins' exceptions.

³ There is no official transcript of the hearings associated with 82640. Aston has made efforts to transcribe portions of the hearing recording but given the limited time to file exceptions and responses with the Director, not all

Spradlins moved to their property in 1992. They enjoy the benefits of possessing and using surface water right entitlements in the Weston Creek Irrigation Company, a benefit that Aston does not have. This economic reality—and Aston’s economic disadvantage—has been the motivating force behind Aston’s efforts to modernize his farm by installing a variable speed drive pump and efficient center pivots to maximize the efficient use of water and minimize his use of electricity.

As part of Aston’s efforts to improve his farm, he has also responsibly attempted to address the status of the water rights associated with his farm. As is unfortunately the norm in the Bear River Basin of Idaho, where the last comprehensive water rights adjudication occurred nearly a century ago, water rights such as 13-4120 (a statutory claim) and 13-8026 had not had their elements verified and/or updated prior to the filing of 82640. To clean up the water rights record, 82640 was filed seeking to change the point of diversion and place of use for 13-8026 and proposes to change the place of use for statutory claim 13-4120. However, despite these changes on paper, on the ground, both rights have been diverted from a well located in the NWNE, Section 8, T16S, R38E (the “Aston Well”) since the 1960s and the proposed point of diversion change to 13-8026 was submitted to update this right to where water has been diverted pursuant to this right for decades. *Preliminary Order* at 10.

Aston originally only wanted to address 13-4120, not 13-8026, as 13-2209 (the parent right to 13-8026) had become the subject of significant controversy because of the localized actions and efforts of Jay Fannesbeck. However, Aston was directed by James Cefalo, the Water Resources Program Manager at the Eastern Region Office of IDWR, to include 13-8026 because it covered some of the same acres as 13-4120 in the transfer application that would eventually be numbered

the hearings have been transcribed. Where the hearing has been transcribed, Aston will quote from and cite to the transcription. Otherwise, Aston has referred to his notes and recollection from the hearing and cite generally to the testimony provided at the hearing.

as 82640. As expected, Fannesbeck protested 82640 and encouraged others to protest as well. By the time the fourth day of hearings had occurred, all the protestants had either withdrawn their protests or had their protests dismissed, except for Fannesbeck and the Spradlins.

As described below, the Spradlins exceptions are unavailing and fail to discuss or acknowledge certain evidence from the hearing. For the following reasons, their exceptions should not serve as a basis for the Director to amend the findings and conclusions of the *Preliminary Order*.

III. ARGUMENT

The Spradlins represented themselves *pro se* in this contested case. As a general matter, the Spradlins' exceptions document is not easy to follow or understand, and the Director should not give the Spradlins special consideration or leniency in working to decipher the specific issues raised—they should be held to what is written in in their exceptions without reading in other possible issues:

Pro se litigants are not entitled to special consideration or leniency because they represent themselves.” *Id.* Rather, “[p]ro se litigants must conform to the same standards and rules as litigants represented by attorneys, and this Court will address the issues accordingly.” *Mendez v. Univ. Health Servs. Boise State Univ.*, 163 Idaho 237, 242, 409 P.3d 817, 822 (2018).

PHH Mortg. v. Nickerson, 164 Idaho 33, 423 P.3d 454, 459 (2018). Our best summarization of the issues raised by the Spradlins relative to the *Preliminary Order* are:

1. The Hearing Officer erred in concluding that approval of 82640 will not reduce water available to the Spradlins under their water rights, and in particular, the Spradlins challenged Aston's expert report from Dr. Tom Wood;
2. The Hearing Officer erred in his analysis on forfeiture of certain water right portions such that there should only be one water right for 2.8 cfs for the irrigation of 87 acres;
3. The Hearing Officer erred in concluding that 82640 is consistent with the conservation of water resources in the State of Idaho;

4. The Hearing Officer erred in his analysis that 82640 was not a transfer from one watershed to another;
5. The Hearing Officer erred in concluding that there would not be a change from agricultural use of Aston's water rights; and
6. The Hearing Officer erred in not requiring the addition of a measuring device at the Aston well.⁴

Each of these items will be addressed below.

A. The Hearing Officer did not err in concluding that approval of 82640 will not reduce water available to the Spradlins under their water rights.

In their exceptions, the Spradlins assert that their water rights will be injured because "it would be impossible to remove a greater quantity of water and expect the same amount to be available." Spradlin Exceptions at 3. The Spradlins then focus most of their exceptions on Dr. Wood's analysis submitted in conjunction with the transfer, *Id.* at 3-4, but at no time cite to or discuss the *Preliminary Order*, which only cites to Dr. Wood's expert report one time. Because the Spradlins have failed to identify any alleged errors or other defective analysis in the *Preliminary Order*, the Director should not change any part of the Hearing Officer's analysis.

As described above, 82640 was filed to align the water rights at issue with the historic diversion location for 13-8026 and the development of 13-4120 that occurred in practice over 50 years ago. *Preliminary Order* at 26. The Aston Well historically diverted a maximum of

⁴ The Spradlins also assert that Department should issue a cease and desist order for an approved Idaho Water Supply Bank rental agreement executed between Aston and the Idaho Water Resource Board. However, that approval is not at issue in this contested transfer proceeding for 82640, and the approval was granted under other legal authority found at IDAPA 37.02.03. By way of information, the water bank approval allows Aston to irrigate additional acreage (only 22 additional acres) under one of his pivots, but he has no intention of increasing the pump discharge at the Aston well to divert more than it is currently capable of diverting. The rental was necessary economically to allow some additional irrigation under the south pivot because full irrigation under the pivot cannot occur due to the reduction of acres under the *Preliminary Order* from 187 down to 141. In the event Aston's exceptions are found to be meritorious, his ability to irrigate 171 acres will make the pivot economical to keep in place. Otherwise, it is likely that the pivot will need to be removed and sold.

approximately 2.9 cfs (1,300 gpm) and Aston testified that the well has the same 100 horsepower associated with it that was there historically, only now the well is equipped with a variable speed drive to be used in conjunction with pivot irrigation to minimize use of electricity and diversion of water. This improved irrigation system maximizes efficiency. The Aston well continues to divert an approximate maximum of 2.9 cfs, and Aston has no intention of increasing this maximum diversion amount.

As presented and discussed at the hearing, one way to measure the volume of past water diversions at the same diversion point is to compare power consumption records. Aston was faced with allegations from the Spradlins that he has diverted more water than the prior farm owner, Sid Schvaneveldt. Accordingly, Aston compared power consumption records as depicted on Exhibit 124. *See also* Exhibit 123 at 8. The records showed that Aston used less power, and logically, diverted less water (both before and after the variable speed drive in the pump was installed in 2011). This empirical data is consistent with how Aston's irrigation system changes resulted in his ability to cover the same number of acres in 7 days that originally took Sid Schvaneveldt 14 days to cover. This significant increase in efficiency, and all the improvements Aston has made, are summarized in the following testimony from him given at the hearing⁵:

RH: Since you purchased the property, what upgrades, changes, or other modifications have you made to well number 2? I'll ask you to be as specific as you can on dates if you remember

CA: Alright, so I bought it in 2004. It was portable mainline like I described before. My dad was telling me "you've got to get that thing more pressurized, more efficient, it's just wasting water." So I took his strategy, and Sid farmed it better than I did I've decided because I changed all the gaskets and tried to build pressure. The hard thing about that well is when it's on, it pumps a lot of water. In 2004 and 2005, I tried to build pressure, and that aluminum pipe was so old and thin, it would

pop new holes in the pump. So I saw why Sid flood irrigated with valve openers on parts of the farm. I dealt with that the first couple years. Then in 2006 I decided to put in a buried mainline to create efficiency. At that time when I bought the farm, it took 14 days to get across the farm watering it. When I put the mainline in and the pivot, part of that was to cut my watering days down and conserve water, but conserve power bill mainly. I cut down to half, I can get across that farm in 7 days. That's the first improvement I did. Then in 2010, just after first crop hay, I went to fire up that well, and when you ran that well, it ran at such high volumes of flow, I'd have to get on my motorcycle, and you'd have to kind of build pressure, even with that new mainline, you kind of had to let them build pressure, and you had to escape pressure, meaning I had to flood irrigate some. So I was always watering ground I didn't need to just to get rid of water. So bad thing happened in 2010, I went to turn on the pump, went to the other end to open some things, get the pressure going, and I saw a flash back at the pump, because it was starting to get dark and there was a big yellow flash. So I drove back over to the pump and the pump had burned up, you could smell that. So I called Mountain Valley Pump, they came and removed the pump to rewind it. After they took the pump off, they grabbed the shaft and the shaft had slop in it. And I said "is that bad?" And they go "That's bad." And they said they could put the pump back on, but it probably wouldn't last that long. So they came and put a 10 inch column pipe, there's a 3 inch oil pipe in the shaft, and a lot of those bearings had warped, but what the big problem was that pipe was so old, the column pipe, that it had little pinholes in it and that's what was causing the problems. It had let water into the 3 inch tube, and there was water where it's not supposed to be, there's supposed to be oil in there

RH: In the pump?

CA: Yes, so water was coming up the 3 inch oil tube in the shaft, so obviously that's what made the shaft wear out. So when they pulled it out, they looked at the 10 inch column pipe and it was pretty fragile, like tap on a hammer, it's probably going to break through. And they said "we can band-aid it together, but you're probably going to have us back, so we're probably going to replace everything." I did not have any money, and I was trying to pay for a farm, so I basically quit farming that year. I had no money to repair it, I lost second and third crop.

RH: This was in 2010?

CA: This was 2010, it was a bad year. So luckily we got 5 inches of rain that year and my barley was good because of the rain that spring. But I lost second and third crop hay. I worked that winter trying to figure out what I could do, tried to get creative with the financing, they wouldn't loan me any money because I didn't have any equity or a down payment. So the long-short of it is, I finally got creative with some house mortgage stuff, and finally bit the bullet, and \$45,000 later, I replaced the pump. At the time, the power panel had given me troubles. It was worn out, I mean since 1960. So I put in a Variable Speed Drive and power pump at the same

time. The nice thing about that is it allows me to not hit peak demand. I only need to water what I need to water, and it slowly turns the pump on so I can run at 60-70% so I only water what I need instead of throwing out water just to throw out water.

RH: Let me ask you this question, did anyone help you design the Variable Speed Drive or make recommendations on it?

CA: Yeah, I had Rocky Mountain Power has a guy that comes around and helps you determine if it's valuable to do. In my situation, because I had a pivot and some stuff, it wasn't something I really wanted to pursue, but he helped me kind of design, but I worked with Valley Implement.

RH: What's the horsepower on that pump?

CA: 100 horsepower

RH: So 100 horsepower, same amount of horsepower that was there before?

CA: Correct

RH: And now it's a variable speed drive

CA: Yes

RH: Because of that, do you believe you've become more efficient with your use of well number 2?

CA: Yes

RH: Do you think you've used less power?

CA: For sure. And just go back to 2004. It used to take me 14 days to get across that farm watering, and now I can do it within 7 or less. So that well is on a lesser period of time. Now I don't water as much as I should, I'm pretty cheap because it's so expensive.

RH: Because power costs money, right?

CA: Power costs money.

RH: And you don't have any surface water, canal shares anywhere do you?

CA: No, it's all pumped

RH: All pumped, so you have to pay for it.

CA: And it doesn't matter how much rainfall we get in the winter to me, it's all groundwater because it's pumped. So one of the things with that is I know that I'm more efficient, there's no doubt, that's why I've spent the money that I've done improving my process. I've looked at it as a 20-year plan. It doesn't make sense on paper to do what I've done, until you look at the power bill and hope. Now in 2007 and 2008, they did away with the BPA. Now I don't remember if it was 2007 or 2008...

RH: That was the credit?

CA: Because power is generated from hydroelectric power, they used to give agricultural irrigators a discount on their power bill because that power was generated through irrigation. In 07-08, they quit doing that. And I'm using less power and less water now, but my bill for my pump is 3 times what it was, so I'm glad I did what I've done because I can't imagine what the power bill would have been. So I think that's the hard thing about this is these protests are acting like I haven't made an efficient gain of water when that's what I've done. That to me is the hard part because I know what I've done and I know what efficiency is there.

Hearing Recording (beginning at 56:20).

Despite these facts, the Spradlins asserted that Aston's well interferes with their well as evidenced by the amount of sand in the well (not the amount the well produces⁶) which they claim was not an issue when Sid Schvaneveldt farmed the property. In response to these claims, the Hearing Officer correctly noted that there are several existing ground water diversions within a one-mile radius from the Spradlin well, that it is possible that these wells "have a similar or greater impact on the pumping level in the Spradlin irrigation well," and that the assertion that the Aston well is already injuring the Spradlin well should be raised in a delivery call proceeding where the Department can properly weigh the effects of "all ground water diversions in the area" *Preliminary Order* at 26-27 (underlining in original).

⁶ According to testimony from Shelly Spradlin, the Spradlins have never had problems obtaining an adequate quantity of water for domestic use from their domestic well, *Preliminary Order Approving Transfer* at 19 (April 1, 2019), but assert that they have noticed "a change in the amount of sand in the outflow from their irrigation well during times when the Aston Well is operating." *Preliminary Order* at 26.

With specific regard to claims of injury, the Hearing Officer's analysis was sound and the Spradlins have not identified what specific portions of his analysis they believe was erroneous. The Hearing Officer noted that the Aston well's historic diversion rate is approximately 2.9 cfs, and the transfer approval for 82640 would not result in a diversion rate that is "significantly different than has been historically pumped from the Aston Well." *Id.* at 27. Thereafter, the Hearing Officer used the specific capacity calculation from Dr. Wood for the Spradlin irrigation well (18 gpm), and assuming the same specific capacity for the Aston well (evidence from Dr. Wood indicates it was higher at 83 gpm/ft),⁷ the Hearing Officer performed a Theis analysis—a commonly utilized formula when quantifying pumping impacts between wells. Based on this analysis, the Hearing Officer determined that the additional diversion of 9 gpm (the additional amount based on 141 irrigated acres at 0.2 cfs/acre above the 2.8 cfs amount under 13-4120) would only result in drawdown of an additional 0.5 feet. *Id.* The Hearing Officer also correctly noted that the Theis equation assumes 88 continuous days of diversion (which is not how the Aston well or other irrigation wells, for that matter, operate), and as a result, the calculated drawdown was *de minimis* and would not violate the reasonable pumping level standard set forth in Idaho Code § 42-226. *Id.*

⁷ The specific capacity calculations appear to be something the Spradlins believe are at issue. It was necessary for Dr. Wood to arrive at a reasonable specific capacity number for his analysis. Relying upon well logs in the area, Dr. Wood understood one of the well logs to be for one of the Spradlin wells. He averaged the specific capacity of four local wells, and it turned out that one of the well logs was for a location further away. Even with this, the average specific capacity was 13.6 gpm/ft, while Dr. Wood concluded that the Aston well has a specific capacity of 83 gpm/ft (which he calculated based on Aston's observation that the well experienced 15 feet of drawdown at 1250 gpm). For the Theis calculation, Dr. Wood average the 13.6 and 83 values to arrive at the number of 48.5 gpm/ft. Exhibit 123 at 4. Based on this specific capacity, and all other assumptions in the Theis equation (confined aquifer, continuous pumping, etc.) he concluded that there would only be 2.8 ft of drawdown. **However**, the Hearing Officer did not focus on this portion of Dr. Wood's analysis, but instead, used the report to use a very conservative specific capacity number (18 gpm/ft). Accordingly, the Spradlin's reference to Dr. Wood's inclusion of information from a well log in their exceptions is irrelevant to what the Hearing Officer concluded.

The Spradlins have not provided any argument as to why the Hearing Officer's analysis was erroneous. In tracking through their exceptions, they argue:

The statement above mentioned testimony that Mr. Aston's geologist made (Thomas Wood testimony) regarding overpumping on water right 13-2209 (3.42 cfs exceeded his allotted 2.8 cfs) in the past and "having no negative impact" on surrounding wells indicates Mr[.] Aston willingly submitted via geologist report, during the hearing he has overpumped the shares resources demonstrating his unwillingness [sic] to abide by the allotment (water right) constraints.

Spradlin Exceptions at 4. The Spradlins have misapprehended use of a 3.42 cfs amount by Dr. Wood entirely and instead argue that use of 3.42 cfs is evidence of Aston's alleged overpumping at the well. This is not the case at all. Dr. Wood used a 0.62 cfs value in his modeling which was derived from the 87-acre portion of 13-2209 (the licensed water right) that was associated with the Aston property that was being amended by 82640 to change its point of diversion. If you add 2.8 cfs (the amount already present at the Aston well under 13-4120 and therefore not subject to any change under the transfer) to this 0.62 cfs value, the total is 3.42 cfs. Again, Dr. Wood only considered that the 87 acres of 13-2209 as being moved in the transfer (87 acres of 13-2209 is 0.62 cfs). This amount is more than the current diversion rate pumped from the Aston well of approximately 2.9 cfs (which will not change), but this number was used by Dr. Wood to more conservatively model what would occur if the transfer was approved. At the end of the day, the Hearing Officer used the specific capacity calculation from Dr. Wood for the Spradlin irrigation well (18 gpm) in his analysis, not the average utilized by Dr. Wood, and for that reason, arguments directed towards Dr. Wood's report are misplaced.

On the issue of injury to water rights, it is also necessary to address a few minor points, even though they are not raised in challenge to the Hearing Officer's analysis in the *Preliminary Order*. The Spradlins assert that Aston uses a 12-inch pipe, and Dr. Wood provided a flow rate

based on a 10-inch pipe. Spradlin Exceptions at 4. Testimony from Aston at the hearing confirms that the well column pipe was and is a 10-inch pipe at the place where the water is diverted.

The Spradlins also assert that some farmers in the area only get two alfalfa crops per year, when the normal number of crops is three to four, and Aston gets four alfalfa crops. This makes little sense. It is not evidence of injury for Aston to harvest four crops in an area where the normal harvest is three to four crops. What the Spradlins seem to fail to understand is that the success of growing crops is not how much water is placed on a crop, but how efficiently the water is placed on the crop, particularly in the Weston area with his clayey soils. Aston's pivots are designed to deliver 600 gpm, which is on the lower side of pivot water application design and is equivalent to two wheel lines. This allows Aston to only have to put down 1.75 inches of water at a time compared to a 12-hour wheel line set which applies 2.50 inches. Simply put, quantity of water applied does not necessarily result in more crop production. The Spradlins have mistaken Aston's efficient use of water and improved irrigation water delivery system—that results in better crop production—to be the result of diversion and use of more water. This is simply not so.

In summary, the Spradlins have not identified any specific findings or conclusions in the *Preliminary Order* for the Director to reconsider relative to injury to other water rights. These findings and conclusions from the Hearing Officer should remain unchanged.

B. The Hearing Officer did not err in his analysis and conclusion that 13-4120 and 13-8026 combined are authorized to irrigate more than 87 acres.

It is not entirely clear what the Spradlins' legal or factual basis is for the following portions of their exceptions:

Should Mr.[Aston not be held to the cfs of the 87 acres not being protested?

• • •

We are requesting that until all legal remedies have been exhausted and a determination is reached by findings or agreement, Mr[.] Aston place on the 2.8 cf[s] allotted for the 87 acres on the 87 acres.

Spradlin Exceptions at 5 (bolding omitted). However, the Hearing Officer did not hold that 2.8 cfs was associated with only 87 acres. Rather, the Hearing Officer assigned a new water right number—13-8026—for the **0.62 cfs portion of licensed right 13-2209 associated with 87 acres identified on the place of use for 13-2209**. The 2.8 cfs amount is associated with statutory claim 13-4120. The Hearing Officer devoted 2 ½ pages describing with great detail evidence and testimony associated with establishing the validity of 13-4120 (again, which was originally a statutory claim in need of adjudication). *Preliminary Order* at 7-9. The Spradlins—who moved to their property in 1992 after many of the events testified to concerning 13-4120 occurred—did not provide any evidence at the hearing in support of the position that 13-4120 should only be associated with 87 acres. More significantly, they have not identified any legal or analytic defect in the Hearing Officer’s decision on the validity of 13-4120 to support their position that the only right that should exist is a 2.8 cfs water right for the irrigation of 87 acres. Accordingly, their exceptions on this point are unavailing.

C. The Hearing Officer did not err in concluding that 82640 is consistent with the conservation of water resources in the State of Idaho.

The Spradlins assert that the Hearing Officer erred in concluding that 82640 is consistent with the conservation of water resources in the State of Idaho because “overuse of any water would not constitute conservation of water resources.” Spradlin Exceptions at 3. As described above, the evidence is clear that Aston is not diverting more than Sid Schvaneveldt did, and therefore, he is not overusing water. Aston has an economic incentive to divert less water to grow his crops because of electrical costs. Again, the Spradlins have not identified errors in the Hearing Officer’s

analysis that warrant reversal. Rather, the evidence is that Aston is using less water, particularly with the installation of a variable speed drive and center pivot irrigation. The Hearing Officer concluded that center pivots and sprinklers are “an efficient means of irrigation and is consistent with the conservation of water resources within the state of Idaho.” *Preliminary Order* at 28. We agree with this conclusion and believe nothing should be changed on this issue upon review by the Director.

D. The Hearing Officer did not err in concluding that 82640 was not a transfer from one watershed to another.

One of the questions to be addressed at a hearing on a transfer application is “[w]ill the proposed transfer adversely affect the local economy of the watershed or local area within which the source of water of 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?**” (Bolding added); See Idaho Code § 42-222. It is undisputed that Aston is not transferring a water right from another watershed under 82640. Aston’s water rights are Basin 13 water rights being transferred within Basin 13, and, as explained above, 82640 was filed to have the water rights match a change that occurred in practice over 50 years ago for 13-8026 and to adjudicate a statutory claim on property that the statutory claim was originally filed on. In their exceptions, the Spradlins assert that the changes under 82640 under the above-cited criterion have already “affected domestic wells . . . as well as neighboring agricultural wells.” Spradlin Exceptions at 3. However, under the plain language of Idaho Code § 42-222, this criterion only applies to inter-basin transfers, and for that reason, this exception raised by the Spradlins on this point should be disregarded as the statute is inapplicable. Furthermore, the issues raised here are a restatement of allegations of injury to existing water rights, which has already been addressed above.

E. The Hearing Officer did not err in concluding that there would not be a change from agricultural use of Aston's water rights under 82640 that would warrant denial of 82640.

82640 does not propose to change the nature of use of any water right. Idaho Code § 42-222 provides that the "director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area." On this issue, the Spradlins assert that the Hearing Officer erred "by granting more water than that is allowed in the past has already significantly impacted the agricultural base of the local areas as some farmers have only had the opportunity to harvest two crops (norm for the area is 3-4). Incidentally, Mr. Aston has been able to harvest 4 crops per year in the past." Again, this argument is asserted under the wrong statutory provision and is already addressed in the injury portion of this pleading above. Under the agricultural base provision of Idaho Code § 42-222, it is undisputed that there is no proposed change to the nature of use of any water right at issue in this proceeding. Accordingly, the Hearing Officer made no error for the Director to correct.

F. The Hearing Officer did not err in not requiring the installation of a measuring device at the Aston well.

Finally, the Spradlins ask, as to the Aston well only, "should there not be a device monitored by the IWRB?" Spradlin Exceptions at 4. It appears that the Spradlins intended to type IDWR in their exceptions, as water distribution is a function of IDWR and not the Idaho Water Resource Board. See Idaho Code § 42-601 *et seq.* and Idaho Code § 42-701. The Director has authority to require installation of measuring devices of all water users in the Weston area, including Aston's well, should the Director elect to order installation of such measuring devices. See., e.g., *Final Order on Reconsideration*, In the Matter of Requiring Measuring Devices for Ground Water Diversions for Ground Water Diversions in Water Districts Nos. 31, 34, 100, 110,

120, 130, and 140, July 20, 2016 (requiring ground water right holders in various water districts within the Eastern Snake Plain Aquifer to install measuring devices). Because such an order has not been issued, Aston alone should not be required to install a measuring device. However, IDWR officials (including the applicable local watermasters) have the right at any time to take a measurement at the Aston well and any other ground water well. For this reason, a requirement for installation of a measuring device is unnecessary. Furthermore, this issue was not raised at the hearing, and should not be allowed to be raised on appeal for the first time to the Director.

III. CONCLUSION

For the reasons set forth above, the Director should not amend the *Preliminary Order Approving Transfer* as requested by the Spradlins. Instead, the Director should only amend the *Preliminary Order* to allow for the irrigation of a combined 171 acres as requested by Aston in his exceptions to the *Preliminary Order* previously filed in this matter.

DATED this 3rd day of September, 2019.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2019, I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by the method indicated below.

DOCUMENT SERVED: ASTON'S RESPONSE TO SPRADLIN'S EXCEPTIONS TO PRELIMINARY ORDER APPROVING TRANSFER

ORIGINAL VIA EMAIL

AND FIRST-CLASS MAIL TO: Gary Spackman, Director
Rosemary DeMond, Administrative Assistant
Idaho Department of Water Resources
P O Box 83720
Boise, ID 83720-0098
Gary.Spackman@idwr.idaho.gov
Rosemary.DeMond@idwr.idaho.gov

ATTORNEYS AND/OR INDIVIDUALS SERVED:

James Cefalo
Hearing Officer
Idaho Department of Water Resources
900 N. Skyline Dr., Suite A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov

- ☐ Regular Mail
- ☒ Hand Delivery
- ☐ Courthouse Box
- ☒ Email

Shelly and William Spradlin
6995 W. 2200 S.
Weston, ID 83286
westoncreek@aol.com

- ☒ Regular Mail
- ☐ Hand Delivery
- ☐ Courthouse Box
- ☒ Email

Jay Norman Foncesbeck
6022 W. Hwy 36
Weston, ID 83286
jnfonnes@gmail.com

- ☒ Regular Mail
- ☐ Hand Delivery
- ☐ Courthouse Box
- ☒ Email



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