

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

**NOTICE OF ASTON'S DEFENSES OR
EXCEPTIONS TO FORFEITURE**

Applicant Clinton Aston, (hereinafter "Aston" or the "Applicant"), by and through his attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby provides notice of the defenses or exceptions to forfeiture "Aston intends to raise or present evidence about at hearing" as required by the *Notice of Hearing and Scheduling Order* dated May 21, 2019.

Aston's position is that none of his water rights have been forfeited for various reasons, including the application of defenses or exceptions to forfeiture, and intends to present evidence in support of this position at the hearing. By submitting this notice, Aston reiterates that it is the protestants' burden to prove forfeiture: "the party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by **clear and convincing evidence.**" *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680 (emphasis added) (citing *Carrington*, 65 Idaho 525, 147 P.2d 1009). Similarly, the lack of applicability of a defense or exception to

forfeiture must be proven by clear and convincing evidence by the proponents of forfeiture, who in this matter are either the protestants or the Department:

Although the owner of the water right has the burden of raising defenses to statutory forfeiture, *Jenkins v. State, Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982), **the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense.** *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) (the party asserting there was a forfeiture of a senior water right had the burden of persuasion on issue that there was no resumption of use of the senior water right before the party's appropriation). See also *In re Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (parties alleging forfeiture of water right have burden of proof).

Sagewillow, 138 Idaho at 842, 70 P.3d at 680 (emphasis added). Accordingly, the law is clear that a proponent of forfeiture—either the protestants or the Department in this case—must disprove forfeiture defenses to a standard of clear and convincing.

“Clear and convincing evidence is generally understood to be ‘evidence indicating that the thing to be proved is highly probably or reasonably certain.’” *State v. Kimball*, 145 Idaho 542, 181 P.3d 468, 472 (2008) (citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006)). “It is not a burden of convincing one that the facts which are asserted are certainly true or that they are almost certainly true, but it is greater than a burden of convincing one that the facts are more probably true than not true.” 29 AM. JUR. 2D EVIDENCE § 170.

In terms of forfeiture defenses, it is important to remember that Idaho Code § 42-223—the Idaho statute describing the statutory exceptions or defenses to forfeiture—is not an exhaustive list of all exceptions or defenses to forfeiture that may be considered valid under Idaho law. This is made clear in the following language from Idaho Code § 42-223:

The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not

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

There should be many defenses or exceptions to water right forfeiture because—as previously explained by Aston—the Idaho Supreme Court has clearly held that “forfeitures are disfavored under Idaho law” and that disfavor is evident by the fact that “there are defenses and exceptions to forfeiture.” *Barnes v. Jackson*, 163 Idaho 194, 198, 408 P.3d 1266, 1270 (2018) (citing *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999)).

The statutory exceptions or defenses to forfeiture asserted by Aston in this matter under Idaho Code § 42-223 are:

1. **Idaho Code § 42-223(1):** “(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.”
2. **Idaho Code § 42-223(3) (the first portion of this statute):** “(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 . . .”
3. **Idaho Code § 42-223(4):** “(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.”¹
4. **Idaho Code § 42-223(6):** “(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

1. Under this provision, we assert that voluntary non-use of a water right in an area covered by the *Management Plan for the Bear River Ground Water Management Area* protects water rights from forfeiture because the very basis for imposition of a ground water management area and its associated plan is that the area is approaching the conditions of a “critical ground water area” which is “defined as any ground water basin, or designated part thereof, **not having sufficient ground water** to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then-current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.” Idaho Code § 42-233a (emphasis added).

over nonuse of water shall be determined on a case-by-case basis.” Aston’s position under this defense or exception was explained in Aston’s *Petition for Reconsideration* previously filed in this matter, which once again primarily relates to the economics.

The common law exceptions or defenses to forfeiture asserted by Aston are:

1. **Agricultural Economics.** Idaho Code § 42-223(11) gave the mining industry an exception for non-use of water “due in whole or in part to mineral prices” as described here: “(11) 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.” The same principle applies to agriculture, which is explained in Aston’s *Petition for Reconsideration* previously filed in this matter, where non-use of water is “due in whole or in part” is due to agricultural economics where irrigation of all acres under water rights is not economical and the need for a water right user to concentrate his water resources on certain portions of his property.
2. **Voluntary Water Conservation.** Analogous to Idaho Code §§ 42-223(4) and 42-223(9), voluntary reduction is water use resulting in either less water diverted or non-irrigation of less productive acres to maximize the benefit of irrigation water is an exception or defense to forfeiture.
3. **No Need To Use Water Right Because No Beneficial Use Will Result.** This is related to the first portion of Idaho Code § 42-223(3) which provides “(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 . . .” This was previously described by the hearing officer as: “A water right is not subject to forfeiture if the water user is able to accomplish the described beneficial use from water from another source.” *Preliminary Order* at 16.²

Aston reserves the right to add additional defenses or exceptions to forfeiture based on exhibits or evidence that may be presented by the protestants at the hearing on this matter.

2 This defense or exception applies where sub-water or other water was present on certain acres. For example, the 16 acres in section 5, T16S, R38E.

DATED this 21st day of June, 2019.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 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:

**NOTICE OF ASTON'S DEFENSES OR EXCEPTIONS
TO FORFEITURE**

**ORIGINAL VIA
EMAIL TO:**

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

ATTORNEYS AND/OR INDIVIDUALS SERVED:

J&F King Farms Inc.
Geraldine K. Gunnell
8169 W. Hwy 36
Weston, ID 83286
ggunnell25@gmail.com

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

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

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

Jay Norman Fannesbeck
6022 W. Hwy 36
Weston, ID 83286
jfannes@gmail.com

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



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