

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

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Department of Water Resources
Eastern Region

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

**PETITION FOR
RECONSIDERATION**

Applicant Clinton Aston, (hereinafter "Aston" or the "Applicant"), by and through his attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., pursuant to the *Explanatory Information to Accompany a Preliminary Order* provided in this matter, the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), and Rule 11.2(b) of the Idaho Rules of Civil Procedure, Aston hereby requests reconsideration of portions of the Hearing Officer's *Preliminary Order Approving Transfer*, dated April 1, 2019, issued in the above-entitled matter (the "Preliminary Order").

In the event the Hearing Officer does not grant this *Petition for Reconsideration*, in the alternative, Aston requests to re-open the hearing for the limited purpose of taking evidence on the matters addressed in this *Petition for Reconsideration* pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. *See* IDAPA 37.01.01 (certain Idaho Rules of Civil Procedure apply to procedures of the Idaho Department of Water Resources).

I. BACKGROUND AND PROCEDURAL HISTORY

As described herein, Aston requests reconsideration of the Hearing Officer's (1) forfeiture findings and conclusions on all acres where forfeiture was determined, and (2) the findings and conclusions relating to the 16 water right acres in Section 5 of Township 16S., Range 38E. Aston does not challenge the other conclusions of law of the Hearing Officer.

Clinton Aston purchased the land to which Water Right No. 13-4120 ("13-4120") and a portion of Water Right No. 13-2209 ("13-2209") are appurtenant—and are the rights subject to Transfer No. 82640 ("82460")—in July of 2004. *Testimony of Clinton Aston*; IDWR Exhibit 1. These water rights have been the subject of much scrutiny and controversy, and as the new owner of these rights, Aston fast became the target of neighbors that have attempted to re-write history while at the same time becoming the first person to blame whenever water issues arose. This is the case even though Aston does not enjoy the benefits of being entitled to any surface water from ownership of shares in the Weston Creek Irrigation Company, and is left to spend money from already-thin crop revenue margins on expensive electricity to pump ground water for his farming operations. 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 13-2209 have not had their elements verified and/or updated. Despite this, the water right backfile for 13-2209 reveals that in November of 2004—within the time period he was required to do so after purchasing the farm in

July of 2004—Aston filed a *Notice of Change of Water Right Ownership* (“NCO”). IDWR did not act upon that request because of a pending transfer (Transfer No. 70722), and after nearly seven years, the NCO was returned. See https://idwr.idaho.gov/apps/ExtSearch/DocsImages/hg7_01.PDF. The letter accompanying the returned NCO suggested that the ownership of 13-2209 might have to be resolved through a quiet title action or in a general adjudication of the Bear River. *Id.*

At around this time in 2011, Aston had no choice but to repair his well, and at the same time, install a variable speed drive pump. Testimony of Clinton Aston. Consistent with a farmer’s land ethic to generate the highest and best use of his farm ground, Aston also installed pivots to cover approximately 187 acres—the acreage he believed he had based on Sid Schvaneveldt’s statutory claim for 13-4120. Based on testimony at the hearing, it was the second of Aston’s pivots that apparently generated the ire of the Fannesbecks and others, and Aston was once again obliged to modernize his water rights by filing a transfer and working with IDWR to do so. Only this time, IDWR was willing to act on updating 13-4120 and Aston’s portion of 13-2209. Aston only wanted to address 13-4120, not 13-2209, as 13-2209 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 the 13-2209 portion that covered the same acres as 13-4120 in the transfer application that would eventually be numbered as 82640. There was no indication to Aston at the time he filed 82640 that water right forfeiture was an issue, nor was any issue with moving the 16 acres of 13-4120 in Section 5 that were identified in 82640. Accordingly, Aston submitted 82640, and at the same time 82640 was submitted, the statutory claim document for 13-4120 was amended to fix an issue the 16 acres in Section 5 to be consistent with Schvaneveldt’s land ownership at the time the

statutory claim for 13-4120 was submitted. It appeared that Sid Schvaneveldt's map from 1979 was slightly inaccurate on these Section 5 water right acres.

Protests were filed against 82640, with the protestants aligned to attempt to destroy Aston's ability to farm by limiting the number of acres Aston could irrigate, with the primary focus on the water right acres associated with the NWNW of Section 9. Despite Sid Schvaneveldt's statutory claim, which is a sworn affidavit swearing to its truth, and despite not having farmed the property at any point in time, Fannesbeck was resolute and—in his mind—absolutely certain that no acres were ever irrigated in the NWNW. And, despite Sid Schvaneveldt's statutory claim, even Kevin Olsen testified against his sister's husband based on his time on the farm in the 1970s, even though the relevant time frame was the early 1960s. Further, despite only being in the area since the 1990s, the Spradlins joined in asserting that on their horse rides, they were certain there was only one culvert present for draining a spring and no other culvert where the mainline could have been extended under the gravel road to the NWNW. In their minds, there was simply no way the NWNW of Section 9 was irrigated as Aston described it was irrigated based on what Aston was told by Sid Schvaneveldt.

The protestants were proved wrong. ElRay Balls, Fannesbeck's own witness, explained in detail how the NWNW of Section 9 was irrigated precisely as Sid Schvaneveldt had explained to Aston—with a portable mainline used to provide water to handlines to sprinkle the property in the early 1960s. ElRay was physically there when this was occurring, and despite long-standing disputes with Sid, he testified honestly about what occurred there and should be commended for this honesty and for understanding the serious nature of the hearing. ElRay was clear that after one or two years of difficult work in the early 1960s, but after a water right had been developed and perfected under Idaho law as a "beneficial use" water right, the work difficulty and economics

of irrigating the NWNW led Sid to focus his efforts on the remainder of his farm ground and to cease irrigating the NWNW of Section 9. And there are two culverts still present, despite the Spradlins' insistence otherwise. These culverts were unfortunately covered with snow at the time of the hearing, which prevented introduction of photographs of the culverts, but the snow has since melted, and the culverts are plainly there. See *Declaration of Clinton Aston* at Exhibits 1-3.¹

Having addressed this main issue concerning of establishing irrigation of the NWNW of Section 9, relative to the water rights themselves, the protests by the protestants never alleged any subsequent partial forfeiture of Aston's water rights by non-use. The focus was on whether 13-4120 had been a perfected water right in the first place. It was therefore unexpected that in the *Preliminary Order*, without any prior notice, the Hearing Officer addressed post-development forfeiture of 13-4120. This was not an issue specifically identified in the protests, or specifically asserted at the outset of the hearing as the issues of protest were summarized. While it was briefly raised in testimony at the hearing, given the important nature of the property rights at issue and the difficult evidentiary standard—"clear and convincing evidence"—of both proving forfeiture and finding that no defense to forfeiture exists by the same difficult evidentiary standard, Aston was not expecting forfeiture findings and conclusions. Nor was Aston expecting concerns with the sixteen acres of pasture located in Section 5 where sub water and/or waste water makes it unnecessary most of the time for additional and ineffective application of ground water that serves

¹ As explained by Aston at the hearing and confirmed in the *Declaration of Clinton Aston* at ¶¶8-10, the culvert with the label of "2nd" on it was the original culvert that drained the spring. The other culvert that was used to place portable mainline through has been removed. A photo of this removed culvert was introduced at the hearing as Exhibit 115. The County provided the culvert that currently drains the spring, which was installed by Gary Cahoon. This culvert is depicted on the Exhibit 1 photo below on the left side of the photo. The location of this culvert is where the Exhibit 115 culvert (where mainline was placed through) was originally located. Once water goes through this new culvert, the spring drain is piped through Aston's field. To summarize, there have been three total culverts in the area depicted on the Exhibit 1 photo: One that was removed that had portable mainline placed through it, one that originally conveyed spring water that was later no longer used (but remains in place), and one that currently drains the spring that was provided by the County and installed by Gary Cahoon at the location of the Exhibit 115 culvert.

no beneficial use. On these issues, we echo the Idaho Supreme Court: “Any claim that the water right had been abandoned or forfeited in whole or in part by nonuse would be an issue raised either by the Department or a third party. Ordinarily, issues of forfeiture or abandonment are not adjudicated in a transfer proceeding, although they can be.” *Sagewillow, Inc. v. Idaho Dep’t of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003).

Now that these issues have been raised, this *Petition for Reconsideration* outlines the legal arguments and supporting facts against the Hearing Officer’s findings and conclusions on water right forfeiture and against his findings relative to the 16 acres in Section 5. For the reasons set forth below, the Hearing Officer should reverse his decision relative to these issues and issue an amended decision accordingly.

A petition for reconsideration before the Department is analogous to a motion for reconsideration allowed under Rule 11.2(b) of the Idaho Rules of Civil Procedure. In that regard, “the case law applying Rule 11(b) [now 11.2(b)] *permits* a party to present new evidence when a motion is brought under that rule but does not *require* that the motion be accompanied by new evidence.” *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct. App. 2006) (italics in original); See also *Coeur d’Alene Mining Co. v. First Nat’l Bank of North Idaho*, 118 Idaho 812, 800 P.2d 1026 (1990) (A rule 11 motion for reconsideration was properly denied in the absence of additional evidence that would provide a basis upon which to reconsider the prior order).

Based on the above case law, Aston submits supplementary legal argumentation herein and additional evidence as contained in the *Declaration of Clinton Aston* filed contemporaneous with this *Petition for Reconsideration*. In short, and overlooking the errors of declaring property forfeited without proper notice, intermittent irrigation of any portion of Sid’s farm—or the focus of resources and water on more productive portions of Sid’s farm—is understandable and expected

given the electrical power expenses of pumping ground water and Sid's lack of any surface water rights or canal company shares entitling him to surface water.

II. WATER RIGHT FORFEITURE

A. **The Hearing Officer Erred By Concluding that (1) the 40-acre portion of 13-4120, and (2) the 4-acre portion of 13-2209 (now 13-8026) were forfeited under Idaho law. The Hearing Officer's conclusions are not supported by "clear and convincing" evidence and the Hearing Officer failed to follow the provisions of Idaho Code § 42-222 by failing to consider whether any of the exceptions or defenses to forfeiture contained in Idaho Code § 42-223 or under common law apply.**

1. Forfeiture Legal Standards.

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)). Because a determination of water right forfeiture takes away a property right², the evidentiary standard for proving a water right forfeiture is daunting: "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, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2003) (citing *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944)) (emphasis added). More on the clear and convincing evidentiary standard will be provided below.

Water right forfeiture is explained in statute:

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

² A water right is real property. Idaho Code § 55-101; *see also Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). A water right is a "complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied." Idaho Code § 42-101. This is a longstanding principle of Idaho water law. *See Koon v. Empey*, 40 Idaho 6, ___, 231 P. 1097, 1098 (1924) ("there can be no question that a water right becomes appurtenant to the land to which it has been applied and upon which the water has been used for irrigation.").

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 § 42-222(2) (emphasis added). As explained below, the second bolded portion above of this statute is critical in this proceeding.

Idaho Code § 42-223—cited to in Idaho Code § 42-222(2)—describes its own application thusly:

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

Idaho Code § 42-223 (emphasis added). Thus, if the “failure to apply the water to beneficial use” for five years is caused by any of the “conditions specified in any subsection of” § 42-223, the water user has a viable defense to forfeiture. *Id.*

Accordingly, in a contested transfer proceeding, the Hearing Officer is **required** to analyze the defenses and exceptions to forfeiture found in Idaho Code § 42-223 as part of his forfeiture analysis. The Hearing Officer did not do that in his *Preliminary Order*, even though he is required to do so even if specific defenses to forfeiture were not argued or asserted at the hearing. Just like the Department’s independent obligation to protect against injury, enlargement, etc., described in Idaho Code § 42-222—even if those issues are not specifically raised by protestants—the Hearing Officer is required to consider defenses to forfeiture. This point bears repeating. The Hearing Officer has an independent obligation to consider defenses to forfeiture under Idaho Code § 42-223 as part of his independent review of the matters described in Idaho Code § 42-222. In the *Preliminary Order*, the Hearing Officer did not consider many of those 42-223 defenses.

Based on the above-described statutory provisions—and the common-law recognized “resumption of use” doctrine—a three-step analysis is required to determine whether a water right has been forfeited:

- (1) whether there has been five years of non-use of the water right, Idaho Code § 42-222(2);
- (2) whether a statutory exception applies to prevent the forfeiture, Idaho Code § 42-223; and
- (3) whether any common law defense to forfeiture applies, such as if use of the water right was resumed before a third party asserted a claim of right to the forfeited water, *Sagewillow*, 138 Idaho at 836, 70 P.3d at 674 (quoting *Carrington*, 65 Idaho at 531–32, 147 P.2d at 1011).

Although Idaho Code § 42-222 does not explicitly provide for partial forfeiture, the Idaho Supreme Court has explained that “that partial forfeiture is provided for by [Idaho Code] § 42-222(2).” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). Accordingly, the three-part forfeiture analysis described herein applies identically to both complete forfeiture and partial forfeiture. *Sagewillow*, 138 Idaho at 842, 70 P.3d at 680.

The Hearing Officer did not engage in a 42-223 analysis relative to his forfeiture findings and conclusions for both the 40-acre portion of 13-4120 and the 4-acre portion of 13-4120, and instead focused on resumption of use only. Stated more simply, the Hearing Officer ignored the second step in the forfeiture analysis which he cannot do under Idaho Code § 42-222. As described below, upon reconsideration, the Hearing Office cannot find that certain provisions of 42-223 do not apply by clear and convincing evidence.

2. Clear and Convincing Evidence Standard.

In a legal proceeding, the “concept of a burden of persuasion ordinarily applies to questions of fact, and ordinarily is expressed in one of three ways: (1) preponderance of the evidence; (2) clear and convincing evidence; and (3) proof beyond a reasonable doubt.” 29 AM. JUR. 2D

Evidence § 170. “Clear and convincing evidence refers to a degree of proof greater than a mere preponderance.” *Idaho State Barr v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed).

As described above, “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 absence 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. The Idaho Civil Jury Instructions describe clear and convincing evidence as follows:

IDJI 1.20.2 – Burden of proof – clear and convincing evidence

INSTRUCTION NO. _____

When I say a party has the burden of proof on a proposition by clear and convincing evidence, I mean you must be persuaded that it is highly probable that such proposition is true. This is a higher burden than the general burden that the proposition is more probably true than not true.

This is different than the preponderance of the evidence standard, which the Idaho Civil Jury Instructions describes as follows:

IDJI 1.20.1 – Burden of proof – preponderance of evidence

INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression “if you find” or “if you decide,” I mean you must be persuaded that the proposition is more probably true than not true.

Relative to these evidentiary standards, the Idaho Civil Jury Instructions therefore embody the following principle: “If we are to give meaning to the phrase ‘clear and convincing proof,’ it must mean that the proponent must show that the facts which he asserts are **more than merely probably true; that the probabilities that they are great that they are true.**” Bryan M. Bennett, *Evidence: Clear and Convincing Proof: Appellate Review*, California Law Review Vol. 32, Issue 1, at 76-77 (1944) (emphasis added).

Accordingly, the law is well-defined that a proponent of forfeiture—either the protestants or the Department in this case—must disprove the defense to a standard of clear and convincing evidence, which means that in disproving the defense, the forfeiture proponent must prove that it is highly probable (or great) that the defense does not apply. This is a difficult standard, one that is just below that of “beyond a reasonable doubt” standard applied in criminal proceedings. As set

forth below, the proponents of forfeiture in this matter cannot establish forfeiture because they cannot disprove certain defenses to forfeiture under Idaho Code § 42-223.

3. Analysis of Forfeited Portions of Water Right 13-4120

The Hearing Officer confirmed the validity of all 187 acres of 13-4120 claimed in Sid Schvanaveldt's statutory claim (which is a sworn affidavit). The portion of 13-4120 that was of particular controversy at the hearing and the main point of attack by the protestants—as described above—was the portion of the 13-4120 claimed by Sid for the NWNW of Section 9. The testimony of ElRay Balls—who personally worked with Sid on the property—left no question that Sid was honest in his statutory claim filing in including the NWNW of Section 9:

33. The 55 acres located north of the Anker Ditch (in the NWNW and SWNW of Section 9) were irrigated in the early 1960s, immediately after the Aston Well was completed. Testimony of El Ray Balls. The ground was 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 and Jerry Schvanefeldt 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.*

Preliminary Order at 7.

While the evidence is that the NWNW of Section 9 was not irrigated for five consecutive years after 1963, it was for good reasons, and those reasons shield the perfected water right on this property from forfeiture. In the *Preliminary Order*, the Hearing Officer focused on the third step of the forfeiture analysis—the resumption of use doctrine—which is only one defense to forfeiture (and a common law one at that). *Preliminary Order* at 15. The Hearing Officer failed to consider the defenses to forfeiture found in Idaho Code § 42-223 and/or elsewhere in common law and failed to find by clear and convincing evidence that none of these defenses applied.

Aston asserts that subsection (6) of Idaho Code § 42-223 applies and there is a lack of clear of convincing evidence that it does not:

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.

Idaho Code § 42-223(6).

The circumstances over which Sid Schvaneveldt had no control were specific economic circumstances associated with his farm, specially the fact that his farm was only irrigated with ground water—generated with expensive electrical costs—with no access to shares that would entitle him to surface water. This was confirmed by ElRay Balls when he described how Lee Schvaneveldt sold his farm to Sid and ElRay. El Ray Balls testified at Disk 2, Section 5 at 47:45 as follows in response to questions from Jay Fonneseck (JF is Jay Fonneseck and EB is ElRay Balls):

JF: And was the farm you bought, the lower farm, was it considered an irrigated farm?

EB: Yes.

JF: And to make it irrigated what did Lee sell you to, so, you could irrigate the farm that you got [indiscernible] for the lower farm?

EB: I got all the Weston Creek water plus 1/4 interest in the well on #2 farm.

(emphasis added).

Economic considerations are clearly a circumstance envisioned and embodied under Idaho Code § 42-223(6) and defenses to forfeiture in general. In 2008, subsection (11) of Idaho Code § 42-223 was added to protect mining water rights during extended periods of nonuse “**due in whole or in part to mineral prices**” (emphasis added):

(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.

Just like with mining, agriculture can suffer from low commodity prices, and when such prices are present, a farmer must cut back on expenses and allocate and/or concentrate his resources in a manner that maximizes output. This is particularly true when irrigation can only occur when electricity is being paid for, which is what Sid Schvanveldt had to suffer with. This is certainly a viable defense to forfeiture even under a preponderance of the evidence standard. The standard that the Hearing Officer must establish is by clear and convincing evidence that economic considerations are not a defense to forfeiture and in Sid's case, that there is evidence in the record that either (1) electrical costs are not an issue that would deter irrigation activity or (2) that the commodity prices were such at the time for a small-time hay farmer that sufficient profit would occur with the utilization of electricity. There is no such evidence. Indeed, the evidence supports precisely the opposite.

There is ample evidence in the record about the difficulty of irrigating the NWNW of Section 9 as described by ElRay Balls and the testimony of others that the ground in the NWNW is hilly and higher in elevation above the gravel road that runs along its southern border. While anything is possible with unlimited resources, Lee and Jerry Schvaneveldt had limited resources, and it was too much work to continue to haul handlines back and forth on the farm to irrigate the NWNW of Section 9. Those work resources had to be concentrated where they would produce the most benefit for the time expended, and they were concentrated on other, more productive parts of the farm. The testimony of ElRay Balls was correctly summarized by the Hearing Officer:

33. The 55 acres located north of the Anker Ditch (in the NWNW and SWNW of Section 9) were irrigated in the early 1960s, immediately after the Aston Well was completed. Testimony of El Ray Balls. The ground was 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 and Jerry Schvaneveldt 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.*

As further evidence of Aston's defenses to forfeiture, consider the following testimony from Aston (with particular emphasis on certain testimony in bold):³

Disc 1, Section 2: Beginning at 56:20 (RH is Rob Harris, and CA is Clinton Aston)

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 a lot of 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 every time I built pressure, that aluminum pipe was so old and thin, it would pop new holes in the pipe. 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 first 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 the 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. 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 go "Is that bad?" And they said "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 pulled the entire 10-inch column pipe, there's a 3-inch oil tube in the shaft, and a lot of those bearings had wore, but what the big problem was that pipe was so old, the

³ The recording for the hearing was provided to Aston with three CDs, with each CD containing multiple mp3 files. The citations are to the relevant disk and mp3 (denoted as "section"). Some portions of the hearing have been transcribed, but because of the time-consuming nature of transcribing, not all of the hearing has been transcribed.

column pipe, that it had little pinholes in it and that's what was causing the problems. Those little pinholes 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.

...

Disk 2 Section 3 Beginning at 1:04:52: Mr. Spradlin testimony that primary water source for farm is surface water, supplemental supply is ground water, and that Mr. Spradlin **"can't afford to run that pump as much as I would like to."**

...

Disk 2 Section 5 Beginning at 5:50: Kevin Olsen testimony that Sid had **health problems**, and that prior to sale of the NWNW property to Beckstead, Sid and Charlotte **experienced financial difficulty** and could get crops in, approached Kevin about running farm.

...

Disk 2 Section 5 Beginning at 7:15: Kevin Olsen testimony of financial difficult and watering problems on Sid's farm.

...

Disk 3 Section 1 From 26:00-27:06: (RH is Rob Harris, and CA is Clinton Aston):

RH: Do you like spending money on power to pump?

CA: No

In short, relative to the 40 acres associated with the NWNW of Section 9, there is insufficient evidence in the record to support a finding by clear and convincing evidence that economic considerations did not factor into Sid's farming decisions to not farm these acres, and as a result, during the time period that the Hearing Officer found forfeiture, there was no forfeiture because a statutory exemption applied. Further, even if there is not a specific delineation of a defense to forfeiture for farmers because of economic considerations—like miners have—the absence of such a specific exemption does not mean the exemption does not apply as Idaho Code

§ 42-223 did not delineate all forfeiture defenses:

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.

It is important for all non-farmers to remember that there is no guaranteed outcome or profit when it comes to farming. Worrying about irrigating all acres just to cover them to avoid a forfeiture argument is surely not an area of concern for a farmer who is worrying about providing for his wife, children, themselves, their animals, and all others that depend on him or her. Farmers do not choose to not irrigate their properties to get rid of water rights, and that must not be lost on the parties to this proceeding and the Hearing Officer. Findings water right forfeiture is not merely an academic exercise. It is difficult to conclude because property rights are at stake. No wonder the Idaho Supreme Court has clearly held that “forfeitures are disfavored under Idaho law.” In addition to the many challenges associated with farming, the law should not be structured to take away their property rights when there is no economic benefit obtained from irrigating land that does not produce sufficiently or where the water so applied to those lands could be used elsewhere much more efficiently.

In addition to the non-irrigation of the NWNW of Section 9 because of economic considerations, the same analysis applies to the non-irrigation of the 4 acres associated with the Shaun Schvaneveldt property. See *Preliminary Order* at 15-16. When the four acres of land was sold to Shaun in the late 1990s for a home site, just several years prior to Sid’s sale of the farm to Aston, the reduced land for Sid to irrigate allowed Sid to concentrate his resources on his remaining

property where he was even then not fully irrigating the entirety of the 187 acres under 13-4120. Sid managed a marginal farm entirely dependent upon ground water supplied by paying for electricity and not surface water (which serves to be a competitive disadvantage to others who do have surface water). Further, he provided a home site to a person who helped Sid farm even the acres he still irrigated, and even then, not all acres were irrigated like they were after Aston purchased the property. Simply stated, there is insufficient evidence in the record to support a finding by clear and convincing evidence that economic considerations also did not factor into Sid's decision to provide a home parcel to Shaun, and as a result, the 4 acres of 13-4120 upon which Shaun built his home were not forfeited.

Relative to the analysis associated with Shaun's acres, it is also worth noting that counsel for Aston (and others in his law firm) have worked often with IDWR staff to resolve unauthorized water use letters or notices of violation for illegal water use pursued under Idaho Code § 42-1701B. Many of those situations are resolved with realigning the GIS shapefile for the place of use of the water rights to the current irrigation systems on the property. This has even been the case if a prior small parcel has been sold, and that new landowner agrees that the water right should be moved off the property to cover actual irrigated land. This approach is a common-sense approach because it recognizes that water rights can be overlooked in land transactions (where even updating ownership of water rights on IDWR's records can be forgotten). In these instances, the Department did not forfeit a portion of a water right GIS shapefile covering non-irrigated land and simultaneously fine the water user for irrigated acres not covered by a GIS shapefile. There is routinely the need for clean-up, and given this prior experience, it seems unduly harsh to impose a forfeiture on the 4 acres of 13-4120 when the very reason for Aston's filing of 82640 was to rearrange and clean up the GIS shapefile to cover acres under his irrigation systems. *See, e.g.,* In

the matter of Notice of Violation No. E2017-1147 dated May 11, 2017, issued to Widmer Ranch LLC; Unauthorized Water Use No. #2017-1254 in the name of DeLoy and Viola Ward; Unauthorized Water Use E2015-728 in the name of Sunrain Varieties, LLC.

Furthermore, such a finding is contrary to important water law policy considerations. While 82640 is not an adjudication proceeding, 82640 is based on the same concepts of fixing outdated water right information. In the Snake River Basin Adjudication, the shifting of acres was one of the bases for the Idaho Legislature enacting the “accomplished transfer” statute in water right adjudications found at Idaho Code § 42-1425. After specifically referring to changes in place of use, this statute specifically described that it would result in “harsh economic impacts” to the water user and the local economy to not allow these changes to be grandfathered into a water right decree. The statute further describes that it is in the “local public interest” to allow for these clean-up changes to be described by water right decree, as set forth in the following subsection of Idaho Code § 42-1425(b) (with emphasis added):

The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the **local public interest** provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause **significant undue financial impact to a claimant and the local economy**. Approval of the accomplished transfer through the procedure set forth in this section avoids the **harsh economic impacts** that would result from a denial of the claim.

From a policy standpoint, Aston should be held to the same standard in this transfer proceeding as he and others will be subject to if an adjudication of the Bear River drainage occurs. Otherwise, concerns can and will be expressed relative to whether an adjudication will be worth it if that proceeding will simply provide a forum to forfeit water rights in these types

of situations.

No forfeiture of any portion of 13-4120 has occurred under Idaho law. A proponent of forfeiture—either the protestants or the Department in this case—must disprove the defense to a standard of clear and convincing evidence, which means that in disproving the defense, the forfeiture proponent must prove that it is highly probable (or great) that the defense does not apply. This is a difficult standard, one that is just below that of “beyond a reasonable doubt” applied in criminal proceedings. As set forth above, the proponents of forfeiture in this matter cannot establish forfeiture because they cannot disprove certain defenses to forfeiture under Idaho Code § 42-223. For all the above reasons, the Hearing Officer’s forfeiture conclusions relative to 13-4120 should be reversed and the transfer of all of Aston’s 187 acres should be approved.

B. The Hearing Officer Erred By concluding that 16 acres in Section 5 cannot be transferred. For most of the time, it was not necessary to irrigate these 16 acres because sub water and/or waste water provided sufficient water to these acres such that use of diverted ground water would not be applied on the pasture for a beneficial use. But when water was needed because of a lack of sub water and/or waste water, there is sufficient evidence that these acres were irrigated from the Aston well.

The Hearing Officer concluded that the 16 acres in Section 5 could not be transferred because of remaining questions of enlargement. *Preliminary Order* at 16-17. However, there is sufficient evidence in the record for the Hearing Officer to conclude that the 13-4120 acres in Section 5 are valid and transferrable. That evidence shows that (1) most of the time the 16 acres had sufficient sub water and/or wastewater where application of additional water would not be for a beneficial use of Idaho’s water, and (2) there is evidence of a culvert under the road for sprinkler pipe to cross under the road from the Aston well mainline system to irrigate the property when sub water and/or wastewater was insufficient for the pasture.

The purpose of a water right is to put water diverted under the water right to a beneficial use. IDAHO CONST., Art. XV, § 3. Thus, “[t]he appropriation [of water] must be for **some useful**

or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.” Idaho Code § 42-104 (emphasis added). Consequently, a water right is “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.” Idaho Code § 42-222(2).

“Beneficial use is enmeshed in the nature of a water right,” *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 113, 157 P.3d 600, 607 (2007), and is “the basis, the measure and the limit” of a water right, *Id.* at 111, 157 P.3d at 605. “In Idaho it is ‘a well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law.’” *Id.* at 110, 157 P.3d at 604 (quoting *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 60, 231 P. 418, 422 (1924)). Any appropriator of water “**must apply the water to a beneficial use** in order to have a valid water right in Idaho.” *Pioneer*, 144 Idaho at 110, 157 P.3d at 604 (emphasis added). In *Pioneer*, the Idaho Supreme Court made clear that it was the application of water to a beneficial use that creates a valid water right for the irrigator, and that the entity that is merely “diverting, storing, and distributing the water” does not have a water right because it is not applying water to beneficial use. *See Id.* at 111, 157 P.3d at 605. In other words, it is the application to beneficial use—not merely the diversion of water, as the District Court found significant—that sustains a valid water right. *See id.*

For that reason, beneficial use is also enmeshed in the forfeiture analysis. The “doctrine of forfeiture is predicated upon a statutory declaration that all **rights to use water may be lost where an appropriator fails to make beneficial use of the water for a statutory period** regardless of the intent of the appropriator.” *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976) (citations omitted, emphasis added). This principle also applies to partial forfeiture. *See Hagerman Water Right Owners*, 130 Idaho at 735, 947 P.2d at 408. Thus, partial forfeiture of

a water occurs “if **beneficial use** is reduced for the statutory period.” R. at 396 (part of an “Administrator’s Memorandum,” dated March 5, 2012, from IDWR Director relating to forfeiture) (emphasis added).

“The right to appropriate water is for ‘beneficial uses.’” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 811, 252 P.3d 71, 92 (2011) (quoting IDAHO CONST., Art XV, § 3). Irrigation is one such beneficial use. *See, e.g., Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 271, 346 P.3d 286, 288 (2015) (considering the “beneficial use of irrigation”).

Applying more water for irrigation than is necessary is waste, because it is by definition a “use of more water than can be beneficially applied.” Idaho Code § 42-220. A “water user is not entitled to waste water.” *Hagerman*, 130 Idaho at 735, 947 P.2d at 408.

The Hearing Officer stated that it was unclear if the 16 acres are or were previously irrigated with water from the Weston Creek Irrigation Company. *Preliminary Order* at 16. This is not correct. There was testimony at the hearing that Sid and Charlotte did not have rights to surface water (and Charlotte still owns the 16 acres at issue). El Ray Balls testified at Disk 2, Section 5 at 47:45 as follows in response to questions from Jay Fonneseck (JF is Jay Fonneseck and EB is ElRay Balls):

JF: And was the farm you bought, the lower farm, was it considered an irrigated farm?

EB: Yes.

JF: And to make it irrigated what did Lee sell you to, so, you could irrigate the farm that you got [indiscernible] for the lower farm?

EB: **I got all the Weston Creek water** plus 1/4 interest in the well on #2 farm.

(emphasis added).

Furthermore, the president of the Weston Creek Irrigation Company previously was Jay Fonneseck, a protestant to 82640, and he did not assert, state, or explain that there was surface

water associated with the property. To be certain on this issue, and as is permitted in a petition for reconsideration, Charlotte Schvaneveldt has confirmed to Aston that she does not own any such shares. See *Declaration of Clinton Aston* at ¶17.

The 16 acres are or were provided water for use by the pasture grass located thereon with sub water and/or wastewater from the Anker Ditch, which was noted by the Hearing Officer: “There was some testimony that the acres may have been irrigated with surface water in the past, either through direct irrigation or through sub-irrigation from the Anker Ditch.” *Preliminary Order* at 16. With the property irrigated without the artificial application of ground water, it would be a waste to apply more water to the property because no beneficial use would be accomplished. The pasture grass already had sufficient water most of the time. Accordingly, there can be no forfeiture of a water right if there is no need for beneficial use, a conclusion already reached by the Hearing Officer: “One possible defense to forfeiture is that the property has been consistently irrigated with water from another source, such as Weston Creek. **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.**” *Id.* (emphasis added). This is consistent with the legal principles described above.

There is ample evidence in the record that the property is irrigated with sub water or natural occurring spring water. Consider the following:

Disc 2 Section 1 Beginning at 46:20: After testifying that he had not seen the 16 acres in Section 5 irrigated and was not irrigated from the Anker Ditch as far as he knew, Wayne Bingham reviewed aerial photos showing green and growing vegetation, which is evidence of irrigation. Mr. Bingham also testified that this area had flooding occur from the ditch and leakage from the ditch he believed irrigated the property. In questions asked by Jay Fannesbeck, Mr. Fannesbeck indicated his belief that there is a high water table on the 16 acres.

...

Disk 2 Section 3 Beginning at 32:50: Bill Spradlin—one of the protestants who farms directly west of the 16 acres—testimony regarding the land in Section 5 is green because in that area, there is a spring that subs and it has for entire time he has lived there. Most of the area is pretty much a swamp. There is a bunch of willows that grow adjacent to Spradlin's property and there used to be a small pump there to irrigate the property. He concluded by stating that "sub-terranean flow keeps it green most of the year."

...

Declaration of Clinton Aston, Exhibits 4 through 6 (photographs of property at issue):

...

A review of Google Earth Photographs that were reviewed at the hearing, specifically the 2009, 2006, 2004, and 2002 color photos which show much green growing vegetation (as well as the 1998 and 1992 black and white photos that show growing vegetation).

Furthermore, it is Aston's position that when there was not sufficient sub water or waste water from the Anker ditch, and if Sid Schvaneveldt needed pasture grass, he would place mainline under the road and sprinkle irrigate the 16 acres. Shaun Schvaneveldt and others testified of this. The following is testimony of this infrastructure:

Disk 1 Section 4 at 37:22 (HO is hearing officer and SS is Shaun Schvaneveldt):

JC: Do you recall the mainline extending north past the road at the time you started helping?

SS: Over into the pasture?

JC: Yes, to the north of the road.

SS: We did not irrigate that at that point in time, there was mainline left laying around over there in that pasture. I never...

JC: Was there a culvert under the road to get the mainline from south to north?

SS: There was a culvert right here under the road, and then when I moved in, no there actually was a culvert here for the Anker Ditch, and they replaced that shortly after...[Jay Fonnespeck cross-talk made testimony difficult to hear].

...

Disk 1 Section 4 at 38:45 (RH is Rob Harris and SS is Shawn Schvaneveldt):

RH: So, I think you testified from the well, the portable mainline before you built your home would come here and then there was a culvert under the road that would take the mainline over into there?

SS: Correct. Years before, they irrigated that before I started helping with the farm. There was a bunch of old aboveground mainline in that pasture, and we did not use it when I was helping.

RH: I'm looking at this 2002 photo, and it looks like it's pretty green. Do you know how they irrigated that property?

SS: There is surface water in that pasture.^[4]

RH: Okay, so they had surface water they used up there.

...

Disk 1 Section 4 39:25 (RH is Rob Harris and SS is Shawn Schvaneveldt):

RH: And is the culvert still there, or has it been removed?

SS: It's been replaced with a culvert that used to be up by my house. They just did that last year.

RH: They moved the culvert over?

SS: Right.

⁴ The surface water referred to here was the sub-water and/or waste water that provided water to the pasture. As described herein, El Ray Balls obtained all the Weston Creek water for his farm, and Sid and Charlotte obtained no surface water entitlements.

The fact that the 16 acres was not frequently irrigated with ground water from the Aston well makes sense for several reasons. First, because of the prevalence of sub water or spring water, there was usually no need to irrigate the property more because such irrigation would be a waste of water and financial resources to pump water unnecessarily. Second, the application of water would not have accomplished any beneficial use under Idaho law. Third, in terms of prioritization, this parcel was a pasture and was the last parcel irrigated as the alfalfa fields would be the priority—particularly where water was mostly naturally provided for this pasture parcel. The fact that there was infrastructure in place to irrigate the pasture, if necessary, establishes that the water right was perfected for these acres, but the fact that it was not utilized frequently does not automatically effectuate a forfeiture or create other issues with these 16 acres. These acres are valid water right acres.

The Hearing Officer concluded that “[i]f Aston is able to sufficiently address the forfeiture and enlargement concerns associated with the 16 acres in Section 5, he could possibly file a future transfer application proposing to move the 16 acres to the new pivot.” *Preliminary Order* at 17. Based on the foregoing, an additional transfer is unnecessary. Upon reconsideration, there is enough evidence in the record establishing that the 16 acres should be transferred under Idaho law. The Hearing Officer should reverse his decision on this issue and allow the 16 acres in Section 5 to be moved under Aston’s new pivot.

C. In the alternative, in the event the Hearing Officer does not grant this *Petition for Reconsideration* or does not find sufficient evidence in the record to reverse his decision, Aston requests to re-open the hearing for the limited purpose of taking evidence on the matters addressed in this *Petition for Reconsideration* pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure.

In the alternative to the reconsideration sought in this *Petition for Reconsideration*, if the Hearing Officer does not have sufficient evidence in the record to reverse his decision on the

matters requested by Aston, Aston requests a new hearing pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. This rule provides the following:

(3) Further Action After a Non-Jury Trial. On a motion for new trial in an action tried without a jury, the court may open the judgment, if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Idaho Rule of Civil Procedure 59(a)(3). Where the hearing in this matter was tried without a jury, this rule allows the Hearing Officer to “open the judgment ... [and] take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.” *Id.* The Idaho Court of Appeals has concluded “that when a judge is sitting without a jury, he or she may reopen a case to hear additional evidence, prior to final judgment, regardless of the enumerated restrictions in I.R.C.P. 59(a).” *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 991, 993, 812 P.2d 298, 300 (Ct. App. 1990), *aff'd*, 119 Idaho 967, 812 P.2d 274 (1991). This leaves the matter of re-opening the hearing for the limited purpose requested herein to the hearing officer’s discretion. *Id.* To avoid the need for subsequent transfer filings, and in the event the Hearing Officer does not find sufficient evidence in the record to reverse his decision as requested herein, Aston requests that the hearing be re-opened for the narrow purpose of taking evidence and addressing the forfeiture matters and issues with the 16 acres in Section 5 addressed herein.

III. CONCLUSION.

For the reasons set forth above, the Hearing Officer should reverse his findings concerning water right forfeiture of 13-4120 and the 16 acres in Section 5. No water right forfeiture established by clear and convincing evidence has occurred under Idaho Code § 42-222. This statute’s reference to Idaho Code § 42-223 requires the Hearing Officer to analyze defenses to

forfeiture and find that none of them apply by clear and convincing evidence. The Hearing Officer did not engage in that analysis, and for this reason, and all of the other legal and policy considerations described above, should reverse his decision as described in this *Petition for Reconsideration*.

DATED this 15th day of April, 2019.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 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: **PETITION FOR RECONSIDERATION**

ORIGINAL VIA HAND

DELIVERY AND 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

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

Shelly and William Spradlin
6995 W. 2200 S.
Weston, ID 83286

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

Courtesy Copy:
Bob White
7026 W. 2200 S.
Weston, ID 83286

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

Courtesy Copy:
Kevin L. Olson
7806 W. 300 S.
Weston, ID 83286

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

Jay Norman Foncesbeck
6022 W. Hwy 36
Weston, ID 83286

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



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