BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 82640 IN THE NAME OF CLINTON K. ASTON	))))	**PRELIMINARY ORDER APPROVING TRANSFER**

PROCEDURAL HISTORY

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

The parties asked the Department to schedule an administrative hearing to decide the contested case. The Department conducted a hearing on February 26 and 27, 2019, in Preston, Idaho. Aston was represented by attorney Robert Harris. The protestants represented themselves.

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

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

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

Relying on the *Indian Springs* decision, the hearing officer prohibited King Farm from participating in the hearing as a party unless represented by a licensed attorney. Geraldine Gunnell, president of King Farm and non-attorney, was not present at the beginning of the hearing and only attended a portion of the proceedings. Ms. Gunnell was identified as a witness by Fonnesbeck and was allowed to participate in the hearing in that capacity.

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

Exhibits 100, 101, 103, 110-125, 130 and 131 offered by Aston, Exhibit 200 offered by Spradlin and Exhibits 300-303, 310-314, 316, 317, 319, 321, 323, 325, 326, 330, 333, 335, 336, 338 and 342-346 offered by Fonnesbeck were admitted into the administrative record. Exhibits 102 offered by Aston and Exhibits 304-309, 315, 318, 322, 324, 327-329, 334, 337, 339 and 340 offered by Fonnesbeck were excluded from the administrative record. Exhibits 104-109, 126-129, 320, 331, 332 and 341 were not offered or were duplicative of other exhibits. The hearing officer also took official notice of certain documents found within the Department's records. These documents were identified as Exhibits IDWR1 thru IDWR7.

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

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

FINDINGS OF FACT

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

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

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

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

Ownership of Water Right 13-2209

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

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

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

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

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

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

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

10. In the early 1970s, Sidney and Charlotte Schvaneveldt acquired multiple properties from Lee and Naomi Schvaneveldt, including the 87 acres in the NE ¼ of Section 8 covered by water right 13-2209. Ex. 330; Testimony of El Ray Balls.

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

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

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

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

> Whereas the intention of this agreement is to document, record, honor, and defend a verbal agreement executed by our fathers in which they traded to each other their respective share in each well.
>
> As a result of the trade, it was the intention of the respective parties, that Lee Schvanaveldt [sic] would own 100% of the well located in the NW1/4 NE1/4 Section 8 T16S R38E in Franklin County, together with any and all water rights established by or associated with the use of this particular well.
>
> And, Norman and Myron Fonnesbeck would aquire [sic] Lee's share of the well located at the NE corner of the NE1/4 of the NE1/4 Section 36, T15S, R37E in Franklin County, together with any and all water rights established by, appurtenant to the land, or associated with the ownership and use of this particular well.
>
> Further, as a result of the trade and agreement by our Fathers, the use of the well water and water right, as evidenced in License No. 13-2209 and appurtenant to the land owned by said Schvaneveldt in section 8, 10, and 11, T16S, R38E in Franklin County, Idaho, has been transferred to other lands owned by the Fonnesbecks, and to D. Glade Schvaneveldt, a nephew, and the present use needs to be updated and documented with the State of Idaho.

Ex. 325.

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

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

16. The well described in Permit G-29935 (the Aston Well) was completed in 1962. *See* Exs. 113, 310 and 323. Water was diverted from the Aston Well for irrigation use beginning in 1962. *See* Exs. 113, 114, 310 and 323 (all supporting the proposition that irrigation from the Aston Well commenced in the early 1960s); *see also* Exs. 120 and 121 (pump installed on the well described under water right 13-2209, at the same time the pump was installed at the Aston Well, was manufactured in 1962).

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

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

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

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

21. On November 6, 1996, Sidney and Charlotte Schvaneveldt conveyed approximately 35 acres in the NWNW of Section 9 to Jeffrie and Kaye Beckstead through a warranty deed. Ex. 303. The deed did not reserve water right 13-4120 from the conveyance. *Id.*

22. On October 30, 2002, Jeffrie and Kaye Beckstead conveyed the 35-acre parcel in the NWNW of Section 9 to Zayne and Terri Fredrickson through a quit claim deed. Ex. 333. The deed did not reserve water right 13-4120 from the conveyance. *Id.*

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

> We are the owners of the NW1/4 NW1/4 Sec. 9 T16S R38E in Franklin County and are aware that 40 acres of Claimed Water Right 13-4120 are appurtenant to this piece of land.
>
> It is our desire that this portion of this particular water right be transferred to property owned by El Ray and Janice Balls, as it does represent a part of the proportional amount in which they are entitled, as they do own a 25% interest in the well that is the point of diversion for this water right.

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

Ex. 300.

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

25. In 2018, Zayne and Terri Fredrickson conveyed the 35-acre parcel in the NWNW of Section 9 to Farmland Reserve, Inc. ("FRI"), who currently owns the property. Testimony of Zayne Fredrickson.

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

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

Ex. 119. The letter was signed by Warren Peterson, Vice President for the corporation.

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

Validity of Water Right 13-4120

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

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

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

31. Approximately 19 acres of the SWNW of Section 9 were located north of the Anker Ditch. *Id.* Therefore, approximately 55 irrigated acres (36 acres in the NWNW of Section 9 and 19 acres in the SWNW of Section 9) were separated by the Anker Ditch from the remaining acres irrigated under water right 13-4120. *Id.*

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

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.*

34. On May 3, 1965, Myron Fonnesbeck filed an application to amend the irrigation place of use for Permit G-28818 (water right 13-2209). Ex. 338 at 5. The amendment significantly expanded the number of acres authorized for irrigation under the permit and included portions of the Lee Schvaneveldt property. *Id.* However, the amendment did not include any acres in the NWNW or SWNW of Section 9. *Id.*

35. The Department of Reclamation completed a field exam for Permit G-28818 (water right 13-2209) on July 15, 1966. Ex. 302. The examiner did not report any irrigated acres in the NWNW or SWNW of Section 9 under water right 13-2209. *Id.* The map prepared by the examiner did not indicate any irrigation taking place in the NWNW or SWNW of Section 9, even though the examiner's map did show other acres being irrigated on the Lee Schvaneveldt property that were not included in the license for water right 13-2209. *Id.* The acres in the SWNW of Section 9, south of the Anker Ditch, appear to have been irrigated based on the examiners map. *Id.*

36. Brian Balls worked on the Sidney Schvaneveldt farm in the early 1970s. Testimony of Brian Balls. Mr. Balls helped move irrigation pipe across the 19 acres north of the Anker Ditch in the SWNW of Section 9. *Id.* The NWNW of Section 9 was not irrigated in the early 1970s. *Id.*

37. Olson is Charlotte Schvaneveldt's brother and Sidney Schvaneveldt's brother-in-law. Olson helped Sidney Schvaneveldt with various projects on the Schvaneveldt farm between 1976 and 1996. Testimony of Olson. Olson was familiar with the irrigated portion of the farm and visited the farm frequently. *Id.* The 55 acres north of the Anker Ditch (located in the NWNW and SWNW of Section 9) were not irrigated from 1976 to 1996. *Id.*

38. Between 1985 and 1995, 35 acres of the NWNW of Section 9 (the portion currently owned by FRI) was enrolled in the Conservation Reserve Program ("CRP"). Testimony of Aston. The 35 acre parcel was re-enrolled in the CRP between 1997 and 2017. *Id.*

39. Claim 13-4120 describes 16 irrigated acres in Section 5. These acres were originally irrigated by delivering water from the Aston Well through a portable, above-ground mainline to handline sprinklers. Testimony of Shaun Schvaneveldt. The acres in Section 5 have not been irrigated since Aston acquired his property from Sidney and Charlotte Schvaneveldt in 2004. Testimony of Shaun Schvaneveldt, William Spradlin, Wayne Bingham and Aston.

40. Claim 13-4120 is appurtenant to six acres associated with three small parcels located in the northern part of the NWNE of Section 8. Ex. 101. One of these parcels, consisting of approximately two acres, is owned by Charlotte Schvaneveldt and has been consistently irrigated. *Id.* The other two parcels, consisting of approximately four acres, are owned by Shaun Schvaneveldt and have not been irrigated with water from the Aston Well since Shaun Schvaneveldt built a home on the property in 1999. Testimony of Shaun Schvaneveldt.

Point of Diversion Change

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

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

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

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

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

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

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

48. Spradlins own ground water rights 13-8035 (which is a split portion of water right 13-2211) and 13-8036 (which is a split portion of water right 13-2227). Ex. IDWR7 (Herbert Williams rights). Water right 13-8035 bears a priority date of July 1, 1960 and authorizes the diversion of 0.59 cfs and the irrigation of 58 acres. *Id.* Water right 13-8036 bears a priority date of March 30, 1961 and authorizes the diversion of 0.17 cfs and the irrigation of 58 acres. *Id.* In combination, water rights 13-8035 and 13-8036 authorize the diversion of 0.76 cfs (341 gpm).

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

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

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

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

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

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

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

RELEVANT LEGAL PROVISIONS

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

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B,

Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

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

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code.

Idaho Code § 42-223 sets forth certain exceptions and defenses to forfeiture of water rights. Sub-section (1) states:

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.

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

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

Idaho Code § 9-503 states:

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

Idaho Code § 55-901 states:

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

ANALYSIS

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

Fonnesbeck asserts that the irrigation place of use described in the license for water right 13-2209 was incorrect. According to Fonnesbeck, the Lee Schvaneveldt property should not have been included on the license. Fonnesbeck believes the Lee Schvaneveldt portion of water right 13-2209 was traded to the Fonnesbeck family prior to licensing.

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

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

Fonnesbeck argues that he is the owner of Lee Schvaneveldt's portion of water right 13-2209, but has produced no written conveyance from Lee Schvaneveldt to Myron or Norman Fonnesbeck for the water right. The verbal agreement between Lee Schvaneveldt and Norman and Myron Fonnesbeck, attempting to trade water rights, referenced in the 2004 Agreement, is of no effect. Pursuant to Idaho Code § 9-503, real property, including licensed water rights, can only be conveyed in writing, signed by the party making the conveyance. Idaho Code § 55-101; *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983); *Anderson v. Cummings*, 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959).

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

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

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

The 2004 Agreement was signed four months after Sidney and Charlotte Schvaneveldt sold the irrigated farm property to Aston. The Schvaneveldt to Aston Deed did not reserve or exclude water right 13-2209 from the conveyance to Aston. Therefore, a portion of water right 13-2209 was included in the conveyance. The 2004 Agreement does not affect the 81-acre portion of water right 13-2209 appurtenant to the Aston property.

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

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

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

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

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

Aston has demonstrated ownership of water right 13-8026 (an 87-acre portion of water right 13-2209).

Ownership of Water Right 13-4120

The 2004 Schvaneveldt to Aston Deed included an attached bill of sale describing "IDAHO WATER RIGHT NUMBER 13-4120 FOR 2.8 CFS," which constitutes the entire water right. At that time, however, Sidney and Charlotte Schvaneveldt no longer owned the entire place of use described in water right 13-4120. They had already conveyed 35 acres in the NWNW of Section 9 to Jeffrie and Kaye Beckstead in 1996. Water right 13-4120 was not reserved from the conveyance to the Becksteads. Therefore, a portion of water right 13-4120 remained appurtenant to the Beckstead property.

In 2002, Jeffrie and Kay Beckstead conveyed the 35-acre parcel to Zayne and Terri Fredrickson. Fonnesbeck argues that the Fredricksons conveyed their interest in water right 13-4120 to El Ray and Janice Balls through the Fredrickson Letter (signed in April 2005). The Fredrickson Letter does not constitute a conveyance of water right 13-4120 from the Fredricksons to the Balls. The letter merely authorizes the Balls to change the place of use for a 35-acre portion of water right 13-4120. Stated differently, the Fredricksons only granted the "permission to transfer the claimed water right that is appurtenant to [the Fredrickson property]." Ex. 300. They did not convey the water right to the Balls. In 2018, the Fredrickson's sold the 35-acre parcel to FRI. On June 28, 2018, Warrant Peterson, Vice President for FRI, signed a letter disclaiming any interest in water right 13-4120 and consenting to any proposal to move water right 13-4120 off of the FRI property. Ex. 119.

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

The evidence available to the Department at this time supports Aston's ownership of the entirety of water right 13-4120.

Validity of Water Right 13-4120

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

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

The evidence in the record supports the claimed priority date for water right 13-4120 of June 26, 1962. The 187 irrigated acres described in the claim were irrigated in the early 1960s immediately after the Aston Well was completed. Testimony of El Ray Balls. The Aston Well currently produces approximately 1,300 gpm (2.90 cfs). This is consistent with the diversion rate listed by Sidney Schvaneveldt in claim 13-4120 (2.80 cfs). Based on a preponderance of evidence in the record, Lee Schvaneveldt established a beneficial use water right on June 26, 1962 with a diversion rate of 2.80 cfs for the irrigation of 187 acres.

Pursuant to Idaho Code § 42-222(2), a water right, including a beneficial use water right recorded under Idaho Code § 42-243, "shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated . . . ." Forfeiture must be proven by clear and convincing evidence. *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001). "Clear and convincing evidence is generally understood to be evidence indicating that the thing to be proved is highly probable or reasonably certain." *In re Adoption of Doe*, 143 Idaho 188, 191 141 P.3d 1057, 1060 (2006) (quotation marks and citation omitted). A portion of a water right may be lost to forfeiture through non-use, even if the remaining portion of the water right is regularly used. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400 (1997).

The Idaho Supreme Court has recognized that a water right, or a portion thereof, that has undergone a period of more than five years of non-use, may still avoid forfeiture if the water right holder resumes use under the water right prior to a third party making a claim of right for the unused water. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003). The resumption of use must occur on the lands to which the water right was appurtenant. *Id.*, 138 Idaho at 842, 70 P.3d at 680.

Acres in Section 9

The protestants argue that the irrigated acres north of the now-abandoned Anker Ditch in Section 9 have been lost and forfeited through non-use. Approximately 55 acres are located north of the Anker Ditch path. *See* Ex. 111 (Amended Claim 13-4120); Ex. 301 (map). The 55 acres north of the Anker Ditch were not included in the amendment for water right 13-2209, filed in May 1965, suggesting that the acres were not irrigated at that time. According to a field exam map, the 55 acres north of the Anker Ditch were not irrigated in 1966 at the time a field exam was completed for water right 13-2209. Water right 13-4120 was not used to irrigate any acres in Section 9 north of the Anker Ditch from 1976 to 1996. Olson's testimony on the question of historical irrigation was persuasive. Olson was familiar with the property, frequently visited the property during this time period, and never observed any irrigation in Section 9 north of the Anker Ditch. The testimony of Olson constitutes clear and convincing evidence of non-use between 1976 and 1996. In other words, it is highly probable that the acres in Section 9 north of the Anker Ditch were not irrigated between 1976 and 1996.

Although 36 acres in the NWNW of Section 9 were enrolled in the CRP program from 1985 to 1995 and from 1997 to 2017, enrollment in the CRP program does not overcome the nine or more years of non-use occurring prior to 1985.

Aston has not resumed the use of water right 13-4120 in the NWNW of Section 9. Because most of the ground is now owned by FRI, which disclaims any interest in the right, it seems unlikely that irrigation under water right 13-4120 can ever be resumed in the NWNW of Section 9. The 36 irrigated acres located in the NWNW of Section 9 have been lost and forfeited through non-use.

Aston has resumed irrigation of the 19 acres in the SWNW of Section 9. This resumption occurred sometime after Aston purchased the property in 2004. Applying the resumption of use doctrine in the context of ground water irrigation rights is challenging. Unlike surface water rights, it is not easy to determine whether other ground water rights, initiated after the non-use of the subject water right, are now relying on the unused ground water. Ground water rights in the Weston Creek drainage have never been curtailed based on priority. If Aston were allowed to continue to irrigate the 19 acres in the SWNW of Section 9, where the use was resumed, it would not result in the immediate curtailment of any junior ground water rights. Therefore, the hearing officer recognizes resumption of use as a valid defense to forfeiture for the non-use in the SWNW of Section 9, regardless of the duration of non-use occurring between 1962 and the present day.

Shaun Schvaneveldt Acres

Shaun Schvaneveldt owns two small parcels (combined area of approximately four acres), which were included in the irrigation place of use described in amended claim 13-4120. He purchased his property in the late 1990s and began construction on his home in 1999. The portable mainline from the Aston Well was moved off of his property at that time. Water from the Aston Well has not been used to irrigate the Shaun Schvaneveldt property for at least 18 years.

The testimony of Shaun Schvaneveldt, the property owner through that entire time period, constitutes clear and convincing evidence of non-use. The 2019 Correction Quit Claim Deed from

Schvaneveldt to Aston does not resolve the forfeiture issue because the non-use occurred prior to the execution of the quit claim deed. The four irrigated acres associated with the Shaun Schvaneveldt property have been lost and forfeited through non-use.

Acres in Section 5

Water right 13-4120 currently describes 16 irrigated acres in Section 5. Protestants argue that the 16 irrigated acres in Section 5 have been lost and forfeited through non-use. The testimonial evidence presented about the acres in Section 5 was vague and, in some cases, contradictory. Shaun Schvaneveldt testified that mainline could be extended from the Aston Well, under the road, to the acres in Section 5 and that he had seen irrigation pipe scattered around on the acres in Section 5. However, he has never seen the acres irrigated from the well. Aston has not personally irrigated the acres in Section 5.

Shaun Schvaneveldt also testified that the acres in Section 5 had been irrigated from the Anker Ditch with water from Weston Creek Irrigation Company. Wayne Bingham, who was a director on the Anker Ditch for 20 years and was familiar with the diversions from the ditch, testified that there is no headgate on the Anker Ditch to serve the acres in Section 5 and that has never seen the acres irrigated with surface water. William Spradlin, who has performed ditch maintenance on the Anker Ditch over the last 23 years, has not seen the acres in Section 5 irrigated with surface water or ground water. Mr. Spradlin testified that portions of the ground stay green all summer because of sub-water from the Anker Ditch. Aston does not own any of the acres in Section 5 and did not provide any information about the existence of surface water shares on the property or historical irrigation practices.

The Department does not have enough information at this time to determine whether the 16 acres located in Section 5 are still valid. There was no evidence presented that the acres in Section 5 have ever been enrolled in a crop set-aside program. Although there was circumstantial evidence that the acres had been irrigated from the well at one time (irrigation pipe scattered across the property), there was no evidence presented about when the acres were last irrigated. If the acres were last irrigated prior to 2004, when Aston purchased his property from Sidney and Charlotte Schvaneveldt, the acres have likely been lost to forfeiture by non-use.

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 with water from another source. 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. It is unclear whether the property has ever been irrigated with water from Weston Creek Irrigation Company. It is also unclear whether there are shares in Weston Creek Irrigation Company associated with the property. Given the uncertainties regarding surface water use on the acres in Section 5, the Department does not have clear and convincing evidence of forfeiture at this time.

If there are surface water rights associated with the acres in Section 5, Aston's proposal to separate ground water right 13-4120 from the surface water rights could result in an enlargement in total beneficial use under the water rights. The Applicant has not provided enough information

about the acres in Section 5 to sufficiently evaluate the question of enlargement. Therefore, the acres in Section 5 cannot be transferred at this time.

Summary of Irrigated Acres

Water right claim 13-4120 described 187 irrigated acres. The 87 acres associated with water right 13-8026 are located within the 187 acre place of use for water right 13-4120. In combination, the water rights describe 187 irrigated acres. Of these 187 acres, 40 acres have been lost and forfeited through non-use (36 acres in the NWNW of Section 9 and four acres on the Shaun Schvaneveldt property in the NWNE of Section 8). In addition, there is not enough information available to the Department at this time to authorize the transfer of the 16 acres located in Section 5. Therefore, water right 13-4120 should be limited to 147 irrigated acres, with only 131 acres available for transfer in the pending application. In addition, four acres of water right 13-8026 have been lost and forfeited for the non-use on the Shaun Schvaneveldt property. Water right 13-8026 will be limited to a diversion rate of 0.62 cfs and 83 irrigated acres. Water rights 13-4120 and 13-8026, in combination will be limited to 131 irrigated acres on Aston's property. 16 acres of water right 13-4120 will remain in Section 5, on property not owned by Aston.

According to the map filed with Application 82640, Aston was irrigating approximately 125 acres in Section 8 and the SWNW and SENW of Section 9 in 2013. Application 82640 proposed to rearrange the place of use for Aston's water rights to cover the acres irrigated in 2013 and to include a new pivot, covering approximately 62 acres, in the SW ¼ of Section 9. Only six acres of the new pivot will be authorized through Transfer 82640. If 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.

Validity of Water Right 13-2209

Four acres of water right 13-8026 are appurtenant to two parcels currently owned by Shaun Schvaneveldt. As described above, the acres associated with the Shaun Schvaneveldt have not been irrigated for at least 18 years. The four acres of water right 13-8026 appurtenant to the Shaun Schvaneveldt property have been lost and forfeited through non-use. Water right 13-8026 will be reduced to 83 irrigated acres and a diversion rate of 0.62 cfs. The authorized diversion rate for water right 13-8026 (0.62 cfs) need not be reduced because it is still less than the standard diversion rate of one miner's inch per acre (0.02 cfs per acre). *See* Idaho Code § 42-202(6).

Ownership of Aston Well

Aston has an ownership interest in the Aston Well. It is located on the Aston property. Although there was some evidence presented suggesting that El Ray Balls may also have an interest in the Aston Well, that issue is not determinative to the pending contested case. The question of whether Mr. Balls has an ownership interest in the Aston Well must be decided in some other forum. The Department does not have the authority to confirm Mr. Balls's ownership interest in the Aston Well or in any of the infrastructure associated with the well.

Injury to Existing Water Rights

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

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

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

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

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

The transfer approval will not result in a diversion rate that is significantly different than has been historically pumped from the Aston Well. Aston testified that the system produced approximately 1,300 gpm (2.90 cfs) when he purchased the well in 2004. As noted above, water rights 13-4120 and 13-8026, in combination, will be limited to 147 irrigated acres. Consequently, the water rights, in combination, must be limited to 2.94 cfs (0.02 cfs/acre).

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

Prior to Application 82640, water right 13-4120 authorized the diversion of 2.80 cfs. As approved, Transfer 82640 limits water rights 13-4120 and 13-8026 to a combined diversion rate of 2.94 cfs. The additional 0.14 cfs authorized for diversion from the Aston Well through Transfer 82640 is negligible when compared to the 2.80 cfs that was authorized to be diverted from the well prior to the transfer. This amount only equates to a five percent increase over the diversion rate previously authorized to be diverted from the Aston Well under water right 13-4120. Further, this amount only equates to a one percent increase over the 2.90 cfs which has been diverted from the Aston Well since at least 2004.

As noted above, the Spradlin irrigation well has a specific capacity of 18 gpm/ft. This means that for every additional 18 gpm diverted at the Spradlin irrigation well, there would be approximately one foot of additional drawdown within the well. If the Aston Well were to have a similar specific capacity (18 gpm/ft), diverting an additional 0.14 cfs (63 gpm) at the Aston Well would result in an additional 3.5 feet of drawdown within the Aston Well. The amount of drawdown experienced at the Spradlin irrigation well, as a result of diverting an additional 0.14 cfs at the Aston Well for 88 days continuously, would be far less than 3.5 feet. See Ex. 123 at 16 (after 88 days, the potential drawdown at the Spradlin irrigation well is only one-tenth of the drawdown in the Aston Well). Diverting an additional 0.14 cfs from the Aston well will not violate the reasonable pumping level standard set forth in Idaho Code § 42-226.

Although Spradlins own a domestic well that was in existence prior to the 1978 amendment of Idaho Code § 42-226, the Spradlins did not raise any arguments under the legal doctrines established in *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). It is unlikely that Spradlins would be successful in claiming absolute pumping levels for their domestic well under a *Parker v. Wallentine* analysis. According to Shelly Spradlin, they have never had problems obtaining an adequate quantity of water for domestic use from their domestic well.

Fonnesbecks also assert that diversion from the Aston Well diminishes the water levels in their domestic well. The Fonnesbeck domestic well is only 25 feet deep. The Fonnesbeck domestic well is located much farther away from the Aston Well than is the Spradlin wells, over one mile to the southeast. The City of Weston diverts ground water from two wells located directly between the Aston Well and the Fonnesbeck domestic well. In recent years, Fonnesbecks domestic well has run dry during the winter months. The Aston Well only diverts water for irrigation and does not operate during the winter months. The City of Weston wells, on the other hand, divert water for municipal use and operate throughout the entire year.

If the Fonnesbeck domestic well is being impacted by existing diversions, the proper forum to evaluate impact would be a delivery call. A delivery call would include other ground water users in the basin (such as the City of Weston), who are not parties to the pending contested case. Idaho Code § 42-222(1) does not require the Department to evaluate existing well interference under existing water rights, but only to evaluate whether the proposed change would injure other water rights. As noted above, the transfer approval will only result in the authority to divert an additional 0.14 cfs above and beyond the water rights currently associated with the Aston Well. Diverting an additional 0.14 cfs from the Aston Well will not violate the reasonable pumping level standard set forth in Idaho Code § 42-226.

Enlargement

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

As described above, the transfer approval will be limited to 131 irrigated acres on the Aston property. 16 acres of water right 13-4120 will remain in Section 5, on property not currently owned by Aston. According to aerial photos, approximately 131 acres have been irrigated on the Aston property in recent years. See Ex. IDWR1 (transfer map). Approval of this transfer will not result in the enlargement of use under water rights 13-4120, 13-2209 or 13-8026.

Conservation of Water Resources

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

Local Public Interest

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

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

The testimony offered at hearing confirms that there has been a long-standing dispute about the ownership of water rights 13-2209 and 13-4120 for years. Testimony of Sharalyn Fonnesbeck, Jay Fonnesbeck, El Ray Balls and Shelly Spradlin. This transfer addresses the ownership of an 87-acre portion of water right 13-2209 and settles all ownership questions related to water right 13-4120. Further, the transfer clearly defines the place of use for a 131-acre portion of water right 13-4120. This transfer approval brings additional certainty and finality to some of the water rights in the basin and is, therefore, in the local public interest.

CONCLUSIONS OF LAW

A 40-acre portion of water right 13-4120 has been lost and forfeited by non-use. A four-acre portion of water right 13-8026 has also been lost and forfeited by non-use. Further, Aston has not sufficiently addressed questions regarding the historical use or the overlap with surface water rights for a 16-acre portion of water right 13-4120. Therefore, the 16-acre portion will be excluded from the transfer and will remain at its existing location. For the remainder of the application, Aston has satisfied all of the elements of review under Idaho Code § 42-222(1). To prevent

enlargement, water rights 13-4120 and 13-8026 will be limited to the irrigation of 131 acres within Section 8 and 9 and will carry an overall combined diversion rate of 2.94 cfs.

ORDER

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

Dated this 1st day of April 2019.

James Cefalo
Water Resource Program Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April 2019, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

Document Served: Preliminary Order Approving Transfer (82640)

Clinton Aston
PO Box 35
Weston, ID 83286

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

Jay Fonnesbeck
6022 West Highway 36
Weston, ID 83286

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

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

Courtesy Copy sent via standard US Mail:

Kevin Olson
7806 West 300 South
Weston, ID 83286

Bob White
7026 West 2200 South
Weston, ID 83286

Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

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

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

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

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

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

ORAL ARGUMENT

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

CERTIFICATE OF SERVICE

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

FINAL ORDER

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

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

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.