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Department of Water Resources
Eastern Region

Attorneys for Grouse Creek Reserve, LLC

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

IN THE MATTER OF APPLICATION
FOR TRANSFER 84788 IN THE NAME
OF GROUSE CREEK RESERVE, LLC

**GROUSE CREEK RESERVE'S MOTION
FOR SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT**

Grouse Creek Reserve, LLC ("GCR" or the "Applicant"), by and through its counsel, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby moves for summary judgment and submits this *Grouse Creek Reserve's Motion for Summary Judgment and Memorandum in Support* pursuant to the *Notice of Hearing and Scheduling Order; Order Authorizing Discovery* dated July 19, 2021 (the "Procedural Order"). This motion is supported by the *Declaration of Robert L. Harris* (the "Harris Declaration") and *Notice of Deemed Admissions* submitted with this pleading.

The *Procedural Order* provides that dispositive motions must be filed on or before September 10, 2021. This motion for summary judgment is a dispositive motion and is therefore timely filed. The motion and associated memorandum concern the above-described contested case associated with Transfer No. 84788 (the "Transfer" or "84788") before the Idaho Department of Water Resources ("IDWR" or "Department"). Department employee James Cefalo is the designated hearing officer (the "Hearing Officer"). The Transfer was protested by Ron Hansen,

Dennis Craig, Gary Hansen, Kyle Hansen, and Rodney Barnes (collectively the “Protestants”), all of whom are *pro se* in this matter.

GCR hereby moves for summary judgment on each of the legal issues associated with a contested water right transfer, which are described in the following portion of the notice provided to the parties to 84788:

**PRE-HEARING CONFERENCE AND/OR HEARING PROCEDURE
APPLICATION FOR TRANSFER**

ISSUES

Applications for transfer are filed for the purpose of changing a point of diversion, purpose of use, period of use or nature of use of all or part of a licensed, decreed or statutory water right. Section 42-222, Idaho Code, identifies the following potential issues that the department can consider in connection with an application for transfer:

1. Will the proposed transfer reduce the quantity of water under existing Water Rights?
2. Will the proposed transfer constitute an enlargement in use of the original right?
3. Will the proposed transfer be contrary to the conservation of water resources within the State of Idaho?
4. Will the proposed transfer conflict with the local public interest, where local public interest is defined as interests that the people in the area directly affected by a proposed water use and its potential effects on the public water source?
5. Will the proposed transfer 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?
6. If the proposed transfer is for a municipal use, is it necessary to provide reasonably anticipated future needs for a municipal service area and is the planning horizon consistent with Sections 42-222 and 42-202B, Idaho Code?
7. Will the proposed transfer change the nature of use from an agricultural use, and would such a change significantly affect the agricultural base of the local area?

In all legal proceedings in Idaho, *pro se* litigants are held to the same standard as licensed attorneys. “Pro se litigants are not entitled to special consideration or leniency because they represent themselves. To the contrary, it is well-established that courts will apply the same standards and rules whether or not a party is represented by an attorney and that pro se litigants

must follow the same rules, including the rules of procedure.” *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 322, 297 P.3d 1134, 1139 (2013) (citations omitted). As recently as 2017, the Idaho Supreme Court has reiterated:

Idaho courts have long held that: Pro se litigants are held to the same standards and rules as those represented by an attorney. Pro se litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules.

Greenfield v. Smith, 162 Idaho 246, 253, 395 P.3d 1279, 1286 (2017) (citations and quotation marks omitted).

While there is no specific rule in the Department’s procedural rules concerning summary judgment, IDAPA 37.01.01.260 (as a “motion”) and 37.01.01.565 (as a “prehearing motion”) are broad enough to cover summary judgment motions.¹ The Hearing Officer “must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Idaho Rule of Civil Procedure 56(a). In considering a summary judgment motion:

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. [The] Court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party’s favor. If there is no genuine issue of material fact, only a question of law remains.

Davison v. Debest Plumbing, Inc., 163 Idaho 571, 574–75, 416 P.3d 943, 946–47 (2018) (citations and internal quotation marks omitted). While the nonmoving party is entitled to all contested facts

¹ Concerning motions for summary judgment filed before the Department, the Department has received, considered, and ruled on them in prior administrative cases. For example, in a contested case involving Application for Permit No. 37-22852 filed by Innovative Mitigation Solutions LLC, a protestant filed a motion for summary judgment requesting dismissal of the application because the applicant had not provided a lease evidencing authority to use a canal for ground water recharge. Applying case law and Rule 56(c) of the Idaho Rules of Civil Procedure, the hearing officer granted the motion and rejected 37-22852 without a hearing. *Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852*, Hearing Officer Mathew Weaver, May 26, 2015.

and every reasonable inference, it “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial.” *Path to Health, LLP v. Long*, 161 Idaho 50, 54, 383 P.3d 1220, 1224 (2016) (footnote, citation, and quotation marks omitted).

For the reasons set forth below, summary judgment on all seven issues in favor of GCR is appropriate and Transfer No. 84788 should be approved without the need to proceed to hearing which will require additional time and resources of the parties and Department.

I. ARGUMENT.

A. As a matter of law, several of the transfer criteria under Idaho Code § 42-222 are inapplicable to the Transfer.

As described above, there are seven criteria under Idaho Code § 42-222, all of which are matters that the Applicant has the burden to prove at hearing (except for the local public interest, where both the applicant and any protestants share the burden of establishing). As a matter of law, matters 5, 6, and 7 are inapplicable in this matter, and summary judgment on them must be granted.

Matters 5-7 are:

5. Will the proposed transfer 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?
6. If the proposed transfer is for a municipal use, is it necessary to provide reasonably anticipated future needs for a municipal service area and is the planning horizon consistent with Sections 42-222 and 42-202B, Idaho Code?
7. Will the proposed transfer change the nature of use from an agricultural use, and would such a change significantly affect the agricultural base of the local area?

The Transfer application is clear that it does not involve water rights “where the place of use is outside of the watershed or local area where the source of water originates.” Nor is the Transfer “for a municipal use.” And the Transfer does not propose to “change the nature of use

from an agricultural use.” Accordingly, matters 5-7 are not implicated in any way in this matter, and the Hearing Officer must grant summary judgment on these matters.

B. The Protestants have admitted as a matter of law that the transfer meets the applicable criteria associated with the Transfer under Idaho Code § 42-222.

The Department’s procedural rules authorize use of the same discovery procedures found in the Idaho Rules of Civil Procedure to propound “[p]roduction requests or written interrogatories and requests for admission”. IDAPA 37.01.01.524. Discovery serves important purposes as it allows the parties to request and receive information to prepare for a hearing. It also provides the opportunity to narrow the issues at hearing. Legal proceedings are intended to be orderly, and not a trial by ambush.

In this matter, the Protestants were each served with discovery requests on July 30, 2021, with responses due on or before 30 days of service of the discovery requests, or Monday, August 30, 2021.² See *Notice of Discovery Requests*, July 30, 2021 (previously filed in this matter); See also *Harris Declaration* ¶4. The discovery requests are attached to the *Declaration of Robert L. Harris*, and they include interrogatories, requests for production of documents, and requests for admission. *Id.* None of Protestants submitted responses to any of these discovery requests as of September 10, 2021, the deadline for dispositive motions in this matter. *Id.* ¶7.

Specific to requests for admission, under Rule 36 of the Idaho Rules of Civil Procedure, “[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.” Idaho R. Civ. P. 36(a)(4). Rule 36 further provides:

² Thirty (30) days from July 30, 2021 is August 29, 2021, but because that day falls on a Sunday, by rule, the deadline is moved to the next business day, in this case, August 30, 2021. IDAPA 37.01.01.056.

A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. The court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.

Idaho R. Civ. P. 36(b) (emphasis added).

Among other matters, the requests for admission are specific to matters 1, 2, 3, and 4 set forth above, which are:

1. Will the proposed transfer reduce the quantity of water under existing Water Rights?
2. Will the proposed transfer constitute an enlargement in use of the original right?
3. Will the proposed transfer be contrary to the conservation of water resources within the State of Idaho?
4. Will the proposed transfer conflict with the local public interest, where local public interest is defined as interests that the people in the area directly affected by a proposed water use and its potential effects on the public water source?

As set forth in the *Notice of Deemed Admissions*, each of the Protestants were asked (1) to admit that they were not the owner of any water rights that can be affected or injured by the Transfer or that the Protestant is not authorized to divert water at the North Creek Canal heading; (2) to admit that the Transfer will not allow for an enlargement, as described under Idaho Code § 42-222; (3) to admit that the Transfer is consistent with the conservation of water resources within the state of Idaho, as described under Idaho Code § 42-222; and (4) admit that the Transfer is in the local public interest, as described under Idaho Code § 42-222. *See Notice of Deemed Admissions* at 1-3.

These requests for admission remain unanswered, and are therefore admitted under I.R.C.P. 36—in the words of the rule, “[a] matter admitted under this rule is conclusively established . . .” Accordingly, the Hearing Officer must grant summary judgment on matters 1-4, with one caveat. Despite the lack of responses, GCR represented in the expert report submitted in

this matter, and maintains here, that 0.37 cfs should be left in the original conveyance system to alleviate any possible impact or injury to any other water user on the Hubbard Ditch. *Supporting Data and Analysis of Transfer No. 84788*, Rocky Mountain Environmental Associates, Inc., August 27, 2021, at 3, 9. Should the hearing officer grant summary judgment, the order approving the Transfer should include a condition to this effect.

Finally, as to any other water rights that may be injured by this transfer, no other water user on North Leigh Creek or any streams it is tributary to will be injured because the point of diversion from North Leigh Creek will not change under the Transfer. As to water users on the North Leigh Canal and/or Hubbard Ditch, including the Protestants, there are no water users with legal bases to assert injury to their water rights as they have now admitted they will not be injured. Further, a water user cannot be forced to use an inefficient system instead of an efficient one once the water is diverted from a natural source, and it is entirely within the property rights of a water user to exercise his or her right to use a delivery system best for the user *even if* there may be an effect on others. The Idaho Supreme Court has explained:

Generally, “every man may regulate, improve, and control his own property, may make such erections as his own judgment, taste, or interest may suggest, and be master of his own without dictation or interference by his neighbors, so long as the use to which he devotes his property is not in violation of the rights of others, however much damage they may sustain therefrom.”

McVicars v. Christensen, 156 Idaho 58, 62, 320 P.3d 948, 952 (2014), as corrected (Feb. 20, 2014) (quoting *White v. Bernhart*, 41 Idaho 665, 669–70, 241 P. 367, 368 (1925)).

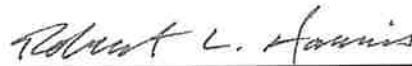
Finally, as to the use of the Grouse Creek channel for delivery of water diverted under GCR’s water rights described in the Transfer, Idaho Code § 42-105 is clear that natural waterways can be used to convey water diverted under a water right for delivery to an authorized place of use without a formal change—a transfer—of the water right to add points of injection or redirection

to the face of the water right.³ Indeed, there are already water rights that use the Grouse Creek channel as part of their delivery. See Water Right Nos. 22-238A, 22-459A, and 22-459B. And because IDWR has inherent authority to regulate the use of natural channels and require measurement and reporting under chapter 6 of title 42 of the Idaho Code, existing Grouse Creek water users will be protected from any injury from use of the Grouse Creek channel by GCR. For all these reasons, as a matter of law, there will be no injury to any existing water rights and summary judgment in GCR's favor must be granted on matters 1-4 described above.

II. CONCLUSION

For the reasons set forth above, summary judgment must be granted in GCR's favor on all 7 matters evaluated in a contested transfer application. Upon grant of summary judgment, the Hearing Officer should issue a preliminary order approving the Transfer with a condition consistent with GCR's expert report submitted in this matter that 0.37 cfs should be left in the original conveyance system (along with any other standard IDWR conditions).

Dated this 10th day of September, 2021.



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

³ Current IDWR policy is that a transfer is not required to add points of injection or redirection to a water right, and that a request to add such points to a water right where no points of injection or redirection are described is optional. GCR reserves the right to withdraw the Transfer if its motion for summary judgment is denied.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2021, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: GROUSE CREEK RESERVE'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

ORIGINAL TO: James Cefalo
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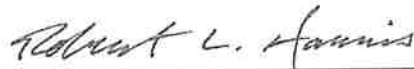
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