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WATER RESOURCES
WESTERN REGION

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Attorneys for Eckhardt Family LLLP

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 67-15333 IN THE NAME
OF DOUBLE C&J LAND CO.

**ECKHARDT FAMILY LLLP'S MOTION
FOR SUMMARY JUDGMENT**

Pursuant to the Hearing Officer's *Amended Notice of Hearing and Amended Scheduling Order*, dated May 19, 2020; the Idaho Department of Water Resources ("Department") Rules of Procedure 260 and 565, IDAPA 37.01.01.260 and 37.01.01.565; and Idaho Rule of Civil Procedure ("I.R.C.P.") 56, Eckhardt Family LLLP ("Eckhardt"), by and through its undersigned counsel, hereby submits this motion for summary judgment, requesting that the above-captioned application be denied as made for delay or speculative purposes and not made in good faith under Idaho Code ("I.C.") § 42-203A(5)(c) and Rule 45.01.c. of the Department's Water Appropriation Rules, IDAPA 37.03.08.45.01.c. By filing this motion, Eckhardt does not waive any additional grounds for denial of the application.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On October 23, 2019, Double C & J Land Co., Inc, through its President John D. Hoff (“Hoff”), filed its completed application for water permit No. 67-15333 (“Application”).
See Declaration of Cheri Moore (“Decl. of Moore”), Ex. A.
2. The Application seeks the use of 345 acre-feet per year of water from Jenkins Creek to fill Monroe Reservoir (“Reservoir”). Decl. of Moore, Ex. A.
3. The Application acknowledges that the Reservoir is located on property that is separately owned by Eckhardt and the Bureau of Land Management (“BLM”). The Application erroneously represents that an “existing easement” enables Hoff—as a party that does not own the applicable land—to file the Application. Decl. of Moore, Ex. A. Both the BLM protest on file in this matter and Eckhardt’s expert report confirm that Maddox Bar Ex Ranch Limited Partnership also owns private land occupied by Monroe Reservoir. Decl. of Moore, Ex. C at 5.
4. Although for purposes of the present motion, Eckhardt acknowledges that Hoff has a limited easement to divert and store water from *Monroe Creek* in the Monroe Reservoir, the easement does not, and never has, authorized Hoff to divert and store water from *Jenkins Creek* in Monroe Reservoir. Decl. of Moore, at ¶ 5; *Id.*, Ex. C at 5.
5. The easement also has never authorized Hoff to divert water into the Monroe Reservoir on a year-round basis. Decl. of Moore, Ex. D (Eckhardt Expert Rebuttal Report).
6. Eckhardt will not extend the scope of the easement to include the right to store Jenkins Creek water. Decl. of Moore at ¶ 7.
7. Based on this and other issues with the Application, Eckhardt filed a timely protest to the Application on November 18, 2019. Decl. of Moore, Ex. B.

LEGAL STANDARD

Rule 565 of the Department's Rules of Procedure authorizes the filing of pre-hearing motions. IDAPA 37.01.01.565. By implication, the rule permits motions for summary judgment. "[T]he Department relies on the standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment." *In the Matter of Sylte's Petition for Declaratory Ruling Regarding Distribution of Water to Water Right No. 95-0734*, Dkt. No. P-DR-2017-001, Order on Motions for Summary Judgment at 3 (September 6, 2017). "A motion for summary judgment may be granted if a hearing officer determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.*; *see also* Rule 56, I.R.C.P. The evidence must be viewed in the light most favorable to the non-moving party. *Berrett v. Clark Cty. Sch. Dist. No. 161*, 165 Idaho 913, 454 P.3d 555, 567 (2019). And credibility findings cannot be made at the summary judgment stage. *Hilliard v. Murphy Land Co., LLC*, 158 Idaho 737, 742, 351 P.3d 1195, 1200 (2015). However, only *reasonable* inferences should be drawn in favor of the non-moving party. *Taft v. Jumbo Foods, Inc.*, 155 Idaho 511, 514–15 (2013).

ARGUMENT

The Hearing Officer "may reject [an] application" if, among other things, "it appears to the satisfaction of the director that such application is *not made in good faith*, [or] *is made for delay or speculative purposes*." I.C. § 42-203A(5)(c) (emphasis added). The Idaho Supreme Court has declared that "an application for a water permit with no possessory right in the land designated as the place of use amount[s] to speculation in and of itself." *Lemmon v. Hardy*, 95 Idaho 778, 781, 519 P.2d 1168, 1171 (1974); *see also*, Rule 45.01.c of the Department's Water Appropriation Rules (IDAPA 37.03.08) (requiring that the applicant "have legal access to the property necessary to

construct and operate the proposed project” and that “[t]here are no obvious impediments” to the proposed use).

Here, Hoff has filed an Application that is entirely speculative. Under the undisputed facts, Hoff has no possessory right in the proposed place of use for storage purposes in the Application, and he has no reasonable hope of ever acquiring such an interest. *See* Decl. of Moore at ¶ 7. The Application seeks to store Jenkins Creek water in the Monroe Reservoir—which sits in part on Eckhardt’s property. *See* Decl. of Moore, Ex. A. Hoff has a limited easement to use Eckhardt’s property. But the easement is for the storage of *Monroe Creek* water on Eckhardt property, not for *Jenkins Creek* water. *See* Decl. of Moore at ¶ 5, Ex. C. Hoff’s expert report and rebuttal report relies entirely on the existing easement. *See* Decl. of Moore, Exs. F & G.

Hoff cannot rely on his current easement to use Eckhardt property to support the Application because the proposed use unlawfully seeks to enlarge the easement—both in adding an additional source of water storage and by significantly lengthening the season during which water may be diverted into the Monroe Reservoir. *See Conley v. Whittlesey*, 133 Idaho 265, 271, 985 P.2d 1127, 1133 (1999) (“The use of an easement may not be enlarged to the injury of the servient estate.”). Here, not only does Hoff’s Application seek to add a new source of water to be stored to the existing easement, it also seeks to “vastly increas[e] the time in which water can be diverted to storage.” *See* Decl. of Moore, Ex. D. After all, Hoff’s Application “proposes to divert water from Jenkins Creek on a year-round basis,” whereas Hoff’s existing water right “authorizes diversion to storage [only] from November 15 to March 15 . . . and does not authorize diversion to storage between March 16 to November 14.” *Id.*; *see also* Decl. of Moore, Ex. E.

That Hoff cannot rely on the current easement is fatal to his cause, as Eckhardt will not grant Hoff an expanded easement on Eckhardt property. *See* Decl. of Moore at ¶ 7. Consequently, Hoff’s

Application is speculative, *Lemmon*, 95 Idaho at 781, and the Hearing Officer should summarily deny Hoff's Application. *See* I.C. § 42-203A(5)(c) and IDAPA 37.03.08.45.01.c.

The expert reports provided by Hoff in support of the Application do not change this conclusion. *See* Decl. of Moore, Exs. F and G (Hoff Expert Reports). The original expert report first concedes that Hoff has never possessed documented permission to store *Jenkins Creek* water on Eckhardt property. Decl. of Moore, Ex. F at 2. The report attempts to overcome this malady by asserting that Hoff and his predecessor have been storing water in the Monroe Reservoir "for about 100 years" under Water Right No. 67-2044. *Id.* The report asserts it is simply an "error" that the right does not refer to Jenkins Creek. *Id.* But a final decree for the water right was issued in 2008, with no right to Jenkins Creek included. Decl. of Moore, Ex. E (Water Right Report). While Hoff's expert asserts that the omission of Jenkins Creek was merely a "technical omission," he concedes that "[b]y the time this error was discovered, the SRBA did not allow for the correction of this routine type of omission." Decl. of Moore, Ex. F at 3.

That the final decree for Water Right No. 67-2044 references only Monroe Creek conclusively defeats Hoff's assertion. After all, a water decree is "conclusive as to the nature and extent of [the] water rights." I.C. § 42-1420; *see also State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) ("Finality in water rights is essential. . . . An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property."). The terms of the decree are not ambiguous, as it clearly refers to Monroe Creek—with no mention of Jenkins Creek. Nor was listing Monroe Creek a mistake. After all, as Hoff's expert admits, Monroe Creek has been used to fill Monroe Reservoir. *See* Decl. of Moore, Ex. F at 2. So, it was not unexpected that a water right would seek to use Monroe Creek water. In any event, the time to appeal the decree has long-since passed, and Hoff cannot rely on Water Right No. 67-2044

to demonstrate that he has historically had the right to store Jenkins Creek water in Monroe Reservoir. Indeed, the decree conclusively demonstrates that no such right exists.

In addition, the Department recently confirmed that this water right is limited to the diversion and storage of water from Monroe Creek and does not include Jenkins Creek water. *See, In the Matter of Applications for Permit 67-15292 through 67-15297 in the Name of Eckhardt Family LLLP*, Order on Reconsideration; Amended Final Order at 6 (“Currently, Hoff is not authorized to capture Jenkins Creek water in Monroe Reservoir”) and 8 (“Hoff’s water rights do not currently authorize any diversion of Jenkins Creek at Monroe Reservoir”) (November 14, 2019).

Significantly, Hoff’s expert had a chance to respond to Eckhardt’s assertion that Hoff has no authorization to store Jenkins Creek water on Eckhardt’s land. *See* Decl. or Moore, Ex. G. But the rebuttal report simply declares, once again, that Double C & J owns the Monroe Reservoir and has an existing easement on Eckhardt’s land to store water (without specifying the source of the water) on that land. *Id.* at 2–3. In other words, the rebuttal report does not confront—or even acknowledge—the fact that Hoff’s existing easement does not authorize the storage of Jenkins Creek water on Eckhardt’s property. Decl. or Moore at ¶ 8.

Finally, even if Hoff’s existing water right and easement included Jenkins Creek water (which they do not), they clearly do not authorize Hoff to divert water to storage in Monroe Reservoir on a year-round basis. Decl. of Moore, Ex. E. Thus, if Hoff wishes to divert and store Jenkins Creek water as proposed in the Application, he must receive new permission to do so. And he has no prospect of receiving such permission from Eckhardt, the owner of the land. In fact, he has not even approached Eckhardt about obtaining permission. Decl. of Moore at ¶ 7. Hoff therefore has “no possessory right in the land . . . amount[ing] to speculation.” *Lemmon*, 95 Idaho at 781. “Persons may not file an application for a water right and then seek a place for use.” *Id.*

As a result, summary judgment should be granted, denying the Application as made for delay or speculative purposes and not made in good faith, pursuant to I.C. § 42-203A(5)(c) and Rule 45.01.c. of the Department's Water Appropriation Rules.

CONCLUSION

For the foregoing reasons, the Court should grant Eckhardt's Motion for Summary Judgment and deny Hoff's Application.

DATED THIS 20th day of May, 2020.

PARSONS BEHLE & LATIMER

By:  

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2020, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service.

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