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Attorneys for Clinton Aston

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

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 82640 IN THE
NAME OF CLINTON ASTON

**RESPONSE TO MOTION TO
DISMISS AND CANCEL TRANSFER
APPLICATION 82640**

Applicant Clinton Aston, (hereinafter “Aston” or the “Applicant”), by and through his attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby files this response to protestant Jay N. Fannesbeck’s *Motion to Dismiss and Cancel Transfer Application 82640* (the “Motion”) filed at the beginning of the second day of the reconvened hearing (July 17, 2019) held in the above-entitled matter.

I. ARGUMENT

IDAPA 37.01.01 “contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of Idaho.” Rule 001.02.¹ Transfer No. 82640 (hereinafter “82640”) is a contested case before the Idaho Department of Water Resources’ (“IDWR” or “Department”). Rule 565 allows parties to a contested case fourteen (14) days to respond to a motion. This response is being filed within that timeframe.

The Motion cites to Rule 304, which provides that “[d]efective, insufficient or late

¹ Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

pleadings may be returned or dismissed.” Pleadings are defined under Rule 210 and include applications. Accordingly, the question before the hearing officer is whether 82640 is defective, insufficient, or late based on the facts and argument asserted by Fannesbeck. As described herein, the application for transfer is not defective, insufficient, or late.

Rule 12(b) is the rule from the Idaho Rules of Civil Procedure that describes various bases for dismissal of a contested matter, which are: “(1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; (7) failure to join a party under Rule 19; and (8) another action pending between the same parties for the same cause.”

The content of the Motion essentially asserts that because there are disputes of fact—which are typical in a contested case—82640 should be dismissed. Mr. Fannesbeck is not a licensed attorney but is representing himself in this matter *pro se* and is held to the same standards as an attorney under Idaho law. “Pro se litigants are not entitled to special consideration or leniency because they represent themselves.” Rather, “[p]ro se litigants must conform to the same standards and rules as litigants represented by attorneys, and this Court will address the issues accordingly.” *PHH Mortg. v. Nickerson*, 164 Idaho 33, 423 P.3d 454, 459 (2018) (internal citations omitted).

The content of the Motion suggests that Fannesbeck is filing a Rule 12(b)(6) motion, which is that there is a “failure to state a claim upon which relief can be granted.” However, when a Rule 12(b)(6) motion is filed based on arguments that require the judge or hearing officer to consider evidence or facts outside of the pleadings, it is converted to a motion for summary judgment under Rule 56 of the Idaho Rules of Civil Procedure:

Under Rule 12(b)(6), “[a]fter viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated.” *Losser v. Bradstreet*, 145 Idaho 670, 673, 183 P.3d 758, 761 (2008) (quoting *Gallagher v. State*, 141 Idaho 665, 667, 115 P.3d 756, 758 (2005)). Dismissal “for failure to state a claim should not be granted ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.’ ” *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005) (quoting *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975)). A Rule 12(b)(6) motion to dismiss in which “matters outside the pleadings are presented to and not excluded by the court ... must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” I.R.C.P. 12(d). “Summary judgment is appropriate if the pleadings, depositions, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Lockheed Martin Corp. v. Idaho State Tax Comm’n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006).

Paslay v. A&B Irrigation Dist., 162 Idaho 866, 868–69, 406 P.3d 878, 880–81 (2017).

Fonnesbeck supports the Motion by citing to hearing testimony and exhibits from the hearing. These are documents and evidence not contained in the transfer application, and as a result, his motion to dismiss is automatically converted to a motion for summary judgment under Idaho law. Stated clearly, the Motion—although titled a motion to dismiss—is a motion for summary judgment as provided under I.R.C.P. 12(d). This correct categorization of the Motion presents procedural deficiencies with the Motion, the result of which must be denial of the Motion.

IDWR’s procedural rules do not address motions for summary judgment. While it could be treated as a generic motion under Rule 565, it is important to note that Rule 565’s title refers to “prehearing motions.” The Motion was made at the reconvened hearing—not before—and therefore, is not a “prehearing motion.” Accordingly, the Motion should not be considered or allowed under Rule 565 because it was not a prehearing motion, and further, even if it is allowed, it was not timely filed to allow for a response within 14 days and a decision to be rendered prior to the hearing date. (See, e.g., timely filed motions for summary judgment filed well in advance of hearing date for Application Nos. 37-22682 (granting motion) and 37-22852 (denying motion)).

Additionally, because a motion for summary judgment is not specifically addressed in IDWR’s procedural rules, the hearing officer can look to the Idaho Rules of Civil Procedure, and application of these rules leads to the conclusion that the Motion was not timely made. Rule 56(b) provides that a motion for summary judgment “must be filed at least 90 days before the trial date, or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court.” The Motion was filed at the beginning of the second day of a reconvened hearing and is unquestionably untimely under this rule. Indeed, the entire point of a motion for summary judgment is to avoid the need to hold a hearing or trial and rule on the matter prior to the hearing or trial where there are no genuine disputes of material fact. The Motion was filed during the reconvened hearing and is based on matters that remain in dispute.

As a threshold matter, the Motion seeks a ruling on all matters in this contested case as it was not styled as a partial motion for summary judgment to address specific issues. The Motion

only focuses on evidence relating to the NWNW of Section 9, but in this contested case, there are many matters that have been decided relative to Aston's burdens of proof under Idaho Code § 42-222, including, for example, irrigation history on other portions of the property, proving the development of the Aston well, injury to other water rights, etc. For this reason alone, the Motion should be denied.

But even if the hearing officer were to address the merits of the Motion, in addressing a motion for summary judgment, as described in the block quote above, all disputed facts are construed in Aston's favor to determine if there is no dispute of fact and that judgment should be granted in Fonnesebeck's favor. That cannot be done in this case.

Relative to the specific issue described in the Motion concerning irrigation in the NWNW of Section 9, partial summary judgment on this issue is not appropriate. The water right (13-2209) and statutory claim (13-4120) described in 82640 were not originally developed or claimed by Aston. In other words, he was a successor-in-interest to the property where 13-2209 and 13-4120 are appurtenant. Aston purchased the farm to which these rights were appurtenant in 2004. Accordingly, his understanding was based upon what he knew from the previously-filed water right documents and from conversations with the prior owners of the property (the Schvaneveldts). Further, 13-4120 is based upon a statutory claim prepared and submitted by Sid Schvaneveldt himself. We disagree with Fonnesebeck's characterization of Charlotte Schvaneveldt's testimony contained in the Motion as she only testified that she did not remember moving irrigation pipe on the property or witnessed it being irrigated, and that she did not assist with preparation of the statutory claim document for 13-4120. Accordingly, even with her testimony, and given that the statutory claim was filed in 1979 where the place of use included the NWNW of Section 9, it is likely that the NWNW of Section 9 was irrigated at times by Sid or others on the farm where Charlotte was not helping with the irrigation pipe. But even if the hearing officer assumes that her testimony conflicts with Sid's statutory claim for 13-4120, for purposes of deciding a motion for summary judgment, the hearing officer must construe the facts in Aston's favor. In so doing, and in addition to the other evidence presented, the statutory claim document is evidence of the NWNW's irrigation and summary judgment is not appropriate. There is many items of evidence in the administrative record supporting the position the NWNW of Section 9 was irrigated and/or there are adequate defenses to forfeiture under Idaho law.

The second argument contained in the Motion refers to the signature block of the

Department's transfer application form where the applicant asserts that the information in the application is "true to the best of my knowledge." The Motion concludes "[t]here are other misrepresentations which can be included, but this should suffice for a cancellation of Transfer 82640. To prevent any further unneeded labor by the IDWR or the Protestants, I present this motion for your acceptance."

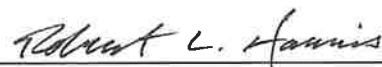
Fonnesbeck ignores the "best of my knowledge" portion of the statement from the application for transfer form. Aston provided the information he knew at the time he submitted the application in the application form and Fonnesbeck has provided no evidence in his Motion that Aston knew about the CRP maps or other evidence that show the CRP contracts commencing in 1987. Aston's testimony is that he was able to obtain copies of the maps while preparing for the hearing, which was well after the application was filed. Accordingly, there has been no showing that Aston willfully misrepresented anything in the application that he knew at the time he submitted the application that would warrant dismissal of the application as being either defective or insufficient under Rule 304. For this reason, the Motion should be denied.

Finally, there was no argument asserted that the application for transfer was filed late under Rule 304. Accordingly, this is not a basis to dismiss the application for transfer.

II. CONCLUSION

For the reasons set forth above, the Motion should be denied. The Motion is a motion for summary judgment under Idaho law to determine whether it is defective or insufficient. There are procedural defects with the filing of the Motion as described above. Even if the hearing officer considers the contents of the Motion, it is only a motion for partial summary judgment, and the application for transfer should not be dismissed in its entirety. Additionally, there are disputes of fact relating to irrigation in the NWNW of Section 9. Finally, the Motion does not contain any evidence that Aston knew about the CRP maps denoting that the NWNW of Section 9 was in CRP beginning in 1987 at the time he submitted the application for transfer. Aston provided the information to the best of his knowledge based on what he had been told. For all of these reasons, 82640 should not be dismissed.

DATED this 24th day of July, 2019.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2019, I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by the method indicated below.

DOCUMENT SERVED: **RESPONSE TO MOTION TO DISMISS AND CANCEL TRANSFER APPLICATION 82640**

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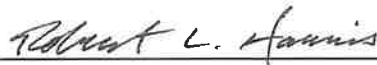
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