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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 SECOND 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. Fonnesbeck's **second** *Motion to Dismiss and Cancel Transfer Application 82640* (the "Motion") filed on November 12, 2019. Fonnesbeck filed a similar motion on July 17, 2019, which was denied in the *Order Denying Motion to Dismiss* issued on August 5, 2019.

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

[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.

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.

As a threshold matter, the Motion should be dismissed as it was not signed by Fonnesbeck in violation of the Department's procedural rules. The Motion was filed by email and at the end of the Motion document, it only contains the typed name "Jay Norman Fonnesbeck" with no actual signature (unlike Fonnesbeck's first motion to dismiss, which was signed by him).

Rule 300 states that the "Department will accept electronic signatures and electronically signed communications complying with the requirements of Rules 306 through 311 and Sections 67-2351 through 67-2357, Idaho Code, for all communications, filings and transactions with the Department."[2] Rule 306 goes on to say that "[f]or an electronic signature to be valid for use by the Department, it must be created by a technology that is accepted for use by the Department," and Rule 307 goes on to describe the criteria for acceptable electronic signature technology. There is no rule that allows a simple typed name to be considered a signature under the Department's procedural rules. Further, a typed name is easily replicated by others, and therefore, is not unique to the person using it and is not capable of verification. There is no evidence that Fonnesbeck's typed name has been proposed to the Department or accepted by the Department as an electronic signature as described under Rule 309. For these reasons, pursuant to Rule 304, which provides allowance for the dismissal of defective pleadings, the Motion should be dismissed. The requirement for signed pleadings is not unique to contested cases before the Department—all pleadings submitted in legal actions governed by the Idaho Rules of Civil Procedure must be

[2] Reference to Idaho Code §§ 67-2351 through 67-2357 in Rule 300 appears to be an error, as these statues relate to the "Energy Facility Site Advisory Act." For that reason, the focus on this motion is on the Department's procedural rules.

signed. Idaho Rule of Civil Procedure 11(a) ("Every pleading, written motion, and other paper must be signed at least one attorney of record licensed in the State of Idaho, in the individual attorney's name, or by a party personally if the party is unrepresented.").

In the alternative, the Motion itself does not provide sufficient justification to wholly dismiss 82640. Rule 304 provides that "[d]efective, insufficient or late pleadings may be returned or dismissed." Pleadings are defined under Rule 210 and include applications. Accordingly, the question is whether 82640 is defective, insufficient, or late based on the facts and argument asserted by Fonnesbeck. As described herein, the application for transfer is not defective, insufficient, or late.

Rule 12(b) it 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 completely normal and typical in a contested case—82640 should be dismissed. Mr. Fonnesbeck is not a licensed attorney but represented himself *pro se* when he filed the Motion 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 Fonnesbeck 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 specifically 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 after the hearings on this matter—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 after the 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 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 primarily 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 Fonnesbeck'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 Fonnesbeck'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 are 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." Motion at *4-5.

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.

In response to the same arguments made in Fonnesbeck's first motion to dismiss, the Hearing Officer concluded:

> Although the evidence presented at hearing establishes that Aston's response to Question 5.g was inaccurate, Fonnesbeck has not shown that Aston's response was a willful misrepresentation. Aston testified at hearing that he did not obtain exact dates for the CRP enrollment until after the application was filed. Further, Aston only owns a 5-acre portion of the NWNW of Section 9, T16S, R38E and acquired that 5-acre parcel in 2006. Evidence presented at hearing related to the irrigation or non-irrigation of the NWNW of Section 9 was primarily provided by witnesses other than Aston. Fonnesbeck did not identify any other defects in Application for Transfer 82640. Therefore, Fonnesbeck's *Motion* should be denied.

In response to these same arguments, the Motion should be denied once again for the same reasons.

Additionally, 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 either. Under Rule 304, there is no basis to dismiss 82640.

Finally, the content and arguments of the Motion are difficult to follow, and for the reasons described above, what amounts to a motion for summary judgment (instead of a motion to dismiss) should be denied. However, we are compelled to respond to specific statements contained in the Motion. The statement and our response are set forth below:

1. **Statement**: "[t]he well described in Permit G-29935 was completed in 1962 is purely conjecture and speculation. No direct support from these exhibits." Motion at *2.

   Response. Fonnesbeck's position on when the Aston Well was drilled depends upon whether his argument benefits Fonnesbeck or not as he has asserted that the Aston Well was operational in 1962, and at other times, that it was not. Many of Fonnesbeck's exhibits at the Aston hearing are exhibits he previously submitted in a prior contested case involving the applicant El Ray Balls which was identified as Transfer No. 70722 ("70722"). Exhibit 323 at *1 contains the following statement from Myron Fonnesbeck submitted in 70722, which was prepared by Jay Fonnesbeck:

My name is J. Myron Fonnesbeck and I wish to attest to the following series of events concerning the ownership of two groundwater wells located in Weston, Idaho.

Well #1 is located in the NE ¼ of the NE ¼ of Sec 36 T15S R37E
Well #2 is located in the NW ¼ of the NE ¼ of Sec 8 T16S R38E

In 1960, well #1 was drilled and cased by Gardner Drilling at the request of the Weston Creek Irrigation Company and who later declined to further develop it. Lewis Bingham, Lee Schvaneveldt, and Norman & Myron Fonnesbeck, joined together by agreement to develop this well.

By the end of 1960, the undeveloped well #1, itself, was owned as follows:

1/3 Lewis Bingham
1/3 Lee Schvaneveldt
1/3 Norman and Myron Fonnesbeck

Starting in 1961, improvements to the well #1 were installed and financed by Lee Schvaneveldt and Norman & Myron Fonnesbeck. The first improvements include the installation of a 12' by 12' cement foundation and base to install a stationary diesel engine and vertical shaft driven turbine pump, horizontal gear head, 8 inch discharge to a 10 inch check valve and then enough 10 inch steel pipe to carry the water directly west to the main channel of Weston Creek which in also the main canal of the Weston Creek Irrigation Company (which runs through the Bingham property), a cement spill and weir box into the canal, and a diesel engine to drive the pump. We also had to put in some new weirs and dividers in the Georgeson ditch to separate our new water from water normally going further down the ditch to other users. We operated with a diesel engine for the first 2 and possibly 3 years until we could get 3-phase power to the well site and then we converted over to a 75 hp electric motor.

This clearly asserts that Well #1 was drilled in 1960 and improvements were installed beginning in 1961 making it operational in 1961 or 1962. As to when the wells were developed, Exhibit 149 (submitted in the Aston matter) is an exhibit from 70722 that was prepared by Jay Fonnesbeck on behalf of El Ray Balls in 70722 explaining that both wells were developed **at the same time**:

That the Fonnesbecks and Schvaneveldts did proceed to develop and put into production two wells simultaneously which I will refer to as the following:

Well #1 located in the NE ¼ NE ¼ Sec. 36 T15S R38E permit #G-28818
Well #2 located in the NW ¼ NE ¼ Sec 8 T16S R38E permit #G-29935

That Well #1 was proven to produce 2.87 cfs as installed as a high volume low head pumping station, and well #2 will produce the same volume, but was installed and set up to deliver water at a much higher pressure.

That the Fonnesbecks were mostly flood irrigating and the Schvaneveldts were sprinkler irrigating.

That by practicality of use, the Fonnesbecks eventually made exclusive use of well #1 and the Schvaneveldts exclusive use of well #2.

Exhibit 149 at *3. This clearly asserts that Well #1 was drilled in 1960 and improvements were installed in 1961 and 1962 making it operational in 1961 or 1962. Well #2 is the

Aston Well. According to Fonnesbeck himself, the Aston Well and Well #2 were put into production "**simultaneously**." (emphasis added). In fact, consider this statement from Fonnesbeck's Petition for Review and *Response to Exceptions to Preliminary Order for Transfer No. 82640* at *4 from Fonnesbeck himself: "This nonsense of a stacked water right. **Every acre that Aston would consider irrigated on his farm has receive water from one and only one source and <u>that is well #2 since June of 1962</u>**."

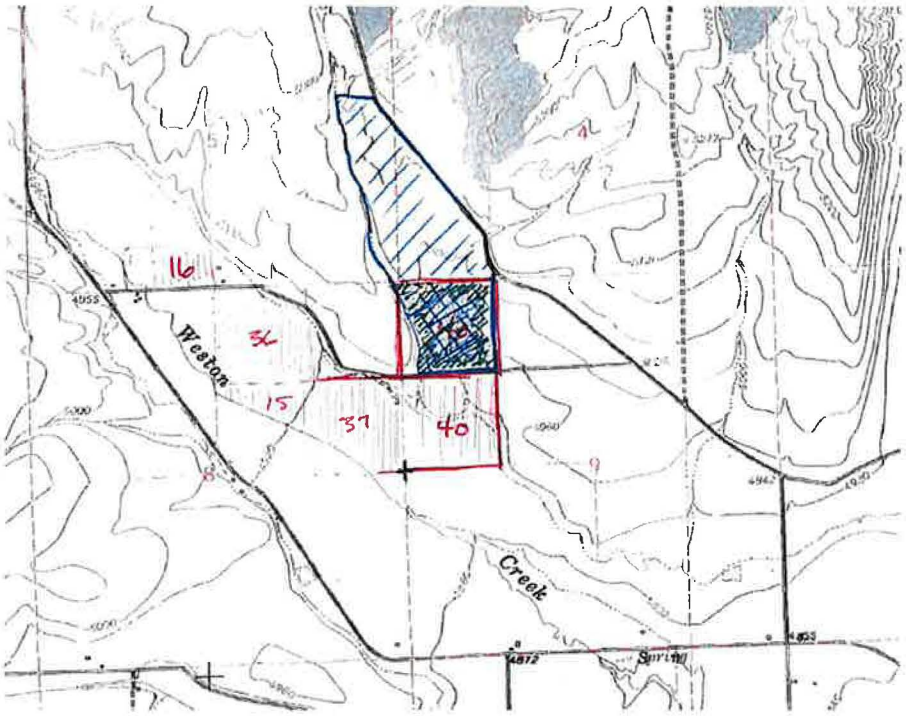
It is frivolous and unreasonable to state that it is "purely conjecture and speculation" that the Aston well was completed in 1962 along with Well #1 when Jay Fonnesbeck's own statements support such a finding. Furthermore, the Hearing Officer summarized the numerous bases for reaching his decision based on evidence in the administrative record:

> 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); Testimony of El Ray Balls (worked as a farm hand for Lee Schvaneveldt prior to 1964 (when Lee sold farm to Cooleys) and moved sprinkler pipe on the property); Exs. 120 and 121 (pump installed on Well #1, at the same time the Aston Well was equipped with a pump, was manufactured in 1962).

Amended Preliminary Order Approving Transfer at 6.

2. **Statement**: Continuing with the Aston Well, Fonnesbeck asserts: "If the well went into operation in June of 1962, I highly doubt that the first priority for water use was to put in on the NWNW of section 9." Motion at *2.

   Response: In the 70722 proceedings, it was to Fonnesbeck's benefit to consider the NWNW of Section 9 irrigated for purposes of his argument that the water right acres developed under 13-2209 and 13-4120 included the NWNW of Section 9 because he believes more acres would be available to him under his convoluted theory that the water right license for 13-2209 was incorrectly issued and that he is entitled to the 13-2209 acres on the Aston property because of an agreement with El Ray Balls. Consequently, he included the following map as an exhibit which depicted the NWNW of Section 9 as irrigated lands:



Witness and Exhibit filing from El Ray Balls, Transfer No. 70722 at page 95. Furthermore, Exhibit 300 is a signed statement prepared and recorded by Jay Fonnesbeck (recording stamp shows it was recorded at Jay Fonnesbeck's request on February 21, 2019) signed by Zayne Fredericksen and Terri Fredericksen attempting to grant permission to move the 40 acres of 13-4120 in the NWNW of Section 9 to property owned by El Ray and Janice Balls:

276932

Idaho Department of Water Resources
and/or

Recorded at the request of
Jay Fonnesbeck
Time: 3:00 Amount $ 10.00
FEB 21 2019
CAMILLE LARSEN, RECORDER
By HCSaun Deputy
Franklin County, Idaho

To whom it may concern,

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 ElRay 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 ElRay 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.

Zayne Fredrickson
Zayne Fredrickson

Terri Fredrickson
Terri Fredrickson

It is self-evident that Jay Fonnesbeck believed that the 13-4120 acres appurtenant to the NWNW of Section 9 were valid and should be transferred. Yet in the hearing on Aston's transfer (82640) held just a week later, Fonnesbeck claimed that the NWNW of Section 9 was not irrigated. Fonnesbeck cannot have it both ways—as to his claims that the water was not used in the NWNW of Section 9, his own documents are pieces of evidence supporting a determination that irrigation did occur prior to March 1963. And despite Fonnesbeck's changing positions, there is ample evidence in the record supports the finding that the NWNW of Section 9 was irrigated prior to the statutory change in 1963. See *Amended Preliminary Order Approving Transfer* at 7-10; 18-20.

3. **Statement**: "Children of Jerry Schvaneveldt remember they were still flood irrigating when they left the farm in the spring of 1964. Testimony o[f] Reta Lynn Braker, Jerry and Barbara Schvaneveldt's oldest daughter who was born in 1953." Motion at *2.

   Response. Reta Lynn Braker is Sid Schvaneveldt's niece, and she did not testify at the hearing. We do not know where this alleged information is from. It is improper to include alleged testimony from her when she did not testify at the hearing.

4. **Statement**: "Mr. Harris [] has characterized the statutory claim [13-4120] as a perfected water right, and has chosen to defend it as such." Motion at *2.

   Response: This is not accurate, and we do not know where the basis for this assertion comes from as there is no citation to the record in support of this.

5. **Statement**: "No discovery was conducted prior, and what minimal negotiation that could have taken place was ignored by Aston." Motion at *2.

   Response: Fonnesbeck's representation of what happened relative to settlement negotiations is wholly inaccurate, and in any event, Rule 610 provides that settlement discussions are confidential unless all participants agree to the contrary in writing, which has not occurred.

6. **Statement**: "With NRCS documentation in his hands to read and the document stating that the funds were dispersed for the construction of a mainline and center pivot, Aston continues to declare under oath that none of the funds were for a center pivot." Motion at *3.

   Response: The NRCS process Aston was involved in has nothing to do with 82640 and is not relevant to the matters to be decided in a contested transfer application proceeding. Nevertheless, in response, this statement by Fonnesbeck is patently false. The letter from NRCS contains the language of what Fonnesbeck requested by email, and his email requested information about construction of the center pivot. In other words, he is citing his own words in his email about he center pivot to argue what the NRCS approved financing for, even though the NRCS declined his request for information. Here is the relevant portion of the letter contained at Exhibit 353 in this matter:

This is a final response letter to your FOIA request, dated February 13, 2019 and submitted to my office via e-mail. Via e-mail you requested: Electronic copies of Mr. Clinton Aston's recently funded 2016 - 2017 EQIP project which involved the construction of a mainline and center pivotCopies, the signature page for the contract appendix and, the form number for this particular page the NRCS-CPA-1202-CPC. Also, by telephone we discussed your request for the contract amount awarded, the date of the award, and the contract number.

To be clear, the NRCS does not purchase center pivots and did not purchase Aston's center pivot. The NRCS assists with water conservation through pipelines, drains, etc. Fonnesbeck's claims otherwise are simply incorrect. While not relevant as described above, if the Department wants to verify who paid for the Aston's pivots, he has a loan for the total value of the pivot as evidenced by a recorded lien, and the NRCS is not a co-signer on the loan.

II. CONCLUSION

For the reasons set forth above, the Motion should be denied because it was not signed by Fonnesbeck, and as a defective pleading, it should be dismissed. Further, it should be dismissed as a legal matter because it is not a prehearing motion under Rule 565 as it has been filed after the hearings on 82640 have concluded.

Alternatively, the Motion must be treated as a motion for summary judgment under Idaho law to determine whether 82640 is defective or insufficient, and 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 as the Motion requests. There are legitimate disputes of fact relating to irrigation in the NWNW of Section 9, and the presence of these disputes of fact does not mean that 82640 should be dismissed, particularly when a full hearing was already held and evidence was presented for the Hearing Officer to weigh and consider.

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 associated with the transfer to the best of

his knowledge based on what he had been told and what he understood, and consequently, there has been no showing by Fonnesbeck that Aston's response was a willful misrepresentation.

For all these reasons, the Motion should be dismissed or denied. 82640 should not be dismissed.

DATED this 26th day of November, 2019.

Robert L. Harris

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

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 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 SECOND MOTION TO DISMISS AND CANCEL TRANSFER APPLICATION 82640**

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