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Fritz X. Haemmerle (ISB No. 3862)
HAEMMERLE LAW, PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
haemmerlefilings@gmail.com

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APR 29 2022

DEPT OF WATER RESOURCES
SOUTHERN REGION

Attorney for the John Lezamiz Family LTD Partnership

BEFORE THE DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 85632 IN THE	)	
MATTER OF THE NAME OF JOHN	)	PETITION CONTESTING
LEZAMIZ FAMILY LTD	)	PRELIMINARY ORDER AND
PARTNERSHIP,	)	REQUEST FOR HEARING
	)	
Applicant.	)	
	)	
	)	
	)	

COMES NOW, the Applicant, the John Lezamiz Family Ltd Partnership, by and through Fritz X. Haemmerle of Haemmerle Law, P.L.L.C., and hereby pursuant to Idaho Code Section 42-1701A and IDAPA 37.01.01 et seq., files this Petition and Request for Hearing from a Preliminary Order issued on April 15, 2022, by Hearing Officer James Cefalo (hereinafter "*Decision*") on Transfer No. 85632.

PETITION

1. This is a hearing request for Transfer No. 85632 filed by the Applicant, the John Lezamiz Family LTD Partnership. The transfer involves moving the point of diversion for water right 34-633 upstream one-half mile from its current location.

2. This matter was heard by Hearing Officer, James Cefalo. The Hearing Officer issued a written Decision on this matter on April 11, 2022, denying the transfer.

3. The Applicant filed Exceptions to the Decision. Those exceptions are filed contemporaneously with this Petition for Hearing. The exceptions are attached hereto as Exhibit 1.

4. The Applicant alleges that the Hearing Officer erred as follows:

a. **Failure to Comply with Idaho Code Section 42-222(a).**

The Preliminary Order does not state whether the Hearing Officer considered any watermaster recommendations. Idaho Code Section 42-222(a) requires:

He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, **and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence.**

(Emphasis added).

In this case, there is no showing that watermaster made a recommendation on this transfer.

b. **The Hearing Officer's injury analysis was not correct or complete.**

The Hearing Officer concluded that moving water right 34-633 upstream would cause injury to junior water rights. This analysis was not correct.

First, as a matter of fact, there were no objections to the transfer. Had any party objected, which they did not, they would have had to show that they "are injured or will be injured by the change, or, as frequently said, substantially injured, not merely a fanciful

injury but a real and actual injury.” *Beecher v. Cassia Creek Irrigation Co., Inc.*, 66 Idaho 1, 154 P.2d 507 (Idaho 1944), *citing Hard v. Boise City Etc. Co.*, 9 Idaho 589, 76 P. 331 (1904); Kinney on Irrigation, Vol. 2, sec. 873, p. 1539.

There should have been some analysis as to the “actual” injury to junior water rights (“the juniors”). The Department has always evaluated the “actual beneficial use” of water by parties. There should have been some analysis as to what, if any, water from Congdon Springs has been available to the juniors under current conditions. If there has historically been no water available to the juniors under current conditions, the juniors would not suffer any actual injury by this transfer. Here, the Hearing Officer speculated that transferring the POD for this water right would cause injury without any analysis of any “actual” injury.

Second, the injury analysis is not correct as a matter of law. Other than water right 34-232, which is owned by Lezamiz, water right 34-633 is the most senior water right for rights diverted from Congdon Springs or Congdon Springs Creek. *Decision*, p. 2, p 8. This transfer calls for water right 34-633 to be transferred approximately one-half mile upstream. Changing the point of diversion does not alter the legal status of water right 34-633 or the junior water rights.

c. The Hearing Officer’s findings that allowing this Transfer would reduce the quantity of water available from Congdon Springs.

The Hearing Officer made a finding that, “Approving Application 85632, therefore, will reduce the quantity of water available to satisfy existing water rights on Congdon Springs Creek.” *Decision*, p. 6. This Transfer does not seek to move water out of Congdon Springs Creek. This Transfer proposes to keep water in Congdon Springs Creek. Therefore, a

finding that this Transfer will reduce the supply of water in Congdon Springs Creek is erroneous.

d. The Hearing Officer erred in requiring a mitigation plan to prevent injury.

The Hearing Officer concluded that the applicant failed to provide a mitigation plan or means to prevent injury, and therefore, the Hearing Officer denied the Application. *Decision*, p. 6. Because there was no showing of any injury, there was no requirement by the Petitioner to file any mitigation plan.

e. The Hearing Officer's application of IDAPA 37.03.08.045.01.a was not correct.

The Hearing Officer applied IDAPA 37.03.08.045.01.a to this transfer. The Hearing Officer relied on Section to define the term "injury." Section 045.01.a does not apply to transfers. Section applies to "whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions." *Id.*

f. The Hearing Officer mistakenly applied the Local Public Interest under Idaho Code Section 42-202B(3).

Idaho Code Section 42-202B(3) does not describe the elements of the "local public interest." Generally, Section 42-202B(3) has been read in conjunction with Idaho Code Section 42-1501 in describing the elements of the local public interest. Those elements are:

The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.

I.C. § 42-1501, *see e.g., Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). "Clearly, the legislature in § 42-203A must have intended the public interest on the local scale to include the public interest elements listed in § 42-1501: 'fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.'..." *Id.* at P.2d 449; *see also, 36-16979 in the Name of N. Snake Ground Water District v. Idaho Department of Water Resources*, 160 Idaho 518, 376 P.3d 722 (2016).

In this case, the Hearing Officer concluded that the Transfer violates the local public interest because the "changes proposed by Application 85632 will diminish the amount of water available to satisfy existing water rights on Congdon Springs Creek." *Decision*, p. 7. This transfer does not change the amount of water in the stream, and it does not change the amount of water received by the juniors because they have not and cannot receive their water from Congdon Springs Creek. The analysis to determine which junior water rights would be diminished based on the juniors historical water delivery and water use from Congdon Springs Creek was not done by the Hearing Officer.

g. Conclusions from the Seefried Letter are not supported by the facts.

The Hearing Officer concluded that the Seefried letter "demonstrates that the proposed change will injure existing water rights on Congdon Springs." *Decision*, p. 7. There is nothing in the Seefried letter that states or concludes that the transfer would injure junior users. As previously cited, there were no protests to this transfer by the junior users. Because the Hearing Officer relied so much on the Seefried letter, his conclusions, as a matter of fact and law, are erroneous.

REQUEST FOR HEARING

The Applicant requests a hearing of this matter pursuant to Idaho Code Section 42-1701A. Thus far, no hearing has been held before the Director or any Hearing Officer on the Transfer Application.

DATED this 29th day of April 2022.



FRITZ X. HAEMMERLE
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April 2022, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Idaho Department of Water Resources
Southern Regional Office
650 Addison Ave. W. Ste 500
Twin Falls, ID 83301-5858

Hand Delivered

Parties - none



Fritz X. Haemmerle