

**STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES**

**TRANSFER OF WATER RIGHT
TRANSFER NO. 84788**

This is to certify that: GROUSE CREEK RESERVE LLC
180 S LAKE AVE STE 405
PASADENA, CA 91101-4711

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

<u>Water Right</u>	<u>Origin/Basis</u>	<u>Priority Date</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
22-131C	WR/DECREED	1/22/1916	1.200 cfs	N/A	N/A	56.0	NORTH LEIGH CREEK
22-2029E	WR/DECREED	1/20/1908	0.800 cfs	N/A	40.0	56.0	NORTH LEIGH CREEK
22-238B	WR/DECREED	6/1/1890	1.550 cfs	N/A	N/A	56.0	NORTH LEIGH CREEK

Purpose of Transfer (Changes Proposed)

<u>Current Number</u>	<u>Split</u>	<u>POD</u>	<u>POU</u>	<u>Add POD</u>	<u>Period of Use</u>	<u>Nature of Use</u>
22-131C	NO	NO	NO	YES	NO	NO
22-2029E	NO	NO	NO	YES	NO	NO
22-238B	NO	NO	NO	YES	NO	NO

Summary Of Water Rights After the Approved Change

<u>Existing Right</u>	<u>New No. (Changed Portion)</u>	<u>Transfer Rate</u>	<u>Transfer Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>New No. (remaining portion)</u>	<u>Remaining Rate</u>	<u>Remaining Volume</u>	<u>Remaining Acre Limit</u>	<u>Remaining Total Acres</u>
22-131C	22-131C	1.200 cfs	N/A	N/A	56.0	N/A	N/A	N/A	N/A	N/A
22-2029E	22-2029E	0.800 cfs	N/A	40.0	56.0	N/A	N/A	N/A	N/A	N/A
22-238B	22-238B	1.550 cfs	N/A	N/A	56.0	N/A	N/A	N/A	N/A	N/A
COMBINED TOTALS		3.550 cfs	N/A	N/A	56.0		N/A	N/A	N/A	N/A

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 29th day of September, 2021.



Regional Manager

Support Data
In File # 22-131C

Transfer No. 84788

WATER RIGHT NO. 22-238B
As Modified by Transfer No. 84788

In accordance with the approval of Transfer No. 84788, Water Right No. 22-238B is now described as follows:

Right Holder: GROUSE CREEK RESERVE LLC
 180 S LAKE AVE STE 405
 PASADENA, CA 91101-4711

Priority Date: 6/1/1890

Source: NORTH LEIGH CREEK

Tributary: SPRING CREEK

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>
IRRIGATION	04/15	to 10/31	1.550 cfs 1.550 cfs

LOCATION OF POINT(S) OF DIVERSION

NORTH LEIGH CREEK	NWSE	Sec 23 Twp 06N Rge 45E	TETON County	(R)
NORTH LEIGH CREEK	NESENE	Sec 25 Twp 06N Rge 45E	TETON County	
NORTH LEIGH CREEK	SESW	Sec 19 Twp 06N Rge 46E	TETON County	(I)
NORTH LEIGH CREEK	L1 (NWNE)	Sec 29 Twp 06N Rge 46E	TETON County	

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06N	45E	22													18.0				18.0
06N	45E	23									18.0	20.0							38.0

POU Total Acres: 56.0

CONDITIONS OF APPROVAL

1. Rights 22-131C, 22-238B and 22-2029E when combined shall not exceed the irrigation of 56 acres.
2. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 01.
3. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).

Transfer No. 84788

WATER RIGHT NO. 22-238B
As Modified by Transfer No. 84788

CONDITIONS OF APPROVAL

4. The amount of water that may be injected into and rediverted from Grouse Creek is limited to 60% of this right (0.93 cfs). The remainder of the water diverted under this right shall be delivered to the place of use through the North Leigh Canal and the Hubbard Ditch. 0.37 cfs of this right shall be used to offset conveyance losses in the North Leigh Canal and Hubbard Ditch.
5. Water is delivered through North Leigh Canal or Hubbard ditch.
6. One of the points of diversion for this right is in Wyoming: T45N, R118W, Sec. 32, SENW, Lot 2, 6PM. The point of diversion shown above (Lot 1 (NWNE), Section 29, T06N, R46E) is where the North Leigh Canal enters Idaho.
7. Point of injection and point of rediversion are on Grouse Creek.
8. This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
9. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
10. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
11. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

WATER RIGHT NO. 22-2029E
As Modified by Transfer No. 84788

In accordance with the approval of Transfer No. 84788, Water Right No. 22-2029E is now described as follows:

Right Holder: GROUSE CREEK RESERVE LLC
 180 S LAKE AVE STE 405
 PASADENA, CA 91101-4711

Priority Date: 1/20/1908

Source: NORTH LEIGH CREEK **Tributary:** SPRING CREEK

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>
IRRIGATION	04/15	to 10/31	0.800 cfs 0.800 cfs

LOCATION OF POINT(S) OF DIVERSION

NORTH LEIGH CREEK	NWSE	Sec 23 Twp 06N Rge 45E	TETON County	(R)
NORTH LEIGH CREEK	NESENE	Sec 25 Twp 06N Rge 45E	TETON County	
NORTH LEIGH CREEK	SESW	Sec 19 Twp 06N Rge 46E	TETON County	(I)
NORTH LEIGH CREEK	L1 (NWNE)	Sec 29 Twp 06N Rge 46E	TETON County	

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06N	45E	22													18.0				18.0
06N	45E	23									18.0	20.0							38.0

Right Acre Limit: 40.0

POU Total Acres: 56.0

CONDITIONS OF APPROVAL

1. Rights 22-131C, 22-238B and 22-2029E when combined shall not exceed the irrigation of 56 acres.
2. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 01.
3. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).

Transfer No. 84788

WATER RIGHT NO. 22-2029E
As Modified by Transfer No. 84788

CONDITIONS OF APPROVAL

4. The amount of water that may be injected into and rediverted from Grouse Creek is limited to 60% of this right (0.48 cfs). The remainder of the water diverted under this right shall be delivered to the place of use through the North Leigh Canal and the Hubbard Ditch.
5. Water is delivered through North Leigh Canal or Hubbard ditch.
6. One of the points of diversion for this right is in Wyoming: T45N, R118W, Sec. 32, SENW, Lot 2, 6PM. The point of diversion shown above (Lot 1 (NWNE), Section 29, T06N, R46E) is where the North Leigh Canal enters Idaho.
7. Point of injection and point of rediversion are on Grouse Creek.
8. This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
9. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
10. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
11. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

WATER RIGHT NO. 22-131C
As Modified by Transfer No. 84788

In accordance with the approval of Transfer No. 84788, Water Right No. 22-131C is now described as follows:

Right Holder: GROUSE CREEK RESERVE LLC
 180 S LAKE AVE STE 405
 PASADENA, CA 91101-4711

Priority Date: 1/22/1916

Source: NORTH LEIGH CREEK **Tributary:** SPRING CREEK

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>
IRRIGATION	04/15	to 10/31	1,200 cfs 1,200 cfs

LOCATION OF POINT(S) OF DIVERSION

NORTH LEIGH CREEK	NWSE	Sec 23 Twp 06N Rge 45E	TETON County	(R)
NORTH LEIGH CREEK	NESENE	Sec 25 Twp 06N Rge 45E	TETON County	
NORTH LEIGH CREEK	SESW	Sec 19 Twp 06N Rge 46E	TETON County	(I)
NORTH LEIGH CREEK	L1 (NWNE)	Sec 29 Twp 06N Rge 46E	TETON County	

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06N	45E	22													18.0				18.0
06N	45E	23									18.0	20.0							38.0

POU Total Acres: 56.0

CONDITIONS OF APPROVAL

1. Rights 22-131C, 22-238B and 22-2029E when combined shall not exceed the irrigation of 56 acres.
2. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 01.
3. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).
4. The amount of water that may be injected into and rediverted from Grouse Creek is limited to 60% of this right (0.72 cfs). The remainder of the water diverted under this right shall be delivered to the place of use through the North Leigh Canal and the Hubbard Ditch.

Transfer No. 84788

WATER RIGHT NO. 22-131C
As Modified by Transfer No. 84788

CONDITIONS OF APPROVAL

5. Water is delivered through North Leigh Canal or Hubbard ditch.
6. One of the points of diversion for this right is in Wyoming: T45N, R118W, Sec. 32, SENW, Lot 2, 6PM. The point of diversion shown above (Lot 1 (NWNE), Section 29, T06N, R46E) is where the North Leigh Canal enters Idaho.
7. Point of injection and point of rediversion are on Grouse Creek.
8. This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
9. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
10. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
11. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

**IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 84788 IN THE NAME OF)
GROUSE CREEK RESERVE LLC)**

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT**

PROCEDURAL HISTORY

On March 11, 2021, Grouse Creek Reserve LLC (“GCR”) filed Application for Transfer No. 84788 (“Application 84788”) with the Idaho Department of Water Resources (“Department”), proposing to make changes to water rights 22-131C, 22-238B and 22-2029E. Application 84788 was protested by Ron Hansen, Dennis Craig, Gary Hansen, Kyle Hansen and Rodney Barnes. Gary Hansen signed a withdrawal of protest on August 27, 2021. The withdrawal of protest was filed with the Department on September 13, 2021.

On July 19, 2021, the hearing officer for the Department issued a Notice of Hearing and Scheduling Order. According to the Scheduling Order, the parties were allowed to engage in written discovery. Discovery requests were to be filed on or before July 30, 2021. Responses to discovery requests were due within 30 days of the request.

On September 10, 2021, GCR filed a *Motion for Summary Judgment and Memorandum in Support* (“MSJ”), asking the presiding officer to issue a preliminary order approving Application 84788.¹ On September 14, 2021, GCR filed an amended MSJ to remove references to protestant Gary Hansen, who filed his withdrawal of protest to Application 84788 after the MSJ was filed. The amendment did not change any of the arguments related to the other protestants. Pursuant to Rule 270.02 of the Department’s Rules of Procedure (IDAPA 37.01.01), responses to motions “may be filed within fourteen (14) days of the filing of the motion.” None of the protestants filed a timely response to the MSJ.

Protestant Ron Hansen filed a *Response to Motion for Summary Judgment* (“Response”) by email after the close of business on September 28, 2021. The *Response* did not include a certificate of service, so it is unclear whether a signed, original copy of the *Response* was also sent by regular mail. Rule 270.02 of the Department’s Rules of Procedure (IDAPA 37.01.01) allows a hearing officer to extend the time period for filing responses to motions upon a showing of good cause. The *Response* did not include a request to extend the filing deadline and did not identify a good cause for the late filing. Therefore, the deadline for filing responses to the MSJ will not be extended and the late *Response* filed by protestant Ron Hansen will not be considered.

¹ GCR filed the original MSJ with the Department and served a copy of the MSJ on the protestants by mail and by email. The email address used by GCR for service on protestant Ron Hansen was incorrect. On September 10, 2021 (the same day the MSJ was filed), the hearing officer identified the error in the email address for Ron Hansen and forwarded the MSJ and supporting documents to Ron Hansen at the correct email address.

STANDARD OF REVIEW

The Department's Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize the filing of motions for summary judgment. The rules do, however, authorize the filing of pre-hearing motions, which would naturally include motions for summary judgment. *See* IDAPA 37.01.01.260 and 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (*see* IDAPA 37.01.01.052), the Department relies on 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. A motion for summary judgment may be granted if a hearing officer determines there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* I.R.C.P. 56.

RELEVANT LEGAL PROVISIONS

Rule 520 of the Department's Rules of Procedure (IDAPA 37.01.01) states that written discovery in contested cases before the Department may include requests for admission. Rule 520.02 states: "unless otherwise provided by statute, rule order or notice, the scope of discovery other than statutory inspection, examination, investigation, etc. is governed by the Idaho Rules of Civil Procedure"

Rule 36(a) of the Idaho Rules of Civil Procedure sets forth the procedure for serving and responding to requests for admission and states, in pertinent part:

(a) Scope and Procedure.

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) *Form; Copy of a Document.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *When May be Served.* Requests for admission may be served on the plaintiff after commencement of the suit and upon any other party with or after service of the summons and complaint.

(4) *Time to Respond; Effect of Not Responding.* 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. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

Idaho Code § 42-222(1) sets forth the criteria used to evaluate changes to water rights (applications for transfer) and states, in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not 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, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

SUMMARY OF APPLICATION 84788

1. GCR holds the following water rights (“GCR Rights”) on North Leigh Creek:

Right No.	Priority Date	Uses	Rate (cfs)	Irrigated Acres	Combined Acres
22-131C	1/22/1916	Irrigation	1.20	56	56
22-238B	6/1/1890	Irrigation	1.55	56	
22-2029E	1/20/1908	Irrigation	0.80	40	

2. Currently, water rights 22-131C, 22-238B and 22-2029E authorize the following points of diversion from North Leigh Creek:

NESENE, Section 25, T06N, R45E (“Hubbard Ditch”)
Lot 1 (NWNE), Section 29, T06N, R46E (“North Leigh Canal”)

3. The GCR Rights do not bear any condition requiring GCR to divert a specific amount of water under the rights at either point of diversion. Therefore, GCR may divert the subject water rights at the North Leigh Canal point of diversion, the Hubbard Ditch point of diversion, or both, as long as the total authorized diversion rate is not exceeded.

4. Currently, GCR uses the North Leigh Canal and the Hubbard Ditch to convey water to the existing place of use. The North Leigh Canal terminates near the head of the Hubbard Ditch. The authorized place of use for the GCR Rights is at the end of the Hubbard Ditch. The Hubbard Ditch has not been adequately maintained and is in a state of disrepair.

5. Application 84788 proposes to add a point of injection and a point of redirection to the GCR Rights.

6. GCR proposes to divert 60% of the GCR Rights from North Leigh Creek at the existing North Leigh Canal point of diversion, convey the water in the canal and a private ditch for approximately two miles, inject the water into Grouse Creek, redirect the water at an existing headgate on Grouse Creek (known as the Grouse Creek Ditch), and convey the water in the Grouse Creek Ditch to the existing irrigation place of use. The remaining 40% of the GCR Rights will continue to be delivered to the irrigation place of use through the North Leigh Canal and the Hubbard Ditch.

7. Water rights 22-238A, 22-459A and 22-459B, which are held by other water users, are diverted from North Leigh Creek at the North Leigh Canal, injected into Grouse Creek and redirected at the Grouse Creek Ditch.

8. Application 84788 does not propose any changes to the irrigation place of use or any changes to the two existing points of diversion on the GCR Rights.

9. GCR hired Rocky Mountain Environmental Associates Inc. ("RMEA") to evaluate whether the proposed changes would injure any existing water rights on North Leigh Creek. On August 27, 2021, GCR filed a report prepared by RMEA, summarizing RMEA's injury analysis.

10. RMEA concluded that the proposed changes may affect other water users on the North Leigh Canal and the Hubbard Ditch. By removing water diverted under the GCR Rights from a portion of the North Leigh Canal and all of the Hubbard Ditch, the remaining water users in those ditches would bear all the conveyance losses associated with those ditches. RMEA calculated GCR's proportionate share of the conveyance losses. According to RMEA's calculations, if GCR leaves 0.37 cfs of its most senior water right (22-238B) in the North Leigh Canal and Hubbard Ditch to offset conveyance losses, the water users on those ditches will be protected from injury.

ANALYSIS

Requests for Admission

GCR served discovery requests on all protestants on July 30, 2021. The discovery requests served on Dennis Craig, Kyle Hansen and Ron Hansen included the following requests for admission:

REQUEST FOR ADMISSION NO. 1: Admit that you are not the owner of any water rights that can be affected or injured by the Transfer.²

REQUEST FOR ADMISSION NO. 2: Admit that the Transfer will not allow for an enlargement, as described under Idaho Code § 42-222.

² The term "Transfer" used in the discovery requests served by GCR refers to Application 84788.

REQUEST FOR ADMISSION NO. 3: Admit that the Transfer is consistent with the conservation of water resources within the state of Idaho, as described under Idaho Code § 42-222.

REQUEST FOR ADMISSION NO. 4: Admit that the Transfer is in the local public interest, as described under Idaho Code § 42-222.

REQUEST FOR ADMISSION NO. 5: Admit that you are not the legal owner of any water rights delivered through the North Leigh Canal and/or the Hubbard Ditch.

The discovery requests served on Rodney Barnes included the following requests for admission:

REQUEST FOR ADMISSION NO. 1: Admit that you do not own any water rights that are authorized to be diverted from North Leigh Creek at the Hubbard Ditch heading and/or the North Leigh Creek Canal heading with an authorized place of use on your property.

REQUEST FOR ADMISSION NO. 2: Admit that the Transfer will not allow for an enlargement, as described under Idaho Code § 42-222.

REQUEST FOR ADMISSION NO. 3: Admit that the Transfer is consistent with the conservation of water resources within the state of Idaho, as described under Idaho Code § 42-222.

REQUEST FOR ADMISSION NO. 4: Admit that the Transfer is in the local public interest, as described under Idaho Code § 42-222.

None of the protestants responded to GCR's discovery requests. Pursuant to Rule 36(a)(4) of the Idaho Rules of Civil Procedure, requests for admission are deemed admitted if the party served with the requests fails to respond to the requests within 30 days. Because the protestants failed to respond to the requests for admission served by GCR, the requests are deemed admitted for purposes of this contested case.

Through their admissions, the protestants assert that the changes proposed in Application 84788 will not result in an enlargement of the GCR Rights, that the proposed changes are in the local public interest and that the changes are consistent with the conservation of water resources within the state of Idaho. Further, Protestants Dennis Craig, Kyle Hansen and Ron Hansen admit that they do not own any water rights that will be affected or injured by the changes proposed in Application 84788. Protestant Rodney Barnes admits that he does not own any water rights that are authorized to be diverted from North Leigh Creek.

The admissions of the protestants offered by GCR have little probative value in this contested case. The requests for admission do not establish facts, but rather attempt to establish legal conclusions or to establish the protestants' opinions on questions of law. For example, Request for Admission No. 2 served by GCR on the protestants states: "Admit that the Transfer will

not allow for an enlargement, as described under Idaho Code § 42-222.” The protestants failed to respond to GCR’s discovery requests. Therefore, the request for admission about enlargement is deemed admitted pursuant to I.R.C.P 36(a)(4). The admission, however, constitutes a legal conclusion. It is equivalent to each of the protestants taking the witness stand during the hearing and stating: “In my opinion, Application 84788 will not result in an enlargement.” The protestants’ opinions about enlargement carry little weight and cannot, by themselves, decide the question of enlargement. Nor do they satisfy the Department’s statutory obligation to review “all evidence and available information” to determine if the application will result in an enlargement, regardless of whether an application is protested. Neither GCR nor the protestants have the authority to determine whether the transfer application satisfies the criteria set forth in Section 42-222(1). That authority is held solely by the Department and its designated hearing officers. Any attempt to use requests for admission to diminish the Department’s authority under Idaho Code § 42-222(1) must be rejected.

Evaluation of Application 84788

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* I.R.C.P. 56. GCR asserts that there are no genuine issues of material fact and asks the hearing officer to evaluate Application 84788 under the review criteria set forth in Idaho Code § 42-222(1). The protestants did not respond to the *MSJ* in a timely manner and have not identified any genuine issues of material fact. The protestants did not respond to written discovery. Nor did they file expert reports. There is no evidence in the record indicating a genuine issue of material fact. Therefore, the hearing officer should evaluate whether GCR is entitled to judgment as a matter of law given the facts presented in Application 84788 and in the *MSJ*.

Validity of GCR Rights

The Snake River Basin Adjudication court issued partial decrees for the GCR Rights in November 2008. Aerial photos and satellite imagery show consistent irrigation of the 56-acre combined place of use since 2008. There is no evidence that the GCR Rights have been lost or forfeited through non-use.

Injury to Existing Rights

Protestant Rodney Barnes does not own any water rights from North Leigh Creek. Protestants Dennis Craig, Kyle Hansen and Ron Hansen admit, for purposes of this contested case, that the changes proposed in Application 84788 will not injure any water rights they may hold. Application 84788 does not propose to change either of the existing points of diversion on North Leigh Creek. According to Application 84788, GCR plans to divert the entire rate authorized under the GCR Rights at the North Leigh Canal. The GCR Rights already allow the entire rate to be diverted at the North Leigh Canal. Application 84788 proposes to convey sixty percent of the rate authorized by the GCR rights through Grouse Creek to the authorized place of use. Idaho Code § 42-105 allows a water right holder to inject water into a natural waterway and redirect from the waterway at a downstream location. The proposed injection into and redirection from Grouse

Creek could occur regardless of whether there is a point of injection and redirection listed on the GCR Rights.

By moving sixty percent of the GCR Rights out of the lower end of the Leigh Creek Canal and out of the Hubbard Ditch, the remaining water users on those ditches will bear a greater portion of the ditch conveyance loss. RMEA conducted a detailed analysis of losses in the system and determined that leaving 0.37 cfs of water right 22-238B in the ditch for conveyance losses will offset any effects on the other users in the ditches. The calculations and analysis from RMEA are reasonable and persuasive. If water right 22-238B is conditioned to set aside 0.37 cfs for conveyance losses in the North Leigh Canal and Hubbard Ditch, GCR has demonstrated that the proposed changes will not injure other water rights.

Enlargement of GCR Rights

Application 84788 does not propose to change the place of use for the GCR Rights. The 56 acres that have been irrigated under the GCR Rights will continue to be irrigated. GCR has demonstrated that the proposed changes will not enlarge the use under the GCR Rights.

Local Public Interest

The injection of water into Grouse Creek will increase the flow in Grouse Creek between the proposed point of injection and redirection. Grouse Creek provides habitat for fish and other aquatic species. GCR has demonstrated that the proposed changes are in the local public interest.

Conservation of Water Resources

The report prepared by RMEA shows that the current conveyance system (which includes the Hubbard Ditch) is in a state of disrepair. The proposed path of water through Grouse Creek will be a more-efficient system of delivery. Other water users use Grouse Creek to convey water from North Leigh Creek. GCR has demonstrated that the proposed changes are consistent with the conservation of water resources within the state of Idaho.

CONCLUSIONS OF LAW

GCR has demonstrated that the changes proposed in Application 84788 will not injure existing water rights, will not result in an enlargement of use of the GCR Rights, are in the local public interest and are consistent with the conservation of water resources within the state of Idaho. Therefore, Application 84788 should be approved.

ORDER

IT IS HEREBY ORDERED that the *MSJ* filed by GCR is GRANTED and Application 84788 is APPROVED as shown in Transfer Approval 84788 issued in conjunction with this order.

Dated this 29th day of September 2021.

A handwritten signature in black ink, appearing to read 'J Cefalo', written over a horizontal line.

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed to the following:

Document Served: Order Granting Motion for Summary Judgment

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IDAHO FALLS, ID 83402-3552

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Christina Henman
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.