

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

IN THE MATTER OF	)	
APPLICATION FOR TRANSFER	)	PRELIMINARY ORDER
NO. 83745 IN THE NAME OF	)	APPROVING TRANSFER
<u>SUNSET FARM & RANCH LLC</u>	)	

PROCEDURAL HISTORY

On November 6, 2019, Sunset Farm & Ranch LLC (“Sunset”) filed Application for Transfer 83745 with the Idaho Department of Water Resources (“Department”). The Department published notice of the application on November 28 and December 5, 2019. The application was protested by Young Harvey Walker (“Walker”), Larry Quist (“Quist”) and Karon Huggins (“Huggins”). Sunset filed an amended Application for Transfer 83745 (“Application 83745”) on July 15, 2020. The Department published notice of the amended application on July 30 and August 6, 2020. No additional protests were filed. In response to the amended application, Huggins filed a revised protest on August 17, 2020. The protest filed by Walker was withdrawn through a *Stipulation for Withdrawal of Protest* (“Stipulation”).

On November 25, 2020, Sunset filed a *Motion for Summary Judgment and Memorandum in Support* (“Sunset Motion”). On December 9, 2020, Huggins filed an *Objection to Motion for Summary Judgment and Memorandum in Support*. Also on December 9, 2020 Quist filed *Larry Quist’s Opposition to Sunset Farm & Ranch LLC’s Motion for Summary Judgment*.

On December 14, 2020, the hearing officer issued an *Order Granting Motion for Summary Judgment, in Part* (“MSJ Order”), which set forth the following conclusions of law:

1. This contested case is not an eminent domain proceeding or an action to condemn water rights. Therefore, the preference structure set forth in Article XV, Section 3 of the Idaho Constitution does not apply to this contested case.
2. This contested case is not the proper forum to raise allegations that the SRBA, Idaho Code § 42-222, or the rules governing administration of water rights in Water District 34 are unconstitutional.
3. Arguments related to constitutional takings arising from the processing of claims in the SRBA, the evaluation of transfer applications under Idaho Code § 42-222, or the administration of water rights in Water District 34 are beyond the scope of this contested case and will not be addressed by the hearing officer.
4. Sunset’s proposal to add the River Pump to its Big Lost River water rights will not injure domestic ground water rights in the Arco area.

The Department conducted an administrative hearing on February 4, 2021. Sunset was represented by attorney Robert Harris. Huggins was represented by her daughter Matea McCray (“McCray”). Quist represented himself.

Exhibits 1-17 offered by Sunset, 101-104, 107 and 108 offered by Huggins and 201-220 offered by Quist were admitted into the administrative record. Exhibits 105, 106 and 110 offered by Huggins were excluded from the record. Exhibit 109 was not offered. Sunset called Michael Telford and Larry Quist as witnesses. Quist called Stacy McCurdy as a witness and testified on his own behalf. Huggins provided testimony and evidence through her daughter McCray.

After carefully considering the evidence in the record, the hearing officer finds, concludes and orders as follows:

FINDINGS OF FACT

1. The following water rights are included in Application 83745:

Right No.	Priority	Source	Rate (cfs)	Volume (af)	Acre Limit	Total Acres
34-187A	5/10/1897	Big Lost River	1.74		84	84
34-195D	6/1/1888	Big Lost River	0.33		16.5	84
34-196C	9/1/1896	Big Lost River	0.13		6.5	84
34-2480B	9/11/1966	Ground Water	2.00	252		84
34-2491G	5/8/1944	Big Lost River	1.16			84
34-4002	7/8/1954	Waste Water		5.0		286
34-2277	10/3/1946	Ground Water	2.00		110	286
34-14770	6/1/1898	Big Lost River	1.55		77.6	358
34-14771	5/8/1944	Big Lost River	3.83		174.6	358
34-14772	8/18/1974	Ground Water	6.86			358
34-14773	10/2/1885	Big Lost River	1.49		74.7	358

2. Water rights 34-4002, 34-2277, 34-14770, 34-14771, 34-14772 and 34-14773, in combination, are limited to the irrigation of 358 acres.

3. Water rights 34-187A, 34-195D, 34-196C, 34-2480B and 34-2491G, in combination, are limited to the irrigation of 84 acres.

4. Application 83745 proposes to combine water rights 34-187A, 34-195D, 34-196C, 34-2480B, 34-2491G, 34-4002, 34-2277, 34-14770, 34-14771, 34-14772 and 34-14773 to irrigate 442 acres within a 612-acre permissible place of use. Ex. 1 at 3-4. The proposed permissible place of use is on property owned by Sunset. *Id.*

5. Big Lost River water rights 34-187A, 34-195D, 34-196C, 34-2491G, 34-14770, 34-14771, and 34-14773 currently authorize one point of diversion: the Arco Canal (“Arco Diversion”) located on the Big Lost River in the NWNWNW of Section 26, T04N, R26E.

Application 83745 proposes to add a second point of diversion to the seven water rights: an existing pump station (“River Pump”) located in the NWNESW of Section 17, T03N, R27E. Ex. 1 at 3-4.

6. Water diverted with ground water right 34-14772 is injected into the Big Lost River and re-diverted from the river at the Arco Diversion. Application 83745 proposes to add the River Pump as a second authorized point of re-diversion for water right 34-14772. *Id.*

7. Application 83745 also proposes to add the Arco Diversion and the River Pump as points of re-diversion for ground water right 34-2480B. *Id.*

8. The River Pump is an existing pump station on the Big Lost River and is located approximately seven miles downstream of the Arco Diversion. Ex. 7.

9. The following water rights include authorized points of diversion from the Big Lost River downstream of the Arco Diversion

Right No.	Priority Date	Rate (cfs)	Uses	Owner of Record
34-244A	10/2/1885	0.16	Irrigation	Joh & Linda Morgan
34-244C	10/2/1885	0.30	Irrigation	Kelly & Linda Grubbs
34-418B	5/1/1892	1.60	Irrigation	Michael A Peterson
34-518	6/1/1890	6.40	Irrigation	Michael A Peterson
34-607B	5/1/1897	0.095	Irrigation	Marva D & Vernon H Barnes
34-4040	4/1/1958	0.44	Stockwater Storage Wildlife Storage	US Bureau of Land Management
34-4190	6/28/1934	0.02	Instream Stockwater	US Bureau of Land Management
34-7061A	1/29/1974	0.14	Irrigation	Ann L & Robert P Karr
34-7061B	1/29/1974	4.88	Irrigation	Larry Quist
34-7149	6/14/1976	7.00	Irrigation	Larry Quist
34-7225	1/4/1979	2.18	Irrigation	Larry Quist
34-12420	3/16/1923	0.19	Instream Stockwater	Larry Quist
34-13705	6/28/1934	0.02	Instream Stockwater	US Bureau of Land Management
34-13714	4/2/1974	1.44	Irrigation	Leon D & Marlene Folkman
34-13725	9/24/1900	1.27	Irrigation	Charles D Huggins
34-13727	8/17/1962	0.22	Irrigation	Charles D Huggins
34-13729	3/12/1975	2.84	Irrigation	Charles D Huggins
34-14315	9/24/1900	0.06	Irrigation	Dennis L & Trudy I Braswell
34-14317	10/2/1885	0.05	Irrigation	Dennis L & Trudy I Braswell

10. At times, the Big Lost River is a gaining reach between the Arco Diversion and the River Pump. Springs and seeps can increase the flow of the river in this reach. At other times, particularly during drought cycles, the Big Lost River is a losing reach between the Arco Diversion and the River Pump.

11. In order to prevent injury to Big Lost River water rights with points of diversion downstream of the Arco Diversion, Sunset agrees to subordinate its diversion at the River Pump to all existing Big Lost River water rights with authorized points of diversion downstream of the Arco Diversion. Telford Testimony.

12. Part of the existing place of use for water rights 34-4002, 34-2277, 34-14770, 34-14771, 34-14772 and 34-14773 lies within the digital service boundary for Big Lost Irrigation District (“BLRID”). Ex. 14.

13. BLRID holds water rights for irrigation storage in Mackay Reservoir. BLRID delivers storage water from Mackay Reservoir to its patrons for irrigation. Sunset is entitled to 5,200 inches (approximately 200 acre-feet) of water through BLRID, in years when the district has a full water supply. Telford Testimony.

14. Given the existing elements of the Sunset water rights, Sunset has the ability to concentrate the storage water supplied by BLRID on the acres within the district and apply its other water rights on the acres outside of the BLRID service boundary. Telford Testimony.

15. Ground water right 34-2480B currently authorizes one point of diversion: the “Middle Well” located in the NENESW, Section 25, T04N, R26E. Ex. 1 at 40-42. Water diverted at the Middle Well was historically injected directly into the Arco Canal for delivery to downstream irrigated acres. Telford Testimony.

16. Ground water right 34-14772¹ currently authorizes one point of diversion: the “Quist Exchange Well” located in the SESENE, Section 3, T04N, R26E. Ex. 1 at 22-24.

17. The Quist Exchange Well pumps water into the Island Canal, which injects water into the East Side Canal. Telford Testimony. At the end of the East Side Canal, water is injected into the Big Lost River and re-diverted into the head of the Arco Canal, located approximately 1.5 miles upstream of the Middle Well injection site. *Id.*; Ex. 7.

18. Ground water right 34-2277 currently authorizes one point of diversion: the “Quist Well” located in the NWSWNW, Section 8, T03N, R27E. Ex. 1 at 25-27.

19. The Quist Well no longer produces the 2.00 cfs authorized by water right 34-2277. Telford Testimony. In October 2019, Sunset attempted to drill a replacement well for the Quist Well. Ex. 5. The replacement well (“New Well”) was drilled to a depth of 800 feet. *Id.* The New Well did not yield sufficient water to satisfy the 2.00 cfs diversion rate authorized by water right 34-2277. *Id.*

20. Sunset proposes to abandon the Middle Well. Ex. 1 at 3. Sunset does not want to abandon the Quist Well, however, because the New Well did not yield sufficient water to supply the 2.00 cfs authorized by water right 34-2277. Telford Testimony.

¹ Water right 34-14772 is a split portion of water right 34-7075. Application 83745 includes a water right report for the parent right, 34-7075.

21. Application 83745 proposes to remove the Middle Well from water right 34-2480B and add the Quist Exchange Well, the Quist Well and the New Well as authorized points of diversion for the water right. Ex. 1 at 3-4. Application 83745 also proposes to identify a point of injection into the Big Lost River and two points of re-diversion (the Arco Diversion and the River Pump) from the river to reflect the delivery system used for water diverted at the Quist Exchange Well. *Id.*

22. Application 83745 proposes to list the Quist Well and the New Well as authorized points of diversion for water right 34-2277. Ex. 1 at 3-4.

23. In the *Stipulation* to resolve the protest filed by Walker, Sunset agreed to the following water right conditions:

a. The right holder shall not perforate the well casing for the [New Well] until 400 feet below land surface.

b. Diversion and use of water from the [Quist Well] under the following water rights shall be limited to the diversion of 2.0 cfs: 34-2277 and 34-2480B.

24. Quist is the current owner of record for water rights 34-7149, 34-7181, 34-10680, 34-12421 and 34-13414. Ex. 1 at 3. These rights, in combination, authorize the irrigation of 495 acres. The authorized irrigation place of use for these water rights includes property now owned by Sunset. *Id.* (describing recent civil court decisions resulting in separate ownership of the water rights held by Quist and the underlying land held by Sunset); Ex. 15.

25. Quist and Sunset entered into an Agricultural Lease Agreement for the 2020 irrigation season and a separate agreement for the 2021 irrigation season. Exs. 12 and 13. These agreements allowed Sunset to divert water rights 34-7149, 34-7181, 34-10680, 34-12421 and 34-13414 for irrigation at the authorized place of use for those rights. *Id.*

26. The 612-acre permissible place of use proposed by Sunset overlaps approximately 305 acres² of the existing place of use for water rights 34-7149, 34-7181, 34-10680, 34-12421 and 34-13414. *See* Ex. 1 at 7 and Exs. 204-208. Sunset does not plan to irrigate the 305-acre area covered by Quist's rights with the Sunset rights at this time, but wants the flexibility to irrigate those acres with the Sunset rights, if the Quist rights are moved off of the 305-acre area or if Quist and Sunset are unable to negotiate an agreement for Sunset to use the Quist rights. Ex. 1 at 3-4.

27. Application 83745 included the following explanation of the relationship between the Quist rights and the Sunset rights:

With this transfer, [Sunset's] water rights and [Quist's] water rights (WRs 34-12421, 34-7181, 34-10680, 34-7149, and 34-13414) are NOT to be combined or

² The 305 acres of the proposed permissible place of use overlapping the Quist water rights includes portions of ten quarter-quarters (400 acres). Even though the permissible place of use is limited to 305 acres in this 400-acre area, Application 83745 refers to this area as the "400 acres".

stacked in any way. To ensure this combination or stacking does not occur, it is requested that a condition be included in the approval of this transfer that requires [Sunset] to use WRs 34-12421, 34-7181, 34-10680, 34-7149, and 34-13414 on the 400 acres if such rights are legally available to the Applicant (i.e., leased) from the water right owner [Quist] instead of using the Applicant's water rights.

28. The property now owned by Sunset was once owned by Arthur and Lenora Quist. Quist Testimony. Lenora Quist passed away in the late 1990s and Arthur Quist passed away in 2002. *Id.*

29. Arthur and Lenora created a trust (Sunset Trust)³ to hold their real property. Quist Testimony. Upon Arthur Quist's death in 2002, a probate action was initiated in Idaho District Court to settle the estate. *Id.* Quist was designated as the personal representative for the estate. *Id.* Quist managed the property held by the estate from 2002 to March 2012. *Id.*

30. In March 2012, Quist's siblings filed a lawsuit to remove Quist as the personal representative of Arthur Quist's estate. *Id.* From 2012 to today, Quist and his siblings have been engaged extended litigation over the assets of the estate. *Id.*

31. Since 2012, the assets of the estate have been managed by court appointed attorneys, who have little experience with water or farming. *Id.* In recent years, portions of the estate have been sold off by court order. *Id.* Sunset acquired a portion of the land and water rights held by the estate. Ex. 305.

32. Quist owns property and water rights separate from those once owned by Arthur and Lenora Quist. Quist Testimony. During the time period that Quist managed the Arthur Quist estate (2002-2012, he would pool all of the water available under his rights and the rights now owned by Sunset to irrigate both properties. Ex. 17. Quist would irrigate everything he could with the water available under the rights. *Id.* In drought years, there was only enough water to run one or two pivots. *Id.*

33. The Big Lost River water rights held by Sunset bear junior priority dates. Quist Testimony. In drought years, many of the Sunset water rights are not even available. *Id.* The Big Lost River basin has experienced multiple drought years since 2001. Ex. 16

34. The Quist Exchange Well pumps ground water into the Island Canal. The water is then injected into the East Side Canal, then into the Big Lost River, and is then re-diverted through the Arco Canal. The Big Lost River Irrigation District charges shrink (reduces the amount of water delivered to the water user to offset ditch losses) for the water conveyed in the district canals, which includes the Island, East Side and Arco Canals. Quist Testimony. In drought years, the amount of water lost to shrink between the Quist Exchange Well and the authorized place of use can exceed 50%. *Id.*

³ Sunset Trust, created by Arthur and Lenora Quist, is not to be confused with the transfer applicant, Sunset Farm & Ranch LLC, which is an entity created by Michael Telford and Marc Hansen.

35. Water rights 34-187A, 34-195D, 34-196C, 34-2480B and 34-2491G share a common 84-acre place of use (“2480B Property”). Ex. 1 at 13-45. The Snake River Basin Adjudication (“SRBA”) court issued amended partial decrees for these five rights in December 2001. *Id.*

36. The owner of record listed on the amended partial decrees for water rights 34-187A, 34-195D, 34-196C, 34-2480B and 34-2491G was Sunset Trust c/o Arthur W Quist, Manager.

37. The 2480B Property has not been irrigated between 2001 and today. Quist Testimony; Ex. 304.

38. During the drought years of the early 2000s, the aquifer levels near the Middle Well dropped so low that the well went dry. Quist Testimony. The Middle Well is located on the bench lands in an unproductive area of the aquifer, making it unlikely that additional water would be obtained by deepening the well. *Id.*

39. Approximately ten years ago, the ground around the Middle Well collapsed, dropping twenty-five feet around the base of the well. McCurdy Testimony. The Middle Well is currently equipped with a pump, but electricity has been disconnected at the well for safety reasons. *Id.*

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications:

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.

ANALYSIS

Validity of Water Rights

As part of its review under Idaho Code § 42-222, the Department must confirm that each water right, or portion thereof, included in a transfer application is valid and has not been lost and forfeited through non-use. The Idaho Supreme Court has confirmed the Department’s jurisdiction to evaluate forfeiture as part of its review of a transfer application:

[T]he director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights. . . . The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right, and evidence which demonstrates that the right sought to be transferred has been abandoned or forfeited, is probative as to whether that transfer would injure other water rights.

Jenkins v. State, Dep't of Water Resources, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982).

Pursuant to Idaho Code § 42-222(2), a water right “shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated” Forfeiture must be proven by clear and convincing evidence. Idaho Code § 42-222(2). “Clear and convincing evidence is generally understood to be evidence indicating that the thing to be proved is highly probable or reasonably certain.” *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006) (quotation marks and citation omitted). A portion of a water right may be lost to forfeiture through non-use, even if the remaining portion of the water right is regularly used. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400 (1997).

“Although the owner of the water right has the burden of raising defenses to statutory forfeiture, the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense.” *Sagewillow, Inc. v. Idaho Dep't of Water Resources*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003) (citations omitted). The record must include evidence supporting any defense to forfeiture raised by the owner of the water right. *Jenkins*, 103 Idaho at 389, 647 P.2d at 1261 (noting that the record was “devoid of any evidence to indicate that any of the established defenses [to forfeiture] would be applicable even if argued”).

The 84-acre place of use for water rights 34-187A, 34-195D, 34-196C, 34-2480B and 34-2491G has not been irrigated since amended partial decrees were issued for those rights in 2001. Ex. 304. Part of the 358-acre place of use for water rights 34-4002, 34-2277, 34-14770, 34-14771, 34-14772 and 34-14773 has not been irrigated since amended partial decrees were issued for those rights in 2001. *Id.*

A number of factors contributed to the lack of irrigation from 2001 to today. First, the Big Lost River basin has experienced multiple drought years since 2001. Ex. 16 (Flow in the Big Lost River near Mackay was below average in thirteen out of nineteen years). Most of the Big Lost River water rights on the Sunset property are junior and would not be available for diversion during a drought year. During the years that Quist managed the subject property, he diverted all of the limited water supply that was available under the rights and concentrated that use under three pivots. According to Quist, there was not enough water available to irrigate any more acres in those years. Second, the Middle Well went completely dry in the early 2000s. The location of the Middle Well (on the bench of the valley) made it unlikely that additional water could be found by deepening the well. Finally, the property now owned by Sunset was

tied up in contentious probate litigation between 2012 and 2019, limiting the ability of the litigants to make improvements on the property.

Idaho Code § 42-223(6) states:

No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.

The Sunset water rights have not been lost or forfeited for non-use because the non-use was the result of circumstances beyond the control of the water right holder at the time the non-use occurred. Sunset has established a valid defense to forfeiture for the non-use of its water rights, or portions thereof, between 2001 and 2018.

Injury to Existing Surface Water Rights

Sunset proposes to add the River Pump as an authorized point of diversion for Big Lost River water rights 34-187A, 34-195D, 34-196C, 34-2491G, 34-14770, 34-14771, and 34-14773. These rights are currently diverted at the Arco Diversion. Sunset also proposes to add the River Pump as an authorized point of re-diversion to ground water rights 34-2480B and 34-14772.

The River Pump is located seven miles downstream of the Arco Diversion. In certain years and during wet cycles, the reach of the Big Lost River between the Arco Diversion and the River Pump can be a gaining reach, with springs and seeps contributing to the flow in the river. In other years and during drought cycles, this section of the river is a losing reach.

Some of Sunset's Big Lost River rights are senior to the Big Lost River rights downstream of the Arco Diversion. If Sunset were to exercise its senior rights and make a delivery call at the River Pump, then the junior rights downstream of the Arco Diversion may be injured. Further, there is a potential that Sunset could capture the water accruing to the river downstream of the Arco Diversion that would not be available to water rights at or upstream of the Arco Diversion and could only be used to fill existing water rights downstream of the Arco Diversion.

In order to prevent injury to water rights with points of diversion downstream of the Arco Diversion, Sunset has agreed to include the following condition on all of its water rights to be diverted at the River Pump point of diversion:

The diversion of water under this right from the point of diversion located in the NWNESW, Sec. 17, T03N, R27E, shall be junior and subordinate to all water rights with existing authorized points of diversion from the Big Lost River downstream of the Arco Diversion (located in the NWNWNW, Sec. 26, T04N, R26E) as of [date of approval].

Telford Testimony.

Water rights on the Big Lost River are administered by Water District 34. The proposed condition can easily be implemented by the watermaster. If the proposed condition is included on the Sunset water rights and administered by Water District 34, the Big Lost River water rights downstream of the Arco Diversion will be protected from injury.

Permits 34-7571 and 34-7573, held by Water District 34, are used for ground water recharge. These permits are the result of applications for permit that were protested by a number of entities and individuals. The protests were withdrawn through settlement agreements. Ex. 103. The settlement agreements require the permits to be exercised in accordance with the Basin 34 Recharge Plan of Operation, which was adopted in conjunction with the settlement agreements. The Plan of Operation includes the following paragraph:

For the Big Lost River itself downstream from Mackay Dam, diversion for recharge downstream from Mackay Dam will not occur unless the flow at the Arco gage is 60 cfs or more measured as a three consecutive day average. The 60 cfs at the Arco gage is for purposes of this Plan of Operation only and is not and cannot be construed as a minimum flow or minimum flow water right under any theory of law.

The United States Geological Survey ("USGS") operates a stream flow gage south of Arco. Ex. 301. This gage, identified by the USGS as "USGS 13132500 Big Lost River near Arco, ID" and known locally as the "Arco Gage" is located approximately one-half mile downstream of the River Pump. *Id.*

It is possible for the River Pump to divert water from the Big Lost River in such a manner and during certain times of the year that would reduce the flow at the Arco Gage below the 60 cfs described in the Plan of Operation. Stated differently, under certain flow conditions (when flow at the Arco Gage is between 60 and 70 cfs), if Sunset were to divert its Big Lost River rights (approximately 10 cfs) at the River Pump, the flow at the Arco Gage could drop below the 60 cfs threshold. Therefore, Sunset's use of the River Pump during certain times of the year may affect the availability of Permits 34-7571 and 34-7573.

The Plan of Operation clearly states that the 60 cfs flow at the Arco Gage was not intended to be administered as a minimum stream flow. A minimum stream flow of 60 cfs would block all future water rights on the Big Lost River except for times when the 60 cfs flow was satisfied. If Application 83745 were denied because of the potential reduction to the 60 cfs flow at the Arco Gage, then the 60 cfs flow would operate as a minimum stream flow. This is contrary to the stated intent of the Plan of Operations and cannot be allowed. Sunset may divert from the Big Lost River at the River Pump regardless of the flow at the Arco Gage or the possible impact to Permits 34-7571 and 34-7573.

Injury to Existing Ground Water Rights

Sunset proposes to change the point of diversion for water right 34-2480B from the Middle Well to the Quist Exchange Well and to add the Quist Well and the New Well as

authorized points of diversion for the right. As explained in subsequent sections of this order, the proposal to move water right 34-2480B to the Quist Exchange Well cannot be approved. Sunset also proposes to add the New Well as an authorized point of diversion for water right 34-2277. Sunset proposes to divert up to 2.0 cfs from the New Well for irrigation use.

The primary issue of protest raised by Walker was well interference. In order to prevent interference with existing ground water wells in the area of the New Well, Sunset has agreed to not perforate the casing of the New Well between 0 and 400 feet below ground surface. Further, Sunset has agreed not to divert any more than 2.0 cfs from the Quist Well (the amount already authorized to be diverted from the Quist Well under water right 34-2277). These two measures should prevent interference with any of the neighboring wells, which are generally completed in shallower aquifer layers.

Enlargement

Application 83745 proposes to create a 612-acre permissible place of use for the 442 irrigated acres authorized by the Sunset rights. 305 acres of the permissible place of use would overlap with the current authorized place of use for some of Quist's irrigation rights⁴. As a permissible place of use, the Sunset rights would not necessarily overlap the Quist rights over the full 305 acres. The permissible place of use proposed in Application 83745 includes 307 acres that are not associated with the place of use for the Quist rights. Therefore, the Sunset rights would necessarily have to overlap with the Quist rights over at least 135 acres.⁵ During the hearing, Telford described the 442 acres to be initially irrigated within the 612-acre permissible place of use. Based on this initial irrigation plan, the Sunset rights would overlap with the Quist rights by 135 acres.

Sunset asks the Department to add a condition to its water rights clarifying that the Quist rights and the Sunset rights are not combined or stacked on the 135 acres where the water rights would overlap. Ex. 1 at 3 ("With this transfer, [Sunset's] water rights and [Quist's] water rights (WRs 34-12421, 34-7181, 34-10680, 34-7149, and 34-13414) are NOT to be combined or stacked in any way.") Sunset wants the hearing officer to authorize an overlap with Quist's water rights for an indefinite amount of time without having the rights combined or stacked for purposes of evaluating beneficial use or enlargement in future transfer applications. Sunset seeks the benefits of overlapping water rights (protection from forfeiture) without bearing any of the natural consequences of overlapping irrigation rights. It is unclear how long the Sunset rights and the Quist rights would be overlapping. There is currently no proposal before the Department to move Quist's water rights off of the Sunset property. The rights may be in an overlapping position for only one year (the length of time under the current Agricultural Lease Agreement between Sunset and Quist), or the overlap could exist for years or decades into the future.

Water rights that authorize irrigation use and describe the same irrigated acres over all or a portion of their places of use represent a combined beneficial use over the overlapping acres. *See Memorandum Decision and Order, Duffin v. IDWR* (SRBA District Court, Feb. 22, 2021) The Department should not allow irrigation rights to be moved into an overlapping position

⁴ Water rights 34-7149, 34-7181, 34-10680, 34-12421 and 34-13414.

⁵ 612 acres – 307 acres = 135 acres.

without being stacked or combined. Doing so would be contrary to the enlargement prohibition set forth in Idaho Code § 42-222. The hearing officer rejects Sunset's proposal to overlap, but not combine, water rights held by Sunset and Quist.

The Department has granted water users some flexibility in accomplishing changes proposed in transfer applications. When an application for transfer is filed, a water user does not know how long it may take before the transfer is approved or denied. If an application is protested, for example, the normal processing time may be extended by months. Often, water users file transfer applications well in advance of the time they plan on making the proposed changes.

Even if an application is not protested, there may be logistical issues preventing water users from completing a change immediately after transfer approval. For example, it may be impossible to make immediate changes to irrigation rights if a transfer is approved in the middle of or shortly before the commencement of an irrigation season. Crops may already be planted and cannot be moved in the middle of an irrigation season to reflect the changes described in a transfer approval. For this reason, the Department generally gives water users one year to accomplish the changes described in transfer approvals.

In this case, the hearing officer is willing to recognize a one-year window to accomplish the place of use changes proposed in Application 83745. This will allow Quist time to move his water rights off of the overlapping acres and avoid a combined acre limit with the Sunset rights. The following condition will be added to the Sunset water rights:

The place of use changes described in Transfer 83745 shall be accomplished prior to the 2022 irrigation season. Currently, water rights 34-7149, 34-7181, 34-10680, 34-12421 and 34-13414 overlap a portion of the permissible place of use described under this right. If water rights 34-7149, 34-7181, 34-10680, 34-12421 and 34-13414 are not moved off of the overlapping acres by May 1, 2022, then those rights shall be considered combined with this right over 135 acres.

A portion of the existing place of use for the Sunset rights is within the digital service boundary of BLRID. Sunset is entitled to delivery of storage water (approximately 200 acre-feet) under the water rights held by BLRID. Sunset's water rights authorize diversion from various sources to irrigate the existing place of use under the Sunset rights. Water from these various sources is comingled before being applied for irrigation. The storage water supplied by BLRID is only authorized to be used within the BLRID service area. The proposed place of use partially overlaps the BLRID service area and Sunset will continue to receive storage water from BLRID for those BLRID acres. There is a danger that Sunset could use the storage water supplied by BLRID to irrigate acres outside of the BLRID service area. However, this danger of using BLRID storage water outside of the BLRID service area is already present on the Sunset property. The risk of enlargement comes through the partial overlap of the Sunset rights with the BLRID service area. The changes proposed in Application 83745 will not alter the partial overlap in any way. Therefore, the proposed changes will not increase the risk of or the likelihood of enlargement of the BLRID storage rights.

Conservation of Water Resources

The Middle Well, when it was used, pumped water into the Arco Canal for delivery to the authorized place of use located approximately four miles down the canal. BLRID reduced the amount of water delivered to the place of use to offset any conveyance losses occurring in the canal. Sunset proposes to abandon the Middle Well and to move a portion of water right 34-2480B from the Middle Well to the Quist Exchange Well. The Quist Exchange Well pumps water into the Island Canal, which injects water into the East Side Canal. At the end of the East Side Canal, water is injected into the Big Lost River and re-diverted into the head of the Arco Canal, located approximately 1.5 miles upstream of the Middle Well injection site.

The BLRID charges conveyance loss (shrink) for the Island Canal, the East Side Canal and the Arco Canal. Diverting water at the Quist Exchange Well instead of the Middle Well will increase the amount of water lost to seepage through conveyance, it would also increase the amount of shrink charged by BLRID to water right 34-2480B. Instead of conveying water approximately four miles in an unlined canal from the Middle Well to the place of use, Sunset proposes to convey water approximately nine miles in unlined canals from the Quist Exchange Well to the place of use. This increase in conveyance loss is not consistent with the conservation of water resources in the state of Idaho and cannot be approved.

During the hearing, there was some discussion about projects proposing to line certain portions of the BLRID system. These projects could reduce or eliminate conveyance losses in some of the system between the Quist Exchange Well and the proposed place of use. The record does not contain enough specific evidence about these efficiency projects to affect the decision on this issue.

The other changes proposed by Sunset are consistent with the conservation of water resources in the state of Idaho. Sunset proposes to divert water right 34-2480B from the Quist Well and the New Well located at the place of use, thereby eliminating any conveyance losses. Sunset also proposes to divert its Big Lost River rights directly from the Big Lost River during certain times of the year (when water is available at the River Pump), avoiding conveyance losses in the Arco Canal.

Local Public Interest

Local public interest is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3). Updating irrigation systems to improve efficiency and crop yield is in the local public interest. Updating water rights to reflect actual irrigation practices is in the local public interest.

Additional Issues Raised by Huggins

This contested case involves a protested application for transfer. The criteria used to evaluate an application for transfer are set forth in Idaho Code § 42-222. Therefore, the scope of this contested case is established by Section 42-222. The Department must determine if the

changes proposed in this transfer application will injure other water rights, will enlarge the water rights being changed, if the change is consistent with the conservation of water resources in the state of Idaho, and if the change is in the local public interest. The Department's review is limited to an evaluation of the proposed changes.

Protestant Huggins, through her daughter McCray, presented allegations and arguments on issues that are beyond the scope of this contested case. A few of these extraneous issues were already addressed in the *MSJ Order*. The remaining issues will be briefly addressed in this order. During the hearing, Huggins offered a document titled: "Matea McCray Analysis of An Empty Big Lost River Near Arco On Down, IDWR's Responsibility Equally to Idaho Citizens, Real Estate Acquisition Plans for Farms and Ranches, and Sunset's Specific Application Request Transfer No. 83745." In that document, McCray alleges or demands the following:

1. Water should not be diverted from the Big Lost River for recharge or stockwater during the non-irrigation season.
2. Corporate agriculture is using water right transfers to dry up and devalue neighboring properties so they can "swoop in and purchase [the neighboring property] for a penny on the dollar."
3. Sunset illegally removed a boundary fence between Sunset and Huggins.
4. Telford has unlawfully petitioned the Big Lost Irrigation District to include land in the district.
5. Huggins was intentionally excluded from a pipeline project on the Munsey Canal.
6. Some of the Big Lost River Irrigation District board members have a conflict of interest because they have filed private applications for transfer with the Department.
7. Telford was the instigator of a project to pipe a section of the Munsey Canal.
8. IDWR should not allow "foreign entities" to file transfer applications.
9. People in Basin 34 should not be allowed to fill large holding ponds during the non-irrigation season.
10. The Department should no longer recognize a land owner's ability to capture and reapply waste water from irrigation.
11. The Department should curtail all diversions of stockwater during the non-irrigation season unless there is 60 cfs of flow at the Arco Gage.
12. The Department has allowed the lower end of the Big Lost River to go dry for most of the year over the past 30 years.

These issues are beyond the scope of this contested case or are outside the jurisdiction of the Department. McCray could not explain how any of these issues are related to the changes proposed in Application 83745. Therefore, the hearing officer will not provide any analysis of these issues. A contested case arising from a protested transfer application is not an open forum to raise general grievances against the Department or all possible complaints related to water.

In addition to the extraneous issues set forth above, McCray promotes a new pre-screening process for transfer applications. McCray argues that the Department, prior to publishing notice of a transfer application, must review every transfer application filed in Basin 34 using a set of eight criteria established by McCray. The eight review criteria will not be recited in this order. During the hearing, McCray threatened to protest every transfer application filed in Basin 34 unless and until the Department adopts her proposed pre-screening process and new review criteria.

Transfer applications (proposals to change the elements or conditions of water rights) are governed by statute, specifically Idaho Code § 42-222. The Department processes and evaluates transfer applications consistent with the provisions of Section 42-222. McCray's proposed pre-screening process and special review criteria for Basin 34 are not found in statute or rule. The Department has no authority to deviate from the provisions of Section 42-222. If McCray believes the process and review criteria set forth in Section 42-222 are insufficient, the solution is to petition her state representatives to change the law. The hearing officer rejects McCray's pre-screening process and new review criteria.

Huggins raises a few issues that are within the scope of this contested case. First, Huggins alleges that Sunset completed unauthorized work at the River Pump in 2020. This location is an authorized point of diversion for water right 34-7149. In October 2019, Sunset and Quist entered into an Agricultural Lease Agreement for the 2020 irrigation season. Through that agreement, Sunset acquired the right to divert water right 34-7149 during the 2020 irrigation season. The River Pump is located on property owned by Sunset. Sunset has the authority under Idaho Code § 42-3806 to make repairs and improvements to its authorized points of diversion, including points of diversion described on leased water rights, without needing a stream channel alteration permit. The record does not contain persuasive evidence that Sunset exceeded its authority to improve the point of diversion for water right 34-7149.

Second, Huggins alleges that the amended transfer application "was so different than the original submittal, that IDWR should have voided [the amended transfer] and filed a whole new notice." Ex. 101 at 2. Huggins also contends that the Department should provide direct notice by mail to all water users downstream of a proposed point of diversion. Huggins further contends that "[t]he descriptions of the changes in the Legal Notices section of newspapers are woefully inadequate for an average person to analyze how the proposed changes will impact their property." *Id.* at 4.

The Department published notice of the original application in the Arco Advertiser (Butte County) on November 28 and December 5, 2019 and published notice of the amended application in the Arco Advertiser on July 30 and August 6, 2020. Pursuant to Idaho Code § 42-222, the Department must "provide notice of the proposed change in a similar manner as

applications under section 42-203A, Idaho Code.” Idaho Code § 42-203A(1) states that the Department provides public notice for an application by making the application available on the Department’s website and publishing notice of the application for two consecutive weeks in the county where the proposed point of diversion is located. The public notices for Application 83745 satisfied the requirements of Idaho Code §§ 42-203A(1) and 42-222. If Huggins believes that the public notice provisions of Sections 42-203A(1) and 42-222 are insufficient, she should contact her state representative about modifying those sections of the Idaho Code.

CONCLUSIONS OF LAW

Sunset’s proposal to include the Quist Exchange Well as an authorized point of diversion for water right 34-2480B is not consistent with the conservation of water resources in the state of Idaho and must be rejected. If limiting conditions described above are added to Sunset’s water rights, Sunset has demonstrated that the other changes proposed in Application 83745 will not injure other water rights, will not result in an enlargement of the transferred rights, that the proposed changes are consistent with the conservation of water resources in the state of Idaho, and that the proposed changes are in the local public interest. Therefore, Application 83745 should be approved with limiting conditions.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 83745 is APPROVED subject to the conditions set forth in Transfer Approval 83745 issued in conjunction with this order.

Dated this 25th day of February 2021.



James Cefalo
Hearing Officer

Support Data
In File # 34-187A

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

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

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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, request 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 Rules of Procedure 302 and 303.

FINAL ORDER

The Department 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February 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: Preliminary Order Approving Transfer
Transfer Approval 83745**

Sunset Farm & Ranch LLC
PO Box 827
Arco, ID 83213

Robert Harris
Holden Kidwell Hahn & Crapo
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Christina Henman
Administrative Assistant