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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 83745 IN THE NAME OF
SUNSET FARM & RANCH LLC

**MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT**

Sunset Farm & Ranch LLC ("Sunset"), by and through its undersigned counsel, hereby submits this *Motion for Summary Judgment and Memorandum in Support*. This is a dispositive motion, which must be filed on or before January 8, 2021. *Notice of Hearing and Scheduling Order* dated November 2, 2020.

This motion and associated memorandum concern the contested case pending before the Idaho Department of Water Resources ("IDWR" or "Department") on Sunset's transfer application, as amended ("T83745"). James Cefalo is the designated hearing officer (the "Hearing Officer"). T83745 proposes to (1) add or change points of diversion of some of Sunset's ground water rights, including the addition of a new point of diversion in the NWSWNW, Section 08, 03N, 27E., for an already-constructed well which is near an existing authorized point of diversion; (2) to amend the place of use for Sunset's water rights to create a permissible place of use of 612 acres to cover Sunset's land within which 442 acres will be authorized for irrigation; and (3) to

add a point of diversion to Sunset's surface water rights at an existing pump station at the very bottom end of the Big Lost River system south of Arco below existing diversions to capture any available water that may be physically present in the river before water flows unused out to the desert.

T83745 was protested by three individuals: (1) Karon Huggins (through her daughter Matea McCray) ("Huggins"); (2) Larry Quist ("Quist"); and (3) Harvey Walker ("Walker"). This motion for summary judgment asks the Hearing Officer to summarily rule on the protests filed by the first two individuals, Huggins and Quist. This will either resolve the issues of protest prior to hearing, or at a minimum, a partial grant of summary judgment will narrow the issues for hearing which will allow all parties and the Department to more efficiently utilize time and resources in preparing for and participating at the hearing.

While there is no specific rule in the Department's procedural rules concerning summary judgment, IDAPA 37.01.01.260 (as a "motion") and 37.01.01.565 (as a "prehearing motion") are broad enough to authorize filing of summary judgment motions.¹

The Hearing Officer "must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Idaho Rule of Civil Procedure 56(a). In considering a summary judgment motion:

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. [The] Court liberally construes the record in the light most favorable to the party opposing the motion,

¹ Concerning motions for summary judgment filed before the Department, the Department has received, considered, and ruled on them in prior administrative cases. For example, in a contested case involving Application for Permit No. 37-22852 filed by Innovative Mitigation Solutions LLC, a protestant filed a motion for summary judgment requesting dismissal of the application because the applicant had not provided a lease evidencing authority to use a canal for ground water recharge. Applying case law and Rule 56(c) of the Idaho Rules of Civil Procedure, the hearing officer granted the motion and rejected 37-22852 without a hearing. *Preliminary Order Granting Motion for Summary Judgment With Respect to Application for Permit No. 37-22852*, Hearing Officer Mathew Weaver, May 26, 2015.

drawing all reasonable inferences and conclusions in that party's favor. If there is no genuine issue of material fact, only a question of law remains.

Davison v. Debest Plumbing, Inc., 163 Idaho 571, 574–75, 416 P.3d 943, 946–47 (2018) (citations and internal quotation marks omitted). While the nonmoving party is entitled to a presumption in their favor for all contested facts and every reasonable inference, it “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial.” *Path to Health, LLP v. Long*, 161 Idaho 50, 54, 383 P.3d 1220, 1224 (2016) (footnote, citation, and quotation marks omitted).

Protests are “pleadings” under IDWR’s administrative rules. IDAPA 37.01.01.210. A protest pleading should “[f]ully state the facts upon which they are based, including the protestant’s claim of right to oppose the application; [r]efer to the particular provisions of statute, rule, order or other controlling law upon which they are based; and [s]tate any proposed limitation (or the denial) of any right, license, aware or authority sought in the application.” *Id.* at 37.01.01.250.02.a-c. (emphasis added).

The original protest filed by Huggins provides the following basis of protest:

During a river split, the lower end receives rising water that can be used to irrigate. These senior water right transfers, would result in water not being available to the existing Jr. priority date water right holders.²

In a statement describing what would resolve her protest, Huggins’ protest provides:

The transfer of these water rights priority dates need to be subordinate to the existing water rights in the lower end that are currently available during a river split where the lower end can currently irrigate during rising water.

After T83745 was amended, Huggins submitted a “revised” protest, but did so without filing a motion to amend the protest under the Department’s administrative rules. *See* IDAPA

² The protest documents are part of the administrative record in this matter.

37.01.01.260. It is unclear, therefore, whether the revised protest should be recognized. Nevertheless, Sunset will address the issues described in the revised protest as well. The revised protest asserts (1) that approval of T83745 will violate the constitutional preference provisions found in Article XV, Section 3, of the Idaho Constitution for domestic water rights; (2) that revised T83745 improperly seeks to divert Sunset's water rights through the Arco Canal "when the lower end of the river is dry"; (3) that "[e]mptying out the natural water ways and river at the lower end of the river is a 'taking'" from domestic water users; and (4) that "emptying a river or natural stream is 'a taking' of private property rights from those individuals who bought "river front property" on a flowing river or natural waterway before the State Adjudication process was completed." On the amended protest document, Huggins states that "[i]f for some reason, IDWR allows this transfer, during times that the river is split, it needs to be put into the river and delivered downstream to 'the next in line.'"

Quist's protest alleges that T83745 "injures my water rights" and that he "[q]uestion[s] their source and statements in Application." Quist provided additional detail to this protest by stating that T83745, which proposes to amend the place of use of Sunset's water rights to cover land owned by Sunset (which land also has appurtenant water rights owned by Quist), will diminish the value of Quist's water rights.

Each of the above bases of protest are addressed below. For the reasons set forth below, the Hearing Officer should summarily rule on them in favor of Sunset.

I. ARGUMENT

A. The original basis for Huggins' protest is fully addressed with a subordination provision that has already been stipulated to by Sunset.

As provided above, one of the proposed changes to Sunset's water rights under T83745 is to add a point of diversion to Sunset's surface water rights for an existing pump station at the very

bottom end of the Big Lost River system below existing diversions to capture any water that may be present before it flows unused into the desert. All of Sunset's surface water rights currently only authorize diversion of water at the Arco Diversion, a diversion upstream on the Big Lost River from the location of Huggins' points of diversion under her water rights. Sunset's intent to add another point of diversion at the existing pump station below Huggins is not to exercise Sunset's rights in a manner where water is called past Huggins' points of diversion under any of Sunset's water rights that may be senior, rather, it was only to formally allow Sunset to divert water physically present in the Big Lost River at the Sunset point of diversion that would otherwise flow into the desert unused.

Huggins' stated concern on this issue is legitimate. However, both verbally and in writing, Sunset has already stipulated to the following condition to address the very concern raised by Huggins not only as to her water rights, but all water rights with authorized points of diversion between the Arco Diversion and the Sunset point of diversion on the Big Lost River:

The diversion of water under this right from the point of diversion located in the NWNESW, Sec. 17, 03N, 27E, shall be junior and subordinate to water rights 34-13725, 34-13727, 34-13729, 34-7061A, 34-7061B, 34-12420, 34-7149, and 34-7225.³

Where the senior privately agrees to subordinate its water rights, it cannot later seek to assert such rights through a call against other juniors. With this condition included on Sunset's water rights upon approval of T83745, Sunset cannot call for water past Huggins' headgates, even if Sunset's water rights are senior to Huggins or any other lower water user on the Big Lost River upstream of the Sunset point of diversion. Huggins herself stated that a subordination would resolve this issue of protest. Accordingly, the Hearing Officer can and should rule that with the

³ Sunset believes it has correctly listed all the water rights between the Arco Diversion and the Sunset point of diversion. To the extent any water rights are missing from this list, Sunset has no objection to adding these rights to the subordination condition.

inclusion of the above subordination condition in the approval of T83745, Huggins' injury concerns are fully resolved.

B. As a matter of law, the approval of T83745 will not violate the constitutional preference provisions found in Article XV, Section 3, of the Idaho Constitution.

Huggins has misapprehended the constitutional preference provisions found in Article XV, Section 3, of the Idaho Constitution. Huggins argues that even despite senior priority dates present on irrigation water rights or other types of water rights, domestic water rights possess a "super-priority" legal status that supersedes all other water rights. This is not a correct statement of Idaho law, and more importantly, nothing that T83745 proposes implicates the constitutional preference provisions. A water law treatise, with citation to relevant legal authority, correctly describes the constitutional preference provisions of Article XV, Section 3 as follows:

B. The "preference" for domestic use is really a right to condemn.

Like the constitutions of several western states, Idaho's constitution ranks certain beneficial uses in terms of "preferences." Idaho's Constitution ranks domestic uses first, agricultural uses second, and manufacturing purposes third, except that in an "organized mining district" (an historical anachronism) mining uses have preference over all but domestic uses.¹³⁸⁰

These preferences mean much less than might appear. They provide neither "super-priority" status in the priority system nor authority for IDWR to "prefer" certain water uses over others in the approval or administration of rights. Rather, this constitutional preference simply confers on the preferred water user the right to condemn the water rights of a less preferred user.¹³⁸¹ Indeed, this is made explicit by the last sentence of section 3: "But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution."¹³⁸²

Thus, for instance, a farmer may condemn the water rights of a manufacturing operation, but would be required to reimburse the manufacturer for the fair market value of the water right taken. That, of course, is not likely to pencil out. Likewise, a municipal provider (whose municipal water needs are deemed "domestic" for this purpose) could, in theory, condemn any other use. The authors are unaware of an instance in Idaho where this constitutional condemnation power has been exercised.

¹³⁸⁰ "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution." Idaho Const. art. XV, § 3.

¹³⁸¹ *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741 (1911).

¹³⁸² This language was noted, in support of this proposition, in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 880-81, 154 P.3d 433, 451-52 (2007).

IDAHO WATER LAW HANDBOOK, Fereday et al., at 486 (October 8, 2020 version).

Under the constitutional preference basis of protest, Huggins asserts that the Big Lost River system is over-appropriated and that has resulted in “no water in the river or natural waterways to allow the number 1 State of Idaho priority, domestic wells, recharge water for their domestic home wells/water rights.” However, there is nothing specific in this allegation that relates to the proposed changes to Sunset’s water rights in T83745. A contested case for a protested transfer is not meant to be a forum for all things water. Rather, it is specific to address whether the changes proposed under a transfer application violate the statutory review criteria found at Idaho Code § 42-222. Huggins has not alleged localized well interference because of the proposed changes, rather, she has alleged a generalized concern that more water should be left in the Big Lost River for recharge to benefit domestic wells, to provide water to Huggins’ irrigation diversions, and for recreation or aesthetic purposes (addressed further below). However, the legal basis to address these allegations are based on a flawed interpretation of the constitutional preference provisions.

Relative to the position that water should bypass the Arco Diversion and flow down to Huggins, that is a water administration issue that is not properly at issue before the Hearing Officer. *See, e.g., Order on Exceptions, Final Order, In the Matter of Application for Permit No. 74-16187 in the Name of Kurt W. Bird and Janet E. Bird*, at 11 (“[Q]uestions related to when water users may divert high flows are questions of administration and not properly before the hearing officer.”). Distribution of water among appropriators is not something Sunset has anything to do with, rather, distribution of water from natural river channels is an “essential **governmental** function.” Idaho Code § 42-604 (emphasis added). The authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, IDWR and its Director. Idaho Code § 42-103 provides that “it shall be the duty of the department of water

resources to devise a simple, uniform system for the measurement and distribution of water.” Chapter 6, Title 42 of the Idaho Code governs the “distribution of water among appropriators” and directs that the Director and the watermasters under his supervision are statutorily charged with distributing water to water rights. Idaho Code § 42-603 instructs that the Director is “authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.”

Included within the watermaster’s authority to distribute water is to make a finding of a “futile call.” This is where it is shown that closing headgates on an upstream tributary or on upstream diversion will not deliver surface water to points of diversion on the river downstream because the water sinks before it reaches the downstream point of diversion such that no measurable amount of water is made available. It is unknown to Sunset whether Huggins has made a delivery call of the Basin 34 watermaster to curtail junior surface water rights at the Arco Diversion and whether a futile call determination has been made. What is clear is that the state-employed watermaster’s job is to deliver water in priority, and not Sunset’s responsibility. And, as to the specific situation where a ground water right holder, such as Huggins, believes it has a claim to water diverted by other water users, it can follow the procedures outlined in the Department’s conjunctive management rules found at IDAPA 37.03.11. *See* IDAPA 37.03.11.001 (“The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.”).

In short, domestic water rights—including those owned by Huggins—do not enjoy a “super-priority” under Idaho law. They are administered pursuant to priority date just like all other

water rights. The constitutional preference that would allow a domestic user to condemn and pay just compensation for a senior water right used for other purposes (such as irrigation) is not at issue in the contested case for T83745 in any way. Furthermore, any claim of injury to Huggins' domestic ground water rights because of the exercise of existing water rights must be addressed through a process that involves the Basin 34 watermaster and/or proceedings under the conjunctive management rules. The Hearing Officer should summarily decide that the constitutional preference provisions and the associated arguments addressed above are not a legal bases that have any bearing on T83745 and Huggins' protest on these bases should be dismissed.

C. T83745 will not improperly approve the right of Sunset to divert its water rights at the Arco Diversion. Sunset's surface water rights already authorize Sunset to divert water at the Arco Diversion.

As currently described, Sunset's surface water rights—WRs 34-14733, 34-14771, 34-14770, 34-187A, 34-195D, 34-196C, and 34-2491G—already authorize Sunset to divert water under these rights at the Arco Diversion. In fact, it is the only location where diversion of surface water under these rights can be accomplished.

Huggins asserts that if T83745 is approved, this will improperly allow Sunset to divert water under its surface water rights through the Arco Canal “when the lower end of the river is dry.” However, Sunset's surface water rights already allow for this. As described above, water rights are administered by IDWR, through the Basin 34 watermaster, who is bound to deliver water in priority to users calling for water under existing water rights, even if this dries up the Big Lost River channel or other rivers and streams within the Basin 34 watermaster's jurisdiction. There are no minimum stream flow water rights (which can only be appropriated by the Idaho Water Resource Board under Chapter 15 of Title 42 of the Idaho Code) present on the Big Lost River. *See Idaho Code § 42-1503* (“Whenever the board desires to appropriate a minimum stream flow .

. .'); Idaho Code § 42-1502(b) (“‘Board’ means the Idaho water resources board.”). Because water rights in Idaho are administered based on priority date consistent with their other elements (including the point of diversion), and because Sunset’s water rights already allow for the diversion of surface water at the Arco Diversion, Huggins’ protest to T83745 on this basis should be dismissed.

D. Diversion of water under valid Idaho water rights does not result in an unconstitutional “taking” from domestic water users or from those who bought “river front property.”

Huggins’ last two bases or protest are addressed together here as they both relate to “takings” arguments. Huggins argues that the application of a statute, Idaho Code § 42-222, which authorizes the Department to approve a transfer application such as T83745, is unconstitutional in its application because it “takes” water from domestic water users and those who own river front property on the Big Lost River channel.

This contested case before the Department is not the proper forum for addressing Huggins’ constitutional arguments (no matter how misplaced they are, as further described below). The ability of the Department to consider constitutional issues is limited. IDAPA 37.01.01.415. If Huggins truly believes that Idaho Code § 42-222 or its application is unconstitutional, it must take those questions up with the judiciary. *Id.*; see also, *Order on Exceptions; Final Order*, In the Matter of Application for Permit No. 63-34348 In the Name of Elmore County, Board of County Commissioners, at 38.

However, even if the Hearing Officer considers the merits of Huggins’ takings claims, they are unavailing. The Idaho Constitution states that private property may be taken by the government for a public use, “but not until a just compensation” has been paid for the property. Idaho Const. Art. I, § 14. An inverse condemnation action is an eminent domain proceeding initiated by the

property owner rather than the condemnor. *Reisenauer v. State Dep't of Highways*, 120 Idaho 36, 39, 813 P.2d 375, 378 (Ct. App. 1991). An inverse condemnation action cannot be maintained unless an actual taking of private property is established. *Snyder v. State*, 92 Idaho 175, 179, 438 P.2d 920, 924 (1968). In order to support a claim of inverse condemnation, the action must be: (1) instituted by a property owner who (2) asserts that his property, or some interest therein, has been invaded or appropriated (3) to the extent of a taking, (4) but without due process of law, and (5) without payment of just compensation. *City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596, 601 (Ct. App. 1993) (citing *Rueth v. State*, 100 Idaho 203, 217, 596 P.2d 75, 89 (1978); see also, *Covington v. Jefferson Cty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002).

Huggins cannot satisfy any of the elements of an inverse condemnation action because Huggins is not the owner of Idaho's water flowing in a river channel, nor is she the owner of water diverted by a water right holder. It is black letter water law that while a water right is a property right, the water right owner does not own the water itself. The water resource itself is owned by the State of Idaho: "**All** of the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state **are declared to be the property of the state**, . . . Idaho Code § 42-101. Idaho has elected to allow its citizens to use its water through issuance of water rights which entitle the holder of the right to divert Idaho's water molecules. Accordingly, Huggins does not own the water flowing in the Big Lost River channel. It is Idaho's to allocate to those who develop water rights for its use. Because Huggins is not the owner of the property she claims she is being deprived of—water flowing in the river channel for those who bought river front property—her takings claim fails on this basis alone. And even if by some legal miracle she has a possible takings claim, it is not Sunset that issued water rights to water users that has dried up the Big Lost River during portions of the year—it is the state

of Idaho that has done so, and her takings claim should be directed at them and not at Sunset in this proceeding.

Further, on the question of who owns water, water diverted by a water right owner is thereafter considered to be owned by the water right holder and is no longer “public water” where others, such as Huggins, can claim the right to use such diverted water. *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943, 945 (1935) (“After the water was diverted from the natural stream and stored in the reservoir, it was **no longer “public water”** subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3). . . . The waters so impounded then became **the property of the appropriators** and owners of the reservoir, impressed with the public trust to apply it to a beneficial use.”) (emphasis added). Accordingly, water that is diverted and used by a water right holder does not “take” water from domestic well users, such as Huggins.

To be clear, appropriated water rights vested in water right owners are real property rights (subject to the requirement to put water to a beneficial use). “When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law....” *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). Huggins does not point to a water right she owns that authorizes use of water for recreation or aesthetic purposes for flows in the Big Lost River that she is being deprived of. Similarly, Huggins does not point to a recharge water right (that would benefit her domestic rights) that could be affected by T83745 such that there is a taking. Accordingly, her takings argument as a domestic water user is unavailing.

Similarly, Huggins’ argument for rights of river front property owners is unavailing. Huggins is advocating for a riparian system of water allocation. The prior appropriation doctrine,

which Idaho has unequivocally adopted and followed (Idaho Const. art. XV, § 3; Idaho Code § 42-106), contrasts with the law of “riparian rights” prevalent in the Eastern United States where water is more plentiful. Riparian water rights are based on the principle of equal sharing of water among all riparian (streamside) landowners, without regard to who got there first. Riparian rights are repugnant to the Idaho Constitution. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) (Idaho has rejected the riparian rights system of appropriation); *see also Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) (rejecting “correlative rights” in ground water).

Finally, while perhaps not directly related to the arguments raised in the protest documents filed by Huggins, it is apparent that Huggins believes that ditch piping and ditch lining projects are legal issues that she is free to raise in the contested case for T83745. However, the Department has previously clearly explained that a ditch owner “is entitled to pipe or tile their privately constructed delivery ditches. No ‘filing’ with, or authorization from the Department is required for a canal or irrigation company to replace a privately constructed ditch with a pipeline.” *See* Exhibit 1 attached hereto (letter from IDWR agent Tim Luke to Eldon Golightly, August 28, 2008, at 3).

The position of the Department is entirely consistent with Idaho law. On many different occasions, the Idaho Supreme Court has been quite clear that easement matters and water rights matters are **separate**: “In Idaho, ditch rights and water rights are separate and independent from one another.” *Zingiber Inv., LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 249 P.3d 868 (2011); *See also Beach Lateral Water Users Ass’n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006) (“Although a ditch easement typically concerns the conveyance of water, it is ‘a property right apart from and independent of questions of water rights.’”) (quoting *Savage Lateral Ditch Water Users’ Ass’n. v. Pulley*, 125 Idaho 237, 242, 869 P.2d 554, 559 (1993)). Thus, the “right

for the conveyance of water is recognized as a property right apart from and independent of the right to the use of the water conveyed therein” and “[e]ach may be owned, held and conveyed independently of the other.” *Simonson v. Moon*, 72 Idaho 39, 47, 237 P.2d 93, 98 (1951).

Accordingly, there is nothing illegal with lining or piping an irrigation ditch, even if it reduces seepage that other water users may rely upon. Incidental loss from ditches is waste water, and water right owners that divert water into ditches or canals are not required or mandated to continue to waste water for the benefit of a third party that may rely upon such water. The law in Idaho is very clear on this point:

It is axiomatic that no appropriator can compel any other appropriator to continue the waste of water whereby the former may benefit. If respondent, by a different method of irrigation . . . could so utilize his water that it would all be consumed in transpiration and consumptive use . . . and thus no waste water return by seepage or percolation to the river, no other appropriator – from the evidence herein – could complain. . . . **The rule that a junior appropriator has the right to a continuation of stream conditions as they were at the time he made his appropriation, could not compel respondent to continue to waste his water . .**

Application of Boyer, 73 Idaho 152, 162-63 (1952) (internal citations removed) (emphasis added); see also *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681 (1980) (“While the waste of the original appropriator is not to be encouraged, the recognition of a right in a third person to enforce the continuation of waste will not result in more efficient uses of water.”); *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 222 (1950) (“It is settled law that **seepage** and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing and able to put it to a beneficial use.”) (emphasis added); *Crawford v. Inglin*, 44 Idaho 663, 669 (1927) (“He can use all his water, waste none of it, or apply it on other lands, and thereby prevent its flow into the ditch.”).

Having fully addressed Huggins' issues raised in her protest documents, as a matter of law, the Hearing Officer must dismiss her constitutionally-based protests for the reasons set forth above.

E. Quist's allegations of diminishment to the value of his water rights is not a legally cognizable injury.

As described above, Quist's protest alleges that T83745 "injures my water rights." Quist has provided additional detail to this protest by indicating that T83745 will diminish the value of Quist's water rights because Sunset's proposed permissible place of use will cover Sunset's property upon which Quist (not Sunset) owns appurtenant water rights.

Like injury in the context of a new water right application, injury in the context of a water right transfer contemplates loss of water to an existing water right or water rights because of the proposed change described in the transfer: "An application that would otherwise be denied because of injury to another water right may be approved upon conditions that will mitigate losses of water to the holder of an existing water right, as determined by the Director." IDAPA 37.03.08.045.01.a.iv (emphasis added).

As a general matter, the starting point for analysis of whether an action will impact another property owner (water rights are defined as real property under Idaho Code § 55-101) is this recognition:

Generally, "every man may regulate, improve, and control his own property, may make such erections as his own judgment, taste, or interest may suggest, and be master of his own without dictation or interference by his neighbors, so long as the use to which he devotes his property **is not in violation of the rights of others, however much damage they may sustain therefrom.**"

McVicar v. Christensen, 156 Idaho 58, 62, 320 P.3d 948, 952 (2014), *as corrected* (Feb. 20, 2014) (quoting *White v. Bernhart*, 41 Idaho 665, 669–70, 241 P. 367, 368 (1925)) (emphasis added).

Stated another way, there may be non-water related impacts to a protestant, but those impacts are

not considered injury to others provided that the property owner is acting within his or her rights. Sunset owns the property where it seeks to create a permissible place of use. Sunset has every right to move water rights onto property it owns—this act seeks to “improve” its property and be “master of his own without dictation or interference by his neighbors.” *Id.* Quist cannot dictate to Sunset that it cannot do this, nor interfere with Sunset’s actions to improve its property. This clear principle is embodied in the very definition of “injury” itself. Under “standing” jurisprudence, which describes the type of injury that grants legal standing, the Idaho Supreme Court has explained the type of injury that must be present:

Idaho has adopted the constitutionally based federal justiciability standard.” *ABC Agra, LLC v. Critical Access Grp., Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014); *Koch v. Canyon Cnty.*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008) (“When deciding whether a party has standing, we have looked to decisions of the United States Supreme Court for guidance.”). Under U.S. Supreme Court jurisprudence, to establish standing “a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘like[lihood]’ that the injury ‘will be redressed by a favorable decision.’” *Susan B. Anthony List v. Driehaus*, __ U.S. ___, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). **An injury sufficient to satisfy the requirement of an injury in fact “must be ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’”** *Id.* (internal quotations omitted) (quoting *Lujan*, 504 U.S. at 560).

Consistent with the federal standard, *Young* also holds that standing “requires a *showing* of a ‘distinct palpable injury’ and ‘fairly traceable causal connection between the claimed injury and the challenged conduct.’” *Id.* (emphasis added) (quoting *Miles*, 116 Idaho at 639, 778 P.2d at 761). This Court has defined palpable injury as an injury that is easily perceptible, manifest, or readily visible. *Martin v. Camas Cnty. ex rel. Bd. of Comm’rs*, 150 Idaho 508, 513 n.3, 248 P.3d 1243, 1248 n.3 (2011).

State v. Philip Morris, Inc., 158 Idaho 874, 881-82, 354 P.3d 187, 194-95 (2015) (emphasis added).

There is no evidence that approval of T83745 will impact the value of Quist’s water rights, *i.e.*, that he has suffered an “injury in fact” that can be “redressed” by the Hearing Officer, or one that is “concrete and particularized.” The acreage numbers described in T83745 are clear that

Sunset's permissible place of use is 612 acres, within which only 442 acres are authorized for irrigation. To fully irrigate Sunset's property, Sunset will need additional water rights, such as those owned by Quist. Sunset has leased Quist's water rights in 2020 and 2021, but Quist has thus far not indicated a willingness to sell them. Indeed, Sunset is the likely candidate to purchase the rights, even if T83745 is approved. Quist has thus far provided no information or evidence supporting his claim that his water rights will lose value if T83745 is approved. Quist's claims are "conjectural or hypothetical."

Despite the foregoing, for purposes of summary judgment, the Hearing Officer can presume that Quist's water rights will lose value under T83745. But even with entertainment of this assumption, loss of value to Quist's water rights is not the kind of legal impact contemplated under the injury criterion contained at Idaho Code § 42-222. As described above, the injury component of Idaho Code § 42-222 contemplates the loss of water to the holder of an existing water right. *See* IDAPA 37.03.08.045.01.a.iv. Loss of value to water rights is not loss of water available for diversion and use. Sunset owns the property where it seeks to create a permissible place of use. Sunset has every right to seek move water rights to property it owns—this act seeks to "improve" Sunset's property and Sunset has the legal right to be "master of his own without dictation or interference by his neighbors." *Philip Morris, Inc.*, 158 Idaho at 881-82, 354 P.3d at 194-95. Quist, as a Sunset neighbor, cannot dictate or interfere with what Sunset proposes under T83745 by protesting this transfer application based on diminished water right value. For all the above reasons, the Hearing Officer must dismiss Quist's protest on this basis.

II. CONCLUSION

For the reasons set forth above, summary judgment in favor of Sunset is appropriate for all bases of protest asserted by Huggins and Quist. The Hearing Officer should issue an order

including the subordination condition described above, dismissing the remainder of the protests filed by Huggins, and dismissing the protest filed by Quist. Sunset believes it has resolved Walker's concerns by agreement, but to the extent a stipulation resolving Walker's protest is not filed, Sunset recognizes that Walker's protest will remain outstanding and will need to be addressed at hearing or with a subsequent motion.

Respectfully submitted this 25th day of November, 2020.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2020, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

**DOCUMENT SERVED: MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT**

ORIGINAL TO: James Cefalo
Hearing Officer
Idaho Department of Water Resources
900 North Skyline Dr., Suite A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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EXHIBIT 1



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

COPY



August 28, 2008

Eldon Golightly
2414 S 1600 E
Preston, ID 83263

C. L. "BUTCH" OTTER
Governor
DAVID R. TUTTILL, JR.
Director

Re: Your Prior Correspondence Regarding Delivery of Water Rights from Spring Creek, and
Follow-up to IDWR Visit with you on July 18, 2008

Dear Mr. Golightly,

I am finally writing you as a follow-up to the visit that Ernie Carlsen, Troy Foster and I made with you at your residence on the morning of July 18, 2008. Ernie, Troy and I also inspected most of Spring Creek between Lamont/Johnson Reservoirs and your point of diversion at Whitney along Highway 91. We also toured portions of the diversion/delivery systems and service areas of Cub River Irrigation Company (Cub River Irrigation), the Preston-Whitney Irrigation Co and the Preston-Whitney Reservoir Company (collectively referred to herein as Preston-Whitney). We also toured other parts of the Cub River water district with the Cub River watermaster, Troy Foster. Ernie and I appreciated the time you provided us to explain your concerns about the lack of delivery of Spring Creek water rights that you currently hold.

Before getting into much detail about our visit of July 18th, I wish to raise a few questions or findings concerning the water rights in which you claim to have an interest. Your correspondence to the Idaho Department of Water Resources (Department) dated July 25, 2007 only referenced water right no. 13-62, which is a 1902 priority decreed right from Spring Creek, tributary to Worm Creek. The owners of record for this right as per the Department's records are Donald G and Nona Golightly. This water right is appurtenant to 114 acres in the E1/2NE, the E1/2SE of Section 12, Township 16 South (T16S), Range 39 East (R39E), and the W1/2SW of Section 7, T16S, R40E. Water right 13-216 is a 1903 priority decreed right from Spring Creek, tributary to Worm Creek, and water right 13-217 is an 1872 priority decreed right from an unnamed stream tributary to Worm Creek. Rights 13-216 and 13-217 also show Donald G and Nona Golightly as the owners of record, and both rights are also appurtenant to the same lands as right 13-62. All three rights have a condition that limits the combined annual diversion of water under the three rights to no more than 400 acre-feet per year.

As per the Franklin County Assessor's office, the E1/2SE of Section 12, T16S, R39E is owned by Wheatley Properties LLC. As a result, at least 64 of the 114 acres under the above three water rights are owned by Wheatley Properties. The Franklin County Assessors office further documented that the remaining lands under the water rights in the NE of Section 12, T16S, R39E and the NW of Section 7, T16S, R40E, are owned by E&M Trust, with the co-trustees being Patricia Vaughn and James Townsend of Preston, Idaho. As per our telephone discussion on August 20, 2008 regarding ownership of the rights, you acknowledged that Wheatley Properties owns a portion of the three water rights appurtenant to the E1/2SE Section 12, T16S, R39E. You also advised me that you have a personal interest in the E&M Trust but that Patricia Vaughn and James Townsend are no longer representatives of the trust.

Golightly Editor
8/28/08, p. 2

Given the above findings concerning the ownership of the rights and lands, the Department recommends that you update the ownership of water rights 13-62, 13-216 and 13-217 by filing a Notice of Change in Water Right Ownership with the Department. Ownership change forms can be downloaded from the Department's web site using the following address: http://www.idwr.idaho.gov/water/rights/water_rights_forms.htm.

Concerning our visit with you on July 18, 2008, I understood some of your concerns to be as follows:

- You allege that your water rights from Spring Creek are not delivered or satisfied at your point of diversion from Spring Creek.
- You believe that the earthen ditch, identified as the Middle Ditch on the local United States Geological Survey (USGS) topographical map, which formerly conveyed water from the Lamont and Johnson Reservoirs and which was replaced by a pipeline last year by Preston-Whitney, is a natural channel.
- You allege that the construction of the Preston-Whitney pipeline that replaced the earthen ditch from the reservoirs constitutes an illegal action by Preston-Whitney and interferes with your ability to divert your Spring Creek water rights.
- You allege that a second pipeline installed by Cub River Irrigation, known locally as the Palmer pipeline, out of a ditch from the Cub River that is also identified as the Middle Ditch on the local USGS topo map, was installed without "filing" with the Department.
- You alleged during our visit on July 18th that water from Preston-Whitney that is conveyed through the pipeline that was installed last year is being delivered outside of Preston-Whitney's service area and/or to water users in the Cub River Irrigation Company.
- You alleged during our visit on July 18th and it is implied in your correspondence dated November 19, 2007 to Cindy Bird of the Department that the Johnson and Lamont Reservoirs intercept or interfere with the flow of water to Spring Creek.
- During our phone conversation of August 20, 2008, you stated that water from Preston-Whitney was being injected or discharged to Spring Creek and re-diverted from Spring Creek "around your diversion" this season to satisfy another water user.

I offer the following observations and responses based on our visit of the area on July 18, 2008.

- During our visit we confirmed that there was very little water available to divert at your diversion on Spring Creek. There may have been just a few inches going to your ditch but that quantity would provide little if any beneficial use under your rights. The lack of available water at this location is consistent with Troy Foster's observations over the past few years as well as the observations of IDWR staff member Cindy Bird who visited your Spring Creek diversion last summer. During our visit on July 18, 2008, we found very little water in any portion or reach of Spring Creek above your diversion (note: our

Golightly Letter
8/28/08, p. 3

definition of Spring Creek is the creek as located in IDWR water rights and the USGS topo map). This observation is again consistent with the observations of Troy Foster over recent years. The Department understands that very little waste water or return flow from Cub River Irrigation and Preston-Whitney irrigation delivery systems enters Spring Creek above your diversion. The lack of return flow or waste water that may enter Spring Creek appears to be directly related to the general transition of flood irrigation to pressurized sprinkler irrigation within the Cub River Irrigation and Preston-Whitney delivery systems, as well as the installation of pipelines that convey water from Cub River Irrigation's Middle Ditch and from Preston-Whitney's Lamont and Johnson Reservoirs. The Department further understands that the amount of waste water or flow returning to Spring Creek from these irrigation systems was greater before irrigation practices changed and/or irrigation system efficiencies were made starting some ten to fifteen years ago. We believe that the reduction in return flow or waste water to Spring Creek from the Cub River and Preston-Whitney service areas is the primary reason your Spring Creek water rights are not being satisfied.

- The Department does not agree that the earthen ditch used by Preston-Whitney to convey water from the Lamont and Johnson Reservoirs, and identified as the Middle Ditch on the local USGS topo map, is a natural channel or a natural tributary to Spring Creek. This is a man made ditch constructed by Preston-Whitney for purposes of conveying stored water from the Lamont and Johnson reservoirs as well as natural flow that Preston-Whitney diverts from the Cub River and Worm Creek.
- It is the Department's position that Preston-Whitney, or any canal or irrigation company in Idaho, is entitled to pipe or tile their privately constructed delivery ditches. No "filing" with, or authorization from the Department is required for a canal or irrigation company to replace a privately constructed ditch with a pipeline. The Department does not agree with your position that the installation of the pipeline replacing the Preston-Whitney Middle Ditch or the installation of the Palmer pipeline by Cub River Irrigation required a 'filing' with the Department, nor does the Department believe that either pipeline was somehow installed illegally.
- We learned from our visit with the watermaster and subsequent review of water district reports and other documents that you forwarded to the Department that Preston-Whitney uses its' upper Cub River diversion located near the Albert Moser Campground, or the Cub River - Worm Creek Canal (aka the Upper Fill Ditch), to deliver its' 1882 Cub River natural flow priority right no. 13-2. The legal point of diversion for this right is the Middle Ditch from Cub River that Cub River Irrigation now uses under agreement with Preston-Whitney to deliver a portion of Cub River Irrigation's water rights. It is our understanding from the watermaster that Preston-Whitney still uses the Middle Ditch but typically diverts most or all of right 13-2 to the Cub River - Worm Creek Canal, which is then injected to Worm Creek and re-diverted through the Lamont and Johnson Reservoirs to Preston-Whitney's service area. Although Cub River Irrigation obtained an approved water right transfer to add the Middle Ditch as a point of diversion to its' water rights, Preston-Whitney has never filed a water right transfer to add the Cub River - Worm Creek Canal as a legal point of diversion to right 13-2. Preston-Whitney therefore should file a water right transfer to add the Cub River - Worm Creek Canal as a legal point of diversion to right 13-2, update the place of use for the right, and update the

Golightly Letter
8/28/08, p. 4

ownership of the right from the Middle Ditch Company to Preston-Whitney Irrigation Company.

- Our visit on July 18, 2008 with Troy Foster also revealed that Preston-Whitney and Cub River Irrigation sometimes engage in a water right exchange. Preston-Whitney water is delivered to certain Cub River Irrigation users at certain times when Cub River is short of water in exchange for an equal amount or volume of water from Cub River Irrigation being delivered to certain Preston-Whitney users at times when Preston-Whitney is short of water. We understood from explanation of Conan Foster, ditch rider for Cub River Irrigation and Preston-Whitney, that the exchange may total a few hundred acre feet of water per year. The details of this exchange are not entirely clear yet to the Department but the Department does not believe that authorization exists for such an exchange nor is there any pending application for exchange of water on file with the Department. The Department therefore intends to instruct the watermaster to discontinue this exchange until the two companies file an Application for Exchange of Water and subsequently receive approval from the Department.
- Relative to your concern about where water is delivered by Preston-Whitney and Cub River Irrigation, the Department has found that Cub River may indeed be delivering water to lands outside of the place of use described under its water rights. In fact we found that Cub River Irrigation delivers shares to a portion of your land in Section 7, T16S, R40E that is not covered by Cub River's water rights. The Department believes that Cub River, and possibly Preston-Whitney may be delivering water to lands that is not consistent with the places of use described by their water rights even though such delivery may have occurred for many years. To this end, the Department will request that both Preston-Whitney and Cub River review their actual service area boundaries with the boundaries identified by their water rights and file any water right transfers, if necessary, to update their respective service areas. The Department will request that Preston-Whitney file a water right transfer at least to update the place of use and ownership for right 13-2.
- We observed no direct diversions of water from Spring Creek during our visit of the creek on July 18, 2008. Since you were not able to physically accompany us on our tour of the creek we could not review with you in the field all of the sites referenced in your November 19, 2007 letter. We did not observe any direct diversion of water from Spring Creek to the Moser pond at the time of our visit. We understand from a previous investigation by Cindy Bird and reports made to her by another local water user that there may have been and perhaps continues to be some unauthorized or out-of-priority diversion on Spring Creek in the vicinity of this pond, and another pond located at or near the Potterborg residence. Although there may be little water to divert in Spring Creek, the Department believes that the creek should be regulated. The Department is prepared to take steps to assure that both Spring Creek and Worm Creek are regulated by the watermaster of Water District 13-A in subsequent years.
- Regarding your allegations that Johnson and Lamont Reservoirs intercept or interfere with the flow of water to Spring Creek. We have no evidence that springs exist in either reservoir but we agree that all or portions of the reservoirs are within the Spring Creek drainage area. We are troubled however that you claim these reservoirs interfere with

Golightly Letter
8/28/08, p. 5

your Spring Creek water rights nearly thirty years after the Worm Creek Basin Adjudication and Final Decree. We are not aware that such complaints or objections were raised during the Worm Creek Adjudication and there is no guidance or direction from the Worm Creek Decree regarding this issue.

- Regarding your complaint on August 20, 2008 about the delivery of water from Preston-Whitney to and from Spring Creek. I contacted watermaster Troy Foster who confirmed that storage water from Preston-Whitney was being delivered to and re-diverted from Spring Creek by a Preston-Whitney shareholder along Spring Creek. The irrigated land in question is located within Preston-Whitney's water rights service area. It is the Department's position that Preston-Whitney's water rights do not authorize them to use Spring Creek to convey their water to any of their patrons, even if the water is used within the place of use authorized by Preston-Whitney's water rights. Preston-Whitney's rights do not authorize them to inject and re-divert their water to or from Spring Creek. Consequently, I verbally directed Troy Foster on August 20, 2008 to prohibit Preston-Whitney from using Spring Creek to deliver any portion of their water or water rights.
- During our site visit on July 18, 2008 we identified several concerns regarding administration of water rights in Water District 13-A that are unrelated to any of the issues raised in our meeting with you or in your previous letters. The Department intends to address these other concerns via separate communication directly with the Water District 13-A watermaster and water users between now and the next annual water district meeting.

In summary, I believe the reduced flows in Spring Creek are due primarily to changes in local irrigation practices. Piping private irrigation ditches and converting irrigation systems from flood irrigation to pressurized sprinklers are not actions that require authorization by the Department. The Department will instruct the watermaster, Preston-Whitney and Cub River Irrigation to discontinue the exchange of Cub River water rights until proper authorization is obtained by the Department. We do not believe that discontinuing the exchange will result in additional water to Spring Creek.

The Department will also instruct the companies to review their water rights place of use and file water right transfers to correct their places of use if necessary. Preston-Whitney must file a water right transfer to add the Cub River-Worm Creek Canal as a point of diversion to water right 13-2. All water right transfers are subject to public notification and may be protested by concerned water users or the public. Water right ownership updates must also be filed for the rights formerly held by Donald and Nona Golightly so that the rights are properly split between Eldon Golightly and Wheatly Properties.

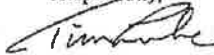
The Department will further instruct the watermaster of Water District 13-A that he immediately begin some regular monitoring and regulation of water use on Spring Creek, tributary to Worm Creek. The Department has already instructed the watermaster to prohibit use of Spring Creek to convey Preston-Whitney project water. While these actions are necessary, we do not anticipate that they will result in improving the water supply of Spring Creek.

Golightly Letter
8/28/08, p. 6

Worm Creek and tributaries were added to Water District 13-A by Order of the Director dated February 25, 1983. The Department therefore will advise the watermaster and water users within the Worm Creek drainage that they are subject to regulation and assessments by Water District 13-A. The Department will send notice of the 2009 Water District 13-A annual meeting to right holders within the Worm Creek drainage, as well as other tributaries in the Cub River that are not directly regulated by the watermaster. The Department intends to send one or more orders requiring installation and/or improvement of measuring devices and headgates in the water district.

Please contact Ernie Carlson or me if you have additional questions related to these issues.

Respectfully,



Tim Luke
Water Distribution Section

Cc: Troy Foster, Water District 13-A Watermaster
Ernie Carlson, IDWR Eastern Region
Gary Spackman, IDWR Administrator
Cub River Irrigation Company
Preston-Whitney Irrigation Company
Preston-Whitney Reservoir Company