

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)	ORDER GRANTING
TRANSFER NO. 83745 IN THE NAME OF)	MOTION FOR SUMMARY
<u>SUNSET FARM & RANCH LLC</u>)	JUDGMENT, IN PART

PROCEDURAL HISTORY

On November 6, 2019, Sunset Farm & Ranch LLC (“Sunset”) filed Application for Transfer 83745 with the Idaho Department of Water Resources (“Department”), proposing to make changes to eleven water rights. 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. In response to the amended application, Huggins filed a revised protest on August 17, 2020.

On November 25, 2020, Sunset filed a *Motion for Summary Judgment and Memorandum in Support* (“Sunset Motion”) pursuant to Rule 260 of the Department’s Rules of Procedure (IDAPA 37.01.01). Sunset asks the Hearing Officer to adopt an approval condition subordinating Sunset’s Big Lost River water rights to rights held by Quist and Huggins and to dismiss the remainder of the protests filed by Quist and Huggins. *Sunset Motion* at 17-18.

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

STANDARD OF REVIEW

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

SUMMARY OF WATER RIGHTS

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. The proposed permissible place of use is located on Sunset property.

5. 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 Big Lost River water rights: a pump station ("Sunset River Pump") in the NWNESW of Section 17, T03N, R27E.

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

7. The following water rights include authorized points of diversion from the Big Lost River between the Arco Diversion and the Sunset River Pump: 34-244A, 34-244C, 34-418B, 34-518, 34-607B, 34-13725, 34-14315 and 34-14317.

8. The following water rights include an authorized point of diversion from the Big Lost River at the Sunset River Pump: 34-7149 and 34-7225.

9. The following water rights include authorized points of diversion from the Big Lost River downstream of the Sunset River Pump: 34-7061A, 34-7061B, 34-12420, 34-13725, 34-13727 and 34-13729.

10. Quist is the current owner of record for water rights 34-7149, 34-7181, 34-10680, 34-12421 and 34-13414. The authorized irrigation place of use for these water rights includes property now owned by Sunset. The 612-acre permissible place of use proposed by Sunset overlaps the existing place of use for water rights 34-7149, 34-7181, 34-10680, 34-12421 and 34-13414.

ANALYSIS

Sunset asks the hearing officer to adopt an approval condition subordinating Sunset's Big Lost River rights to rights with authorized points of diversion between the Arco Diversion and the Sunset River Pump. Sunset argues that, if the subordination condition is adopted, Sunset will prevail on all of the issues of protest identified by Huggins and Quist. The various issues of protest raised by Huggins and Quist will be addressed separately in this order. For each issue of protest, the hearing officer must determine if there are genuine issues of material fact, if there are facts that should be construed in favor of Huggins or Quist, and whether Sunset is entitled to judgment as a matter of law.

Huggins Protest Issue 1 - Injury

The original protest filed by Huggins included the following statement 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 [junior] priority date water right holders. The transfer of these water rights priority dates need to be subordinate to the existing water rights in the lower end that are available during a river split where the lower end can currently irrigate during rising water.

Huggins protest is difficult to understand, but expresses a concern that the proposed change will injure junior water rights at the lower end of the Big Lost River (downstream of the Arco Diversion). Sunset's Big Lost River Rights (34-187A, 34-195D, 34-196C, 34-2491G, 34-14770, 34-14771 and 34-14773) currently authorize only one point of diversion from the Big Lost River: the Arco Diversion. Application 83745 proposes to divert the rights from a second point of diversion (the Sunset River Pump) located approximately seven miles downstream of the Arco Diversion. Application 83745; *Sunset Motion* at 4-6.

Sunset's Big Lost River rights are senior to many of the Big Lost River water rights downstream of the Arco Diversion. Therefore, if Sunset were to move its point of diversion to a downstream location, there is a potential that the change could injure junior water rights. If the transfer is approved, Sunset has agreed to subordinate its diversion from the Sunset River Pump to "all water rights with authorized points of diversion between the Arco Diversion and the [Sunset River Pump]." *Sunset Motion* at 5.

The subordination language proposed by Sunset is not sufficient to protect all downstream Big Lost River rights from injury. There are Big Lost River water rights with authorized points of diversion downstream of the Sunset River Pump. These water rights have historically had access to water passing the Arco Diversion or gains to the river downstream of the Arco Diversion. One way to fully protect downstream rights would be for Sunset to subordinate its diversion at the Sunset River Pump to all water rights downstream of the Arco Diversion, even those water rights with points of diversion downstream of the Sunset River Pump.¹ The *Sunset Motion* doesn't refer to the water rights with authorized points of diversion on the Big Lost River downstream of the Sunset River Pump. It is not clear from the pleadings or from the *Sunset Motion* whether Sunset is willing to subordinate its diversion at the pump station to all Big Lost River water rights downstream of the Arco Diversion. In the absence of a subordination to all water rights with authorized points of diversion on the Big Lost River downstream of the Arco Diversion, there continue to be genuine issues of material fact related to injury to Big Lost River water rights. Therefore, summary judgment on this question is not appropriate.

Huggins Protest Issue 2 – Enlargement / Constitutional Claims / Takings

The revised protest filed by Huggins quotes Article XV, Section 3 of the Idaho Constitution, which states:

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 appropriation 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 the 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.

Huggins' revised protest summarizes the "priority for water rights" as "1) Domestic; 2) Mining, 3) Agriculture and 4) Manufacturing." Huggins Revised Protest at 1. Huggins then raises the following arguments related to Article XV, Section 3:

We cannot tell from a map where the place of use is for these water rights because the IDWR maps associated with this application on the IDWR site have not been

¹ A possible subordination condition could state: "The diversion of water under this right from the point of diversion located in the NWNESE, 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).

downloading for the past couple of days, but his application may be resulting in an expansion of cropland on a water basin (Basin 34) that is already over appropriated (thus 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).

Emptying out the natural water ways and river at the lower end of the river is a “taking” from all of us from just above Arco on down (domestic wells) to the benefit of very specific individuals for crops (priority 3) at the expense of our domestic wells (priority 1) and property deeds. It is obvious that many individuals consider any water in natural water ways downstream from the West side and East side of the (manmade) river as an opportunity to use that water for their own crops by removing it from those waterways and transporting it through lined canals and piping systems. Additionally, emptying a river or natural stream is “a taking” of private property rights for those individuals who bought “river front property” on a flowing river or natural waterway before the State Adjudication process was completed who now have river or stream property with no water in those natural waterways, and those people need to be compensated for their losses that have occurred through these allowed past practices.

Huggins first argues that the proposed changes will result in an expansion of irrigated acres in Basin 34. Idaho Code § 42-222 requires the Department to evaluate whether a proposed change will result in an enlargement of the original rights. In conjunction with evaluating injury and enlargement, the Department must determine whether any portion of the water rights proposed to be changed have been lost or forfeited through non-use. The Sunset Motion did not include any information related to the historical use under the water rights included in Application 83745. Thus, there are genuine issues of material fact related to the historical use under Sunset’s water rights. Without the development of the evidentiary record, it is unclear how the proposed irrigation compares to the historical irrigation occurring under Sunset’s rights since the time partial decrees were issued for the Sunset rights in the Snake River Basin Adjudication (“SRBA”). Therefore, summary judgment is not appropriate for the enlargement concern raised by Huggins.

The question of enlargement is only one component of the Huggins revised protest. Huggins also suggests that the preference structure set forth in Article XV, Section 3 of the Idaho Constitution creates a type of super priority for certain water uses, which would make domestic uses superior to all other beneficial uses, regardless of priority dates. The Idaho Supreme Court has rejected this idea and has explained that the preference structure set forth in Article XV, Section 3 only applies to proposals to condemn water rights. See *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741 (Idaho 1911). There is no evidence that Huggins proposes to condemn Sunset’s irrigation water rights. Nor is there evidence that Sunset is seeking to condemn Huggins’ irrigation or domestic water rights. Therefore, the beneficial use preferences set forth in Article XV, Section 3 of the Idaho Constitution are not relevant to this contested case.

Other parts of the Huggins revised protest are difficult to decipher. There are multiple allegations of takings, but it is unclear who has initiated the takings or what property has been taken. Huggins seems to allege that the SRBA constituted a taking of property rights. She also suggests

that any diversion of water from a natural watercourse constitutes a taking of the property rights for riverfront property owners. Ultimately, these questions of takings are beyond the scope of this contested case. Huggins also seems to argue that the processing of water rights transfers under Idaho Code § 42-222 constitutes a violation of the Idaho Constitution and the U.S. Constitution.

The hearing officer does not have the authority to grant summary judgment for any of these constitutional or takings questions. It is clear from the *Sunset Motion*, however, that Sunset is not asserting that it should prevail on these constitutional or takings challenges. Rather, Sunset is simply seeking a clear statement of the scope of this contested case. The hearing officer should adopt conclusions of law identifying any arguments raised by Huggins that are beyond the scope of this contested case. Doing so will help the parties focus their time and resources on issues that can lawfully be addressed by the hearing officer in this administrative proceeding.

Huggins Protest Issue 3 - Rights Delivered Through Arco Canal

In her revised protest, Huggins raises a concern about Sunset diverting its Big Lost River rights through the Arco Canal:

The revised application seems to allow the applicant to either take the rights from the river or to deliver them through the Arco Canal. By allowing these rights through the Arco Canal, it seems the applicants are using the Arco Canal delivery system to circumvent our original protest to their original application by taking water through the Arco Canal when the lower end of the river is dry (which seems to be the case throughout each summer/fall and even until spring melt now.) Additionally, by pulling those rights from the river at an upstream location from the natural waterways, it further exacerbates the problem of domestic wells going dry downstream from the proposed point of diversion from the river.

Huggins argues that Sunset diverting its Big Lost River water rights through the Arco Canal will cause injury to local domestic wells. Huggins' protest proposes that Sunset should be required to divert its water rights only at the Sunset River Pump. Huggins argues that the Sunset's Big Lost River rights should no longer be diverted through the Arco Canal. Huggins Revised Protest at 2 ("Resolution . . . Disallow these transfers to be delivered through the Arco Canal."). This argument is a direct contradiction to Huggins' original argument, that the proposed change (adding the Sunset River Pump to Sunset's Big Lost River rights) should be denied because the change would injure downstream junior water rights.

Sunset's Big Lost River Rights (34-187A, 34-195D, 34-196C, 34-2491G, 34-14770, 34-14771 and 34-14773) currently authorize one point of diversion from the Big Lost River: the Arco Diversion. Therefore, if Application 83745 were denied, the water rights would continue to be diverted from the Big Lost River at the Arco Diversion. Application 83745 proposes to divert the water rights from the Sunset River Pump during times of the irrigation season when water is available at the pump.

Pursuant to Idaho Code § 42-222, the Department must evaluate whether the proposed change will cause injury. Diverting Sunset's Big Lost River water rights at the Arco Diversion is

not a change. Such use is already authorized by Sunset's water rights. The "change" proposed in Application 83745, among other things, is to divert Sunset's Big Lost River water rights at the Sunset River Pump during certain times of the year. According to Huggins, diversion from the pump station is preferred because of the positive impacts to local domestic wells. By Huggins own admission, Sunset choosing to divert its Big Lost River rights at the Sunset River Pump will benefit local domestic wells. Therefore, Sunset is entitled to judgment as a matter of law on this issue. The hearing officer concludes that adding the Sunset River Pump as an authorized point of diversion to water rights 34-187A, 34-195D, 34-196C, 34-2491G, 34-14770, 34-14771, and 34-14773 will not injure local domestic wells.

Quist Protest Issue 1 - Injury

The protest filed by Quist states a concern that the changes proposed in Application 83745 will injure his water rights. Quist is the owner of record for water rights with authorized points of diversion from the Big Lost River located downstream of the Arco Diversion. As noted above, there are genuine issues of material fact related to the impact of the proposed changes on water rights with points of diversion on the Big Lost River downstream of the Arco Diversion. Quist owns other water rights in Basin 34, including ground water rights that are diverted from one of the proposed ground water points of diversion described in Application 83745. The *Sunset Motion* does not address injury concerns related to any of the other water rights held by Quist. There are genuine issues of material fact related to injury to Quist's water rights. Therefore, summary judgment on the question of injury is not appropriate.

Quist Protest Issue 2 - Diminished Water Right Value

During the pre-hearing conference, Quist raised a concern that the changes proposed in Application 83745 will diminish the monetary value of his water rights. Sunset argues that the question of diminishment of water right value is outside of the scope of this contested case. Therefore, the question presented to the hearing officer through the *Sunset Motion* is whether diminishment of monetary value of water rights falls within any of the review criteria set forth in Idaho Code § 42-222.

Idaho Code § 42-222(1) sets forth the criteria the Department uses to evaluate transfer applications and states, in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be

satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

To better understand the scope of the injury review criterion, it is helpful to refer to the definition of injury used by the Department when evaluating applications for new water rights. Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) states in pertinent part:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.
- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. . . . ; or
- iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.

The value of a water right is closely tied to the beneficial use authorized by the right, the quantity and quality of water available to fill the right, and the infrastructure needed to divert water. As noted in Rule 45.01, a water right is injured if a proposed use reduces the water supply for the existing right, makes it unreasonably expensive to divert water under the right, or reduces the quality of the available water supply. All of these factors could diminish the value of the affected, existing water rights. Diminishment of water right value, by itself, does not constitute injury to the water right. Rather, the diminishment of water right value is a likely consequence of the injury to the water right.

As noted above, summary judgement is not appropriate for the question of injury to Quist's water rights because there are genuine issues of material fact related to injury to Quist's water rights. Although diminishment of water right value, in isolation, does not constitute injury under Idaho Code § 42-222, because there continue to be issues of fact related to injury of Quist's water rights, evidence related to the monetary value of Quist's right may still be relevant. Without further development of the evidentiary record, it is unclear whether evidence of the value of Quist's rights is admissible. Therefore, the hearing officer is not willing to exclude evidence related to the monetary value of Quist's water rights at this time.

CONCLUSIONS OF LAW

Based on the elements of the relevant water rights, the issues of protest raised by Huggins and Quist in their respective pleadings, and the arguments set forth in the *Sunset Motion*, *Huggins Response* and *Quist Response*, the hearing officer adopts 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 Sunset River Pump to its Big Lost River water rights will not injure domestic ground water rights in the Arco area.

Summary judgment is not appropriate for the other issues raised in the *Sunset Motion*. There are genuine issues of material fact related to questions of forfeiture, injury and enlargement. The parties should be given an opportunity to develop the administrative record on these issues in an administrative hearing.

ORDER

IT IS HEREBY ORDERED that the Sunset Motion is GRANTED, in part. This is an Interlocutory Order issued pursuant to Rule 710 (IDAPA 37.01.01).

Dated this 14th day of December 2020.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December 2020, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Granting Motion for Summary Judgment, In Part

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