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Department of Water Resources
Eastern Region

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

WITHDRAWAL OF PROTEST

Application for ☒ Transfer ☐ Permit ☐ Amendment of Permit No. 84145

In the Name of Rocky Mountain Water Exchange, LLC
Applicant

Name of Protestant: Friends of the Teton River

Represented by: Amy Verbeten

I hereby withdraw my protest to the above referenced matter. All of my issues of protest have been addressed and/or resolved.

☒ My withdrawal is not conditional.

Or

☐ My withdrawal is conditioned on the following:

Amy Verbeten

Digitally signed by Amy Verbeten
DN: cn=Amy Verbeten, o=Friends of the
Teton River, ou=Executive Director,
email=amy@tetonwater.org, c=US
Date: 2020.09.01 12:32:16 -06'00'

Signature of Protestant or Representative

Executive Director

Title

9/1/2020

Date



Idaho Department of Water Resources
Attention: James Cefalo
900 N. Skyline Drive, #A
Idaho Falls, ID 83402

September 1, 2020

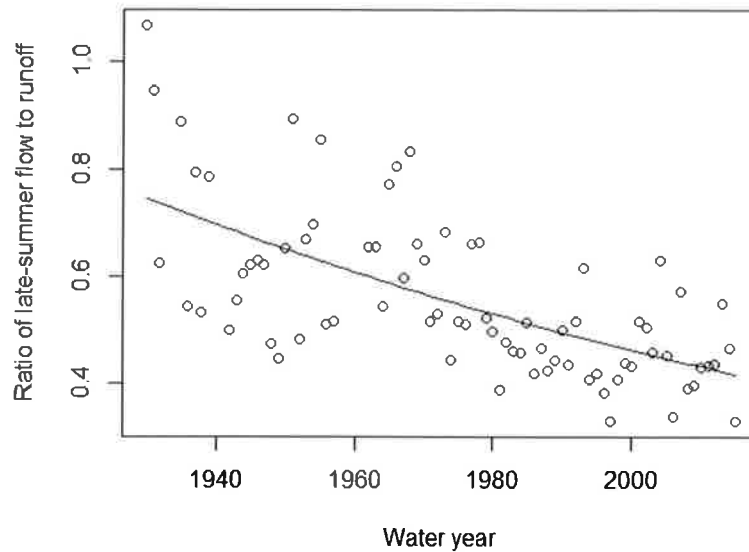
Dear Mr. Cefalo:

Please accept the following, prepared by Friends of the Teton River (FTR) and submitted along with Withdrawal of Protest paperwork relevant to Transfer Nos. 84137 and 84145.

FTR is a nonprofit organization dedicated to the restoration and conservation of the Teton River Watershed, ensuring a lasting legacy of clean water, healthy streams, and a vibrant wild fishery. FTR implements programs and projects founded on sound science, community education, and cooperation with landowners, citizens, and agency partners. FTR furthers its mission by conducting scientific research about the Teton Watershed, using this research to enhance and protect local water resources, and communicating this information to the public.

To that end, FTR works closely with the Teton Water Users Association (TWUA), an organization formed in 2015 in response to a myriad of water related issues including, declines in Idaho's aquifer and river levels - including Teton Valley's aquifer which demonstrated a 55 foot decline, prolonged drought, changes in climactic conditions that impact historic snow and run-off patterns, development pressure to convert farmland to subdivisions, mitigation and water-supply concerns for growing cities and rural areas, water quality issues, dramatic reductions in base flows in the Teton River (see graph below), and declines of Yellowstone cutthroat trout distribution and abundance. These issues promise to shape a future water management paradigm in the region that looks dramatically different from the past. Cumulatively, these issues are raising concerns about long-term water availability for municipal and residential use, tributary and river stream flows for fish and other wildlife, and water availability for agricultural production. The TWUA, being comprised of approximately 50% agricultural water users, 30% conservation water users, and 20% municipal water users, aims to bring together individuals who can identify water supply solutions that satisfy the needs of all constituents within the community – farmers who depend on water for crop and livestock production, municipalities

that require clean and adequate water for residents, and conservation interests seeking water for fish and wildlife.



Ratio of late-summer (August 1 – September 30) mean flow in the Teton River to mean flow during runoff (May 15 – July 15). Curve depicts statistically significant decline in this base-to-peak flow ratio over time.

Significantly, the TWUA, along with its partners have invested significant time and resources, over the past four years, to develop and pilot a phased water management plan that aims to improve groundwater levels in Teton Valley. While initial results suggest that the pilot program is an appropriate and successful means by which to stabilize and improve Teton Valley's groundwater aquifer levels, FTR and the TWUA remain concerned that increased groundwater withdrawal, as well as changes to the location, timing, and quantity of existing groundwater withdrawal, may generate impacts to the aquifer, as a whole or on a sub-watershed level, that are counterproductive to the TWUA's exhaustive efforts. It is from this perspective that FTR protested Transfer Nos. 84137 and 84145. Unfortunately, given restrictions on staff time and funding capacity, FTR does not have the means to take this matter through a formal hearing process, as such FTR has determined that it will withdrawal its protests, leaning heavily up the Idaho Department of Water Resources (Department) to strictly evaluate the applications in light of the statutory requirements set forth in Idaho Code section 42-222, and the associated case law. Specifically, FTR is concern that the applications, as submitted, fail to satisfy the no injury and public interest requirements of the statute. Each of these concerns is discussed briefly, below.

A. No Injury

Idaho Code section 42-222(1) requires that a transfer application be rejected where “other water rights are injured thereby.”¹ FTR is concerned that the proposed transfer applications, if authorized, will generate injury to both senior and junior surface and groundwater users by decreasing water availability in the sub-watersheds associated with the new proposed points of diversion.

The applicants have suggested that any injury is so small that it is simply “de minimis” in nature. However, case law suggests that even small effects can rise to the level of legal injury, as seen in the contested case of *Huf-N-Puf*.² In that instance, the impact of the transfer would have amounted to 0.02 cfs on the river. The Department determined, despite the applicant’s assertion, that the effect was “real and actual injury.”

In the case of Transfer Nos. 84137 and 84145, neither applicant has produced *any* hydrologic or geologic analysis regarding the effect the transfers may have on a sub-watershed scale, and in fact have produced no analysis of the historic diversion rate and consumptive use associated with the water right to be transferred. Therefore, it is impossible to determine the extent of the impact which may result from the transfers, on either a sub-watershed or watershed-wide scale. Logic suggests, however, that moving water from a downgradient location to an upgradient location, will necessarily increase groundwater withdrawals in the region of the new points of diversion, resulting in localized, sub-watershed depletions that generate injury to other water users.

B. Public Interest

Idaho Code section 42-222(1), requires that any transfer be in the public interest. While the legal standards associated with the public interest prong are challenging to define and often left to the Department to muddle through, FTR suggests that each of these transfer applications may not be in the public interest. Regarding Transfer No. 84137, the applicant has been pumping groundwater for irrigation without a valid water right for decades, after having failed to file an SRBA claim for a beneficial use right for this property. If the transfer is approved, the applicant’s long-term illegal practice is rewarded, setting a perverse incentive for water users to act illegally and then simply come into compliance when it is convenient for them to do so. This is not a practice which should be lauded, and certainly does not align with the expectation that Idaho’s water resources be managed for the good of all its citizens. Regarding Transfer No. 84145, the property already has numerous other groundwater and surface water rights which support the diversion of water for irrigation and fish habitat. It is therefore challenging to understand the need for yet another water right for the same purpose, especially when the

¹ “The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights.” *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (quoted in *Barron v. IDWR*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001)).

² *In the Matter of Applications for Transfer No. 5174 in the Name of Dennis M. Baker and No. 5175 in the Name of Huf-N-Puf Trust* (IDWR, Final Order, Nov. 25, 1998).

diverted water will be used to artificially sustain a non-native fishery in an intermittent stream. It seems clear that the primary driver here is not actually fish habitat, as the application would suggest, since that need is already satisfied by an existing water right, but rather the desire to maintain water through a series of artificially constructed, instream water features. Water features, however, are not a designated beneficial use in the State of Idaho.

While FTR has chosen to withdrawal its protests, it is available to answer questions. Please feel free to contact Sarah Lien or Amy Verbeten to discuss further.

Thank you for your consideration.

Best,

A handwritten signature in black ink that reads "Sarah Lien". The signature is written in a cursive, flowing style.

Sarah Lien
Friends of the Teton River

Henman, Christina

From: Sarah Lien <sarah@tetonwater.org>
Sent: Tuesday, September 01, 2020 12:59 PM
To: Henman, Christina
Cc: Rob Harris; Roger Warner; Amy Verbeten; Cefalo, James
Subject: Re: 84137 Love Family Ventures & 84145 Rocky Mountain Water Exchange
Attachments: withdrawal-of-protest_Love Family.pdf; withdrawal-of-protest_Rocky MTN.pdf; 20200831 Protest Withdrawal Letter.pdf

Christina,

Friends of the Teton River has determined that it will withdrawal its protests to Transfer Nos. 84137 and 84145, thereby negating the need for a prehearing conference on either matter.

Please find, attached, protest withdrawal paperwork, as well as a letter from FTR pertinent to both applications. I will put a hard copy in the mail today.

Please contact me with any questions.

Best,
Sarah Lien