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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED ✓

MAY 17 2018

WATER RESOURCES
WESTERN REGION

NOTICE OF PROTEST

This form may be used to file a protest with the department under sections 42-108B, 42-203A, 42-203C, 42-211, and 42-222, Idaho Code. The department will also accept a timely protest not completed on this form if it contains the same information.

1. Matter being protested Application for Transfer No. 82161 in the name of Suez Water Idaho, Inc.
2. Name of protestant Farmers Union Ditch Company, Ltd.
3. Protestant's Representative for service (If different than protestant)
Jerry A. Kiser
4. Service mailing address P.O. Box 8389 Boise, Idaho 83707
5. Service telephone no. 208-861-4657 Email Address: jkiser@cableone.net
6. Basis of protest (including statement of facts and law upon which the protest is based)
See additional pages attached.

(additional pages may be attached to describe nature of the protest)
7. What would resolve your protest? Require right continue to be diverted at Farmers Union point of
diversion from the Boise river into Farmers Union's canal.

I hereby, acknowledge that if I, or my designated representative, fails to appear at any regularly scheduled conference or hearing in the matter of which I have been notified at the address above, the department may issue a notice of proposed default against me in this matter for failure to appear. I also verify that I have served a copy of this protest upon the applicant.

Signed this 17 day of May, 2018.

Protestant

Protestant's Representative

NOTE:

A protestant is required to timely file a protest with the department together with a \$25.00 protest fee for each application being protested in order for the protestant to be considered a full party by the department. In addition, the department's Rule of Procedure, IDAPA 37.01.01203, requires a protestant to send a copy of a protest to the applicant.

INSTRUCTIONS

1. The matter being protested must be clearly identified. A typical matter is identified by the application number such as "Application for Permit No. _____ in the name of _____" or "Application for Transfer No. _____ in the name of _____."
 2. Show the name of the protestant. Only one (1) protestant may be shown per protest form. If this protest form is signed by more than one person, the hearing officer will consider the first signer as the official protestant and the representative for service of documents.
 3. If the protestant is represented by an attorney or other authorized representative, show the representative's name. The department then will serve documents on the representative and upon the protestant if specifically requested.
 4. Show the address where the department is to serve the documents. This should be the address of the authorized representative unless the protestant does not designate a representative.
 5. Show the telephone number of the authorized representative unless the protestant does not designate a service representative.
 6. Specifically describe the nature of the protest.
 7. Describe the relief being sought by the protestant.
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FOR DEPARTMENT USE ONLY

Received by _____ Date _____ Time _____
\$25.00 fee Receipted by (BES) # W046346 Date 5-17-18

ATTACMENT TO FARMERS UNION NOTICE OF PROTEST OF APPLICATION FOR
TRANSFER NO. 82161 IN THE NAME OF SUEZ WATER IDAHO, INC.

Protestant protests the above referenced application for transfer of water right no. 123 F as requested by applicant in its application. Farmers Union has conveyed the water represented by water right No. 123F in its canal since approximately 1916 under an agreement between the right owner(s) and Farmers Union. The basis for Farmers Union's protest is: (1) The right has been forfeited by nonuse and failure to apply the water to beneficial use for a period in excess of five years and the extension of time granted applicant by the Director to resume use of the right to avoid forfeiture is ineffective; (2) Protestant will be injured if the application is granted. I.C. §42-108 requires as a condition of granting any transfer that water rights of others not be injured by the change requested in the transfer.

The Idaho Department of Water Resources on December 31, 2015 approved an application by the owner of the right (Lexington Hills, Inc.) to extend the time to avoid forfeiture of the right. The order states, "The right holder shall resume beneficial use of water on or before July 1, 2020." If the right owner does not resume beneficial use of the right on or before that date the right will be forfeited. The owner of the right cannot resume use of the right as the land to which the right is currently appurtenant is not irrigable land as stated by the right owner in its Application for Extension of Time to Avoid Forfeiture of Water Right. Idaho law provides that in order to avoid forfeiture of a water right from non-use for a term of 5 years or more (or under an extension pursuant to I.C. Code §42-222(3) use of the right must be resumed on the land to which the water right is appurtenant. In *Sagewillow, Inc. v. Idaho Department of Water Resources* the Idaho Supreme Court stated, "The resumption of use must also be upon the land to which the water right is appurtenant." *Sagewillow, Inc. v. Idaho Department of Water Resources* 138 Idaho 831,842, 70 P3d 669, 680 (2003). To avoid forfeiture resumption of use of a water right subject to forfeiture must be on the land to which the right is appurtenant. The owner of the water right the subject of the pending application and protest cannot resume use on the land to which the right is appurtenant because the land cannot be irrigated.

Idaho Code §42-108 provides in part that the owner of a water right may change the point of diversion and place of use of the right if, "... the water rights of others are not injured by such change in point of diversion, place of use...." I.C. §42-222(1) allows the Director to authorize a change in point of diversion and place of use provided no other water rights are injured thereby. Protestant would be injured if the requested transfer is granted. The water under right number 123 has been diverted into the Farmers Union canal since approximately 1916. In 2009, the SRBA court decreed water right 123F to the current owner. Beginning in approximately 2009,

the water carried in the canal consisting of right number 123F has not been used by the right owner but in fact has been used by water users under the Farmers Union canal and has been used by Farmers Union itself to help convey all water to water users under its canal system. Because of the priority of right number 123F (designated as right number 2 in the Stewart Decree) and as provided by the Stewart Decree, when natural flow water deliveries are cut back on the Boise river due to scarcity of water the rights under 123F are not cut back. This water (right no. 123F) remains in the canal, is not cut back in times of scarcity and assists in the conveyance of water to all water users in the Farmers Union canal. If the transfer application is granted the water removed from Farmers Union's delivery system will have to be replaced with storage or other water owned by Farmers Union. As a result Farmers Union will suffer a reduction in the quantity of water available under its other water rights because it will be forced to use storage or other water when it would otherwise not need to because the need was filled by right number 123F.

Protestant will also be injured if the transfer is granted because the water sought to be transferred has met some of the Farmers Union's seepage and conveyance losses and reduces the amount of seepage loss to other water rights in the canal. If removed from the canal the move will negatively impact conveyance losses associated with the delivery of multiple water rights in the canal.

CERTIFICATE OF SERVICE: The undersigned does hereby certify that on this date he caused a true and correct copy of the within and foregoing NOTICE OF PROTEST to be mailed by United States first-class, postage prepaid mail to Applicants representative Michael P. Lawrence 601 W. Bannock St. Boise, Idaho 83702.

DATED this 17th day of May, 2018.

Jerry A. KISER
ATTORNEY AT LAW



Attorney for Protestant