

Receipt # E027655

**LAW OFFICES OF
LAURENCE J. LUCAS, ESQ.**

P.O. Box 1342
Boise, ID 83701
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April 15, 2002

RECEIVED
APR 17 2002
Department of Water Resources
Eastern Region

Idaho Dept. of Water Resources
Eastern Region
900 N. Skyline Dr.
Suite A
Idaho Falls ID 83402

Re: Transfer Application 69783
Water Right No. 73-2098
Sulphur Creek Livestock Co.

Dear Sirs:

In response to the April 4th notice in the Challis Messenger, enclosed for filing with IDWR please find an original and one copy of a Protest to Transfer Application 69783, for water right no. 73-2098, in the name of Sulphur Creek Livestock Co. The Protest is submitted on behalf of my client, Western Watersheds Project.

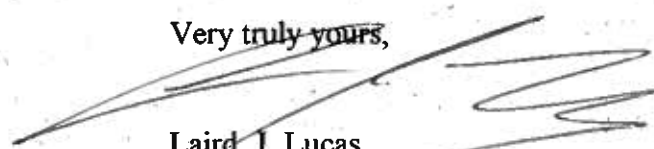
With the Protest, we are also submitting a Motion to Intervene in the transfer proceeding; and a Motion To Deny Transfer based on partial abandonment or forfeiture of the subject water right.

A second copy is enclosed, for you to file stamp and return to me in the enclosed envelope.

The required filing fee of \$25.00 is also enclosed.

Please do not hesitate to contact me if you have any questions.

Very truly yours,



Laird J. Lucas
Attorney for Plaintiffs

Enc.

Cc: Client

Judd Whitworth (Applicant)
Bruce Smith (Whitworth Atty)

E027655

Laurence ("Laird") J. Lucas
P.O. Box 1342
Boise, ID 83701
(208) 424-1466

Attorneys for Protestant/Movant Western Watersheds Project

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Department of Water Resources
Eastern Region

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF TRANSFER)
APPLICATION 69783, PROPOSING TO)
CHANGE WATER RIGHT NO. 73-2098,)
BY SULPHUR CREEK LIVESTOCK CO.)

**PROTEST TO TRANSFER APPLICATION,
MOTION TO INTERVENE, AND
MOTION TO DENY TRANSFER BASED ON PARTIAL FORFEITURE OR
ABANDONMENT**

Protestant and Movant WESTERN WATERSHEDS PROJECT ("WWP"), by and through the undersigned counsel, hereby PROTESTS Transfer Application No. 69783 by Sulphur Creek Livestock Co. to change aspects of water right no. 73-2098; MOVES TO INTERVENE in said transfer proceeding; and further MOVES TO DENY TRANSFER based on partial abandonment or forfeiture of water right no. 73-2098 for all alleged irrigation uses and in all amounts exceeding .02 cfs, for reasons set forth below.

This Protest, Motion to Intervene, and Motion to Deny Transfer are submitted pursuant to the public notice in the Challis Messenger dated April 4, 2002; the Idaho Water Code, including but not limited to I.C. § 42-104, 42-203A, and § 42-222; the IDWR Rules of Procedure; and all other relevant authorities.

The grounds supporting the above Protest and Motions are set forth below:

1. Protestant/Movant WESTERN WATERSHEDS PROJECT (“WWP”) is an Idaho non-profit conservation organization, located at PO Box 1770, Hailey ID, 83333, phone: (208) 788-2290. Until 2001, WWP was known as “Idaho Watersheds Project.” WWP has approximately 1,000 members, located in Idaho and other states, and is dedicated to protecting and conserving the watersheds, public lands and natural resources of the American West.

2. WWP has long-standing interests in both the specific water right at issue here (No. 73-2098), as well as the use of the waters in Mahogany Creek (original source of the right) and the Pahsimeroi River (proposed new source). WWP is the owner and manager of the Greenfire Preserve on the East Fork Salmon River, which holds water rights in that subbasin; and WWP is deeply involved in many water use and land management issues in the Upper Salmon basin generally.

3. In particular, WWP and its staff and members make extensive use of the public lands, waters and resources of the Pahsimeroi watershed, including Mahogany Creek; and those uses include fishing, hiking, study, and other scientific, recreational, and aesthetic pursuits. WWP is concerned with preventing adverse harms to the streams, watersheds, and dependent fish and wildlife in the Pahsimeroi basin, including Mahogany Creek; and in furtherance of those interests has undertaken extensive review and surveys of diversions, land use practices, and other human activities in the basin; participation in federal and state agency proceedings relating to diversions and land use practices in the basin; and has brought federal court litigation over diversions and land use practices in the basin.

4. Among other activities, WWP (under its prior name, Idaho Watersheds Project), filed litigation in December 2000 in the U.S. District Court for the District of Idaho, concerning the diversion by applicant Sulphur Creek Livestock Co. out of Mahogany Creek, under claimed water

right 73-2098. See Idaho Watersheds Project et al v. Judd Whitworth et al, No. CIV 00-0728-E-BLW (D. Idaho). Said litigation is still pending, and alleges claims under the federal Endangered Species Act concerning adverse effects of the Mahogany Creek diversion, under claimed water right 73-2098, upon the listed Bull Trout.

5. As part of WWP's investigation and review of the Mahogany Creek diversion, as well as other diversions in the Pahsimeroi basin, WWP collected and reviewed historical information concerning diversions and beneficial use (or lack thereof) of water from Mahogany Creek by Sulphur Creek Livestock Co. under claimed water right 73-2098. As documented in WWP's submissions to the U.S. District Court in the above-referenced litigation, and in other materials, Sulphur Creek Livestock Co., until 2001, diverted all or nearly all water out of Mahogany Creek into a ditch, which flowed for several miles across BLM lands, which water was never used for irrigation on the alleged place of irrigation use for claimed water right no. 73-2098. See Declaration of Stew Churchwell, filed in IWP v. Whitworth, No. CIV 00-0728-E-BLW (D. Idaho).

6. Under water right 73-02098, Sulphur Creek Livestock claims the right to divert 2.4 cubic feet per second ("cfs") out of Mahogany Creek to irrigate 160 acres of land located in T11N R23E S14 (Boise Meridian), as well as for stockwater purposes. In truth, as WWP's investigation has revealed, neither Sulphur Creek Livestock nor anyone else has used Mahogany Creek water for irrigation purposes in many years – if indeed there was ever any irrigation use at all. Available aerial photography reveals that, as of 1987, no cultivation of crops or irrigation of any kind was visible on the current stated place of use for claimed water right 73-02098. Further, WWP's representatives have traveled along the Mahogany Creek ditch in recent years, including summers of 2000 and 2001, and found no evidence of any irrigation whatsoever, either

at the place of use specified in water right A73-02098 or elsewhere in the vicinity. Churchwell Decl., ¶ 25-26 & Photos L-O. As Mr. Churchwell's recent photographs show, the Mahogany Creek ditch largely runs along a dirt road, and terminates after several miles in the road. Id. Only sagebrush and other range vegetation are present where the Whitworth Defendants have claimed that irrigation is allegedly occurring using Mahogany Creek water. Id. Rather than irrigating any crops, water often just spills out of the Mahogany Creek ditch onto the adjoining road, or leaks out of the ditch into the ground. Id.

7. In other words, Sulphur Creek Livestock Co. has, for well over five years and probably for several decades, simply used the Mahogany Creek ditch as a leaky, miles-long livestock watering trough, without putting the water to beneficial use for the claimed irrigation use purposes. At the same time, Sulphur Creek Livestock Co. has grossly over-diverted water from Mahogany Creek for livestock watering purposes, in violation of Idaho law.

8. Moreover, Sulphur Creek Livestock Co. has likely often diverted even more water than allowed under its claimed water right of 2.4 cfs from Mahogany Creek, since until recently it had no metering device to measure and control diversions, and instead simply took all the water flowing down Mahogany Creek. Churchwell Decl., ¶ 22-24.

9. Idaho water law forbids the type of grossly excessive and wasteful diversions seen here. It is a fundamental tenet of Idaho water law, as in other prior appropriation states, that water may only be diverted for reasonable and beneficial uses. Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 584, 513 P.2d 627 (1973). See also Poole v. Olaveson, 356 P.2d 61, 65 (1960) ("policy of the law of this State is to secure the maximum use and benefit, and the least wasteful use, of its water resources"); Glavin v. Salmon River Canal Co., 44 Idaho 583, 258 P. 532 (1927) ("any property rights [in water] must be considered and construed with reference to the reasonableness of the use").

The basis, measure, and limit of a water right is thus the amount of beneficial use; and the right to use water ceases if water is not put to beneficial use. See I.C. § 42-104 (“appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest cease to use it for such purpose, the right ceases”).

10. A water right also may be abandoned by intentionally giving up use of the water; while failure to put water to the claimed beneficial use for more than five years also results in forfeiture of the claimed right. I.C. § 42-222(2); Dobson v. Dobson, 122 Idaho 59 (1992). Partial forfeiture or abandonment applies to any amount of a claimed water right that is not put to beneficial use for the statutory five-year period, or is abandoned. Id.; State v. Hagerman Water Rights Owners, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997).

11. Further confirming that Sulphur Creek Livestock has partially forfeited or abandoned its alleged water right for irrigation purposes out of Mahogany Creek, Sulphur Creek Livestock admits that in June 2001 it installed a new diversion device in Mahogany Creek, in the form of an “infiltration gallery” leading to a pipe, which was place in the previously existing Mahogany Creek ditch (which was then filled with dirt for some length), so that Sulphur Creek Livestock Co. would divert **only** .02 cfs from Mahogany Creek and use that water **only** for livestock watering purposes.

12. Because Sulphur Creek Livestock Co. has thus partially abandoned or forfeited all but .02 cfs of its claimed water right 73-2098, its application for transfer no. 69783 must be denied under I.C. §§ 42-104, 42-203A, and 42-222, because there is no existing water right for irrigation purposes to transfer as requested by the applicant.

13. In addition, should the requested transfer not be denied based on partial forfeiture or abandonment, as set forth hereinabove, then WWP contends that the transfer must be denied

because it would (a) injure other water rights, (2) is speculative, (3) is contrary to the local public interest, (4) there is insufficient water to satisfy the requested transfer at the new place of diversion and source, (5) the requested transfer would constitute an enlargement in use of the applicant's current valid right of .02 cfs, (6) the change is not consistent with the conservation of Idaho's water resources, and/or (7) the proposed change is otherwise unlawful, as WWP will demonstrate at hearing herein.

14. Although WWP believes that it automatically becomes a "party" to this proceeding by virtue of its above Protest to the transfer application, to the extent necessary WWP further moves under the IDWR Rules of Procedure to intervene as a party, on grounds that its interests may be adversely affected by this proceeding, no other party will adequately represent those interests, and the public interest support such intervention.

15. Pursuant to the Idaho APA and the Department's Rules of Procedure, WWP hereby requests that IDWR conduct a contested case hearing upon the above-referenced transfer application and deny same based on the facts and law set forth above and to be presented by WWP at hearing.

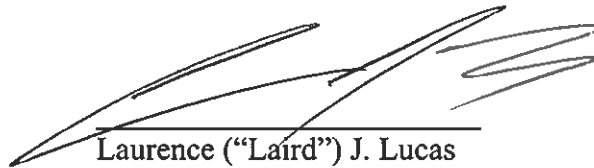
CONCLUSION

For the foregoing reasons, WWP respectfully PROTESTS the transfer application 69783 to change the place of diversion and place of use of claimed water right 73-2098; MOVES TO INTERVENE in said proceeding, to the extent necessary to be a full party and protect its interests; and MOVES FOR DENIAL of the transfer application on grounds that Sulphur Creek Livestock Co. has partially abandoned or forfeited the claimed water right for irrigation purposes, and/or the transfer application does not meet the requirements of I.C. § 42-222 and other relevant provisions of law.

The requisite filing fee is submitted herewith.

DATED: April 15, 2002

Respectfully submitted,



Laurence ("Laird") J. Lucas

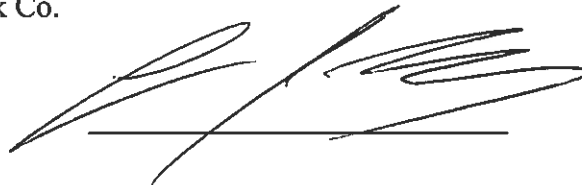
Attorney for WWP

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of April, 2002, I caused the foregoing PROTEST, MOTION TO INTERVENE, and MOTION TO DENY TRANSFER to be served via first class mail, postage prepaid, upon the following persons:

Judd Whitworth
Sulphur Creek Livestock Co.
PO Box 151
May ID 83253

Bruce A. Smith
Moore, Smith, Buxton & Turcke
225 North 9th Street, Suite 420
Boise ID 83702
Attorney For Sulphur Creek Livestock Co.
(Courtesy copy)



ORIGINAL FILED:
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