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Subject: Application for Permit No. 47-17745 In the Name of Chobani, LLC
Attachments: 2024-02-02 City of Twin Falls' Post-Hearing Brief.pdf

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Good afternoon,

Attached, for filing and service, please find the *City of Twin Falls' Post-Hearing Brief* regarding the above reference matter.

Thank you,

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Feb 02, 2024

**DEPARTMENT OF
WATER RESOURCES**

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 47-17745 IN THE NAME OF
CHOBANI, LLC

**CITY OF TWIN FALLS’
POST-HEARING BRIEF**

COMES NOW, City of Twin Falls, by and through counsel of record, and hereby submits the following post-hearing brief in response to the Hearing Officer’s instructions and request at the close of the administrative hearing held December 19-20, 2023.

The Idaho Department of Water Resources (“IDWR” or “Department”) held an administrative hearing on the matter of the application for permit no. 47-17745 in the name of Chobani, LLC (“Hearing”) on December 19-20, 2023 with Angela Hansen serving as the Hearing Officer. At the Hearing, the Hearing Officer heard testimony from lay and expert witnesses and admitted additional exhibits into the administrative record to assist in review.

INTRODUCTION

Chobani, LLC (“Chobani”) submitted the application for permit at issue, water right no. 47-17745, on June 11, 2021. Attachment A to that application stated the purpose for the proposed appropriation as “one component of an Aquifer Storage and Recovery (ASR) project that Chobani is developing as part of a broader water recycling program intended to reduce its

demand on the City of Twin Falls’ municipal water supply and wastewater treatment facilities.” Specifically, Chobani “seeks to appropriate up to 3 cubic feet per second (“cfs”), or roughly 2.0 million gallons per day (“mgd”) of groundwater for industrial uses at its food manufacturing plant in Twin Falls, Idaho.” Chobani proposed that the diversions be mitigated by, “injecting the plant’s advanced treated effluent into the aquifer.”

Following submittal of application no. 47-17745, three protests were filed against the new application by Burks Tractor Company, Inc. (“Burks”), Idaho Power Company (“IPC”), and the City of Twin Falls (“City”) on July 19, 2021. The City protested the application for several reasons, including: Chobani’s failure to demonstrate that the proposed points of diversion (wells) and groundwater withdrawal would not impact the City’s points of diversion (wells) and use of its water rights; Chobani’s proposed mitigation plan raised questions and issues, including concerns related to the Chobani’s proposed use of water currently provided by the City; potential injury to existing water rights; and the application violated criteria of Idaho Code § 42-203A(5).

Prior to the Hearing, Idaho Power Company stipulated that the standard Trust Water language for all new appropriations of Trust Water contained in *IDWR Application Processing Memorandum # 77*, be included in any permit issued in this matter as well as language indicating that the permitted use is mitigated by the recharge and will not be subject to administration to satisfy minimum streamflow rights in the Snake River at Murphy Gauge if the mitigation is appropriately documented. (Ex. 220). IPC and Chobani also stipulated that the term “Aquifer Storage and Recovery” (ASR) (meaning the use of managed recharge to store surface water in a confined underground area while avoiding injury to existing water rights) is not recognized in Idaho, and that such assertions would have no technical basis. (Ex. 220). The parties explicitly stipulated that the application was not premised on ASR and was not precedent for ASR. (Ex.

220). Chobani has since stated that they are no longer seeking approval of an “ASR” project, as previously indicated in their mitigation plan.

Chobani’s proposed permit should be denied for a variety of reasons, including, but not limited to, the failure of Chobani to meet its burden of proof for satisfying the criteria in Idaho Code § 42-203A(5) for approval of water right permit applications, and the unreasonable risk that the application poses to the area aquifer, which is limited in productivity and scope. Further, alternative methods exist for Chobani to obtain additional water to meet their growth needs while protecting the delicate aquifer from injected effluent. Whereas Chobani has failed to test the aquifer and the aquifer’s potential response to effluent directly injected into its depths, the Department should deny the proposed permit and mitigation plan.

PROTESTANTS

Protestants, City of Twin Falls maintains an extensive drinking water system for its citizens and relies upon various wells and groundwater supplies. The City monitors water quality and tests drinking water to ensure that state and federal drinking water standards are met. The City also operates and maintains pressurized pump stations and well systems, monitors up-gradient of City wells, and supplies approximately 4.8 billion gallons of drinking water to Twin Falls’ citizens.

The City protested Chobani’s application due to concerns that additional pumping in the area could reduce the water available to the City’s wells and other area water users. The City’s two production wells, known as the Hankins Wells, are already heavily depleted and are barely usable. *See generally, Bohling Testimony.* Under the additional stress from Chobani’s proposed application, potential exists for surrounding wells to be fully depleted due to Chobani’s requested permit. Further, the City has a legitimate concern, due to Chobani’s past violations, that a great

risk exists that program or human error will cause improperly treated or untreated plant effluent to flow into the aquifer through its proposed injection well(s)—irreparably damaging the aquifer resource. Finally, the City asserts that using City water diverted and used under its water rights for private mitigation purposes is unprecedented and not presently authorized by any statute or rule in Idaho. If a permit is granted to Chobani, the City of Twin Falls’ interests, as described above, will be injured.

I. List of Witnesses that Provided Testimony

Witnesses for Chobani included: Dillon Allen, Senior Project Manager, Chobani, Lay Witness; Josh Reed, P.E., Senior Project Manager, Brown and Caldwell, Lay Witness; and Terry Scanlan, P.G., P.E., HDR, Expert Witness.

The following witnesses appeared on behalf of the City of Twin Falls:

Josh Baird, Public Works Director, City of Twin Falls, Lay Witness

Mr. Baird is a civil engineer and supervises water and wastewater for the City. He explained the potable water and wastewater agreement that Chobani has with the City. (Ex. 201). The agreement includes additional capacity for water and wastewater capacity—2 million gallons a day—and settled all fines from Chobani’s past wastewater discharge violations. (Ex. 201). Mr. Baird stated that Chobani could obtain additional water from the City that would make the proposed reuse project unnecessary. While he agreed that the project might relieve some stress on the City, he also acknowledged the potential for additional treatment on the City’s side to maintain aquifer water quality because of Chobani’s reuse. Mr. Baird was unsure what would need to be done to secure additional water supply for Chobani without more information but stated that it would be possible with enough investment.

Rob Bohling, Water Superintendent, Lay Witness

Mr. Bohling has worked in the Water Department at City of Twin Falls since 1997, which encompasses planning for the City’s growth and the water needed to keep pace with that growth. He testified that the Potable Water Capacity Permit (Ex. 202) from August 2023 between the City and Chobani accurately reflects the potable water capacity that can be delivered to Chobani, currently set at 3 cfs. He further described the Hankins Wells and pump test performed on Hankins Wells 1 and 2 in 1999 soon after they were drilled—both wells pumped air after a short period. (Ex. 206). More water started coming in at approximately 75 feet—indicative of a shallow aquifer. Another pump test was performed on May 31, 2023. (Ex. 210). Pumping was conducted at 700 gallons per minute (“gpm”) then reduced to 320 gpm. (Ex. 210). The test was cut short after thirty-five minutes because they were pumping air and wished to prevent damage to the equipment. (Ex. 210). Mr. Bohling stated that the water levels in the Chobani area go up and down quite regularly and that irrigation has a huge impact on those levels. (Ex. 211). He explained that, due to new irrigation practices like pivots, the aquifer is no longer getting deep filtration, so the City cannot obtain the water supply that was available in the past. (Ex. 211). Mr. Bohling explained that the City has already improved its systems to get water to Chobani. He also noted that the City’s municipal water supply delivery has always occurred, so aside from an unforeseeable “act of God,” he does not foresee a disruption in service happening absent something catastrophic, like an earthquake. He testified that a single line breaking would not cause a problem—there are backups—it would take many lines breaking all at once to cause a disruption in water supply from the City to Chobani. Finally, Mr. Bohling agreed that it was important to Chobani’s function to have water and backup supply would help, but that was why the City has partnered with Chobani for a new pump station and is adding many of its own too.

Charles G. Brockway, Ph.D., P.E., Brockway Engineering, PLLC, Expert

Dr. Brockway is a civil engineer who has worked in water engineering for twenty-eight years. He submitted an expert report for the purposes of the Hearing. (Ex. 3). Dr. Brockway is very familiar with the aquifer near Chobani and the Hankins Wells and assisted the City with the Hankins Wells both when they were first drilled and afterwards. Dr. Brockway testified that the stratified aquifer is homogeneous and less fractured basalt, while the upper fractured zone is discontinuous, so everything must be just right or drilling will not be fruitful. He stated that domestic wells are easy, but there are not many large wells in the area. The Hankins Wells were disappointing when drilled and continue to be a disappointment to the City.

Dr. Brockway testified on his analysis of the Chobani pump tests from their test wells. He noted that completing a single pump test is an issue because the aquifer is not homogeneous. First, the Pump Test from MW-3 showed that it was possible to develop 300,000/m in that zone, while MW-2 and 4 were very different and indicated considerably less available water—likely from the upper fracture zone that is discontinuous. Second, Dr. Brockway noted that MW-3 is clearly anomalous—so using it to predict what is going to happen to the aquifer generally, as Chobani has done, is problematic. When asked if it appeared that the water supply was enough for Chobani’s requested 3 cfs, Dr. Brockway replied “no.”

Dr. Brockway strongly urged additional testing and groundwater modeling. He noted that in an aquifer like this one, there is no way to predict its limits without testing. Further, assessment of ambient water quality characteristics was also encouraged by Dr. Brockway to understand the chemical interactions and hydrological connections of the groundwater. Dr. Brockway noted that mining the aquifer is a risk and important to analyze. He stated that he did not expect the entire aquifer could be mined, but that a smaller scale could—pumping could

locally de-water the productive zone of the aquifer. He explained that while anything is possible with groundwater—including pumping 3 cfs in the Chobani area—he found it unlikely.

Nathan Erickson, Environmental Manager, Public Works, City of Twin Falls, Lay Witness

Mr. Erickson worked for IDWR for sixteen years in well drilling and as watermaster in Districts 130 and 143. He currently works with the City as an environmental manager and oversees the City’s wastewater treatment plant and IPDES permit, compliance with DEQ, and industries that discharge to the City’s system, including Chobani.

Mr. Erickson reiterated concern about the dramatic reduction in available water at the Hankins Wells during the City’s test that resulted in pumping air after just thirty-five minutes. (Ex. 210). He also noted that Chobani had exceeded certain pollutant limits under its wastewater discharge permit many times since 2018, and sudden upsets can be problematic at the City treatment plant because the plant is biological—meaning that a steady stream is paramount. When the City must deal with dramatic upsets, its costs rise. Mr. Erickson acknowledged improvements made by updates installed at Chobani that have helped with compliance since June 2023, however he also identified an October 9, 2023 incident where Chobani experienced a programming error. A valve was left open and essentially dumped untreated wastewater to the City. Such an incident is required to be reported to the City, which is how the City was made aware. The City expected a violation to follow and therefore did not request a five-day report, but to Chobani’s benefit there was also a glitch in the composite sampler that resulted in no sampling, so no record exists of the BOD (biochemical oxygen demand) or TSS (total suspended solids) at the plant that day.

Mr. Erickson emphasized that the fact that such an impactful result could arise from a small programming error is very concerning in view of Chobani's proposal to inject water into the aquifer.

Next, Mr. Erickson explained the Source Water Protection Plan created by the City Water Department and certified by DEQ. (Ex. 214). He described the City's intent to update the plan, which is expected to forbid injection wells in the Chobani area. (Ex. 214). Mr. Erickson expressed concerns that the City has about injection wells in the area, particularly in light of the recent programming errors at Chobani and noted that "you can't go backward on the aquifer"—once pollution is in the aquifer, little can be done to walk back the damage. Further, due to the City's intention to disallow injection wells in the area, it will be problematic if IDWR allows an injection well to be drilled, creating inconsistency in the area and the City's management. *See generally Erickson Testimony.*

When asked about the impact of Chobani's potential reduction in wastewater sent to the City under their proposed plan, Mr. Erickson explained that the wastewater treatment center has plenty of capacity, so a reduction will matter very little to the facility. He also noted that Chobani has improved the quality of wastewater that they send to the City, which has changed the efficiency of processes at the plant, therefore it is best to have consistent loadings in their wastewater because significant changes or spikes can be challenging for the treatment plant. Further, injection of Chobani's water would not decrease the flow burden on the City, but merely change the timing of when the City receives the water.

Jonathan Spendlove, Senior Planning & Zoning Director, City of Twin Falls, Lay Witness

Mr. Spendlove handles the administrative zoning code for corporate limits and advises counsel on planning and zoning issues. He testified that he thought the City should update the

Source Water Protection Plan. (Ex. 214). He also testified as to a letter he wrote as a non-final administrative determination and letter of advisement to Nathan Erickson. (Ex. 217). Mr. Spendlove noted in the letter that injection wells were not listed as a permissible use in the M-2 Heavy Industrial Zone in which Chobani is located. Twin Falls, ID, Zoning District Regulations, Title 10 Chapter 4 § 10. He said that the code is permissive—if something is not listed (i.e., injection wells), it is prohibited. Mr. Spendlove commented that, to his knowledge, no injection wells are operating within City limits. On rebuttal, Chobani's witness, Mr. Scanlan, challenged this statement by claiming that at least twelve injection wells were in operation. Upon further review, it appears that the only injection wells active within City limits involve aquifer remediation, storm runoff, cooling, or similar environmental functions. It seems that most of the injection wells that were previously drilled have since been decommissioned. There is no evidence that any injection wells presently functioning would operate like Chobani's proposed injection well and discharge treated effluent into the aquifer.

ARGUMENT

I. No Law or Rule Exists That Allows a Municipal User to Reuse Water for Mitigation Purposes for its Own New Water Right without the Water Right Holder's (City) Permission.

Under the proposed plan for mitigation, Chobani intends to use water purchased from the City to mitigate for the additional water Chobani will consume through its reuse and injection program. In other words, Chobani is trying to appropriate a new ground water right and use water it receives from the City as mitigation for that new use. In support of this action, Chobani has presented other situations in the state that they believe are using the same approach—City of Rexburg, Micron, and Dry Lot. Each is dissimilar to Chobani's circumstance in definitive ways.

Significantly, the City of Rexburg has used a similar mitigation approach. However, that circumstance included the municipality of Rexburg using *their own* water rights for mitigation—i.e., the City of Rexburg re-organized the way its own water rights were used to allow for a new permit and mitigated that new use by using another one of its water rights for mitigation. In contrast, Chobani is trying to use the *City's* water for mitigation purposes to cover Chobani's new private groundwater right. Such an approach is unprecedented, and to the City's knowledge no rule or law supports such a method of mitigation. Additionally, Rexburg applied their water right *directly* to mitigation, whereas Chobani is planning to have already used their water right and then *reuse* the wastewater for mitigation.

Micron has also used a mitigation approach that Chobani claims is akin to their proposal, however differences exist in Micron's situation. First, Micron is in a geographic "bowl" that makes their use and mitigation more isolated than the unconfined aquifer in the area of Chobani. Second, Micron obtained its own water rights for mitigation, it was not relying upon delivery of water from another water user. Third, prior to having their mitigation plan approved, Micron was required to go through extensive aquifer mapping, while Chobani has not. Finally, all three entities had *separate* water rights to accomplish the mitigation—another right from a separate point of diversion through which to obtain the water to mitigate. Chobani is proposing to mitigate with water delivered by the City, not its own separate right.

IDWR promulgated a guidance document in 2015 that acknowledged accepted mitigation methods in Idaho: *Describing Mitigation in Water Right Records*. Among the recognized approaches to mitigation are the following:

1. Mitigation by change in nature of use of an existing right: new permit or exchange is mitigated by changing the nature of use of other pre-existing rights to recharge or another offsetting direct use. (i.e., instead of using a right to irrigate, the water is used for recharge).

2. Mitigation by storage release: injury or depletion caused by new permit is offset by release of storage water.
3. Continued diversion to maintain shared conveyance losses: water is left in a ditch or canal shared by multiple people to mitigate to other users on that water body.
4. Mitigation by delivery: junior user provides water directly to senior water right holder.
5. Mitigation by nonuse: user may begin to use some rights and quit using other rights to mitigate the new use.
6. Mitigation by nonuse (transfer): transfer mitigated by nonuse of other existing rights.
7. Mitigation by abandonment: abandonment of one or more existing water rights to mitigate for a new use, exchange, or transfer.

None of those mitigation methods describe taking water that would already return to the City of Twin Falls and claiming that it instead serves as “mitigation” to the City and others. On the contrary, each describes a method of actually reallocating or obtaining new sources of water for mitigation. After all, the entire goal of mitigation is to facilitate delivery of water that would not otherwise be available in exchange for a new use. The water Chobani proposes to use as mitigation is presently discharged back to the City, therefore it does not constitute a stand alone mitigation supply. To allow such a novel approach would undermine the goal of mitigation in Idaho’s water management system and is not supported by Idaho law. Therefore, Chobani’s mitigation plan should be denied.

II. Chobani Failed to Meet Its Burden of Proof and Thus Fails to Satisfy the Statutory Criteria for Approval of the Water Right Application.

When deciding whether to grant or deny a water right permit, the Idaho Department of Water Resources must determine whether the application satisfies the following criteria:

In all applications, whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c)

where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in Idaho Code § 42-202B, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will 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; the director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Idaho Code § 42-203A(5)

The Department's regulations allocate the burden of proof in the following manner: The applicant bears the initial burden of presenting evidence for the evaluation of criteria (a) through (d); the applicant also bears the initial burden of presenting evidence for evaluation of criterion (e) for any factor affecting local public interest of which he has knowledge or reasonably can be expected to be knowledgeable. The protestant bears the initial burden of coming forward with evidence for those factors relevant to criterion (e) of which the protestant can reasonably be expected to be more cognizant than the applicant. *See* IDAPA 37.03.08.040.05. Under the applicable criteria, Chobani has not met its burden of proof and the Hearing Officer should deny the permit accordingly.

A. Chobani Did Not Meet Its Burden of Proof That Its Water Right Will Not Reduce the Quantity of Water Under Existing Water Rights and that the Water Supply Itself is Sufficient for the Purpose for which it is Sought to Be Appropriated.

One of the most concerning aspects of Chobani's permit application is the limited understanding regarding availability of the water proposed to be pumped. Idaho law prohibits "mining" the aquifer—"water in a well shall not be deemed available to fill a water right therein" if pumping from the well to satisfy the right would reduce groundwater supply "beyond the reasonably anticipated average rate of future natural recharge." *Idaho Code § 42-237a(g); See*

also Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973). Chobani’s proposed permit will likely result in ground water withdrawals beyond the estimated rate of future natural recharge in the area—unlawful “mining” of the local aquifer (currently subject to a moratorium)—and reduction of water under existing water rights, both of which violate Idaho Code and applicable case law.

As discussed above, Dr. Brockway testified that Chobani is primarily relying on a singular well, MW-3, as the model for what they expect to be able to pump to obtain their requested 3 cfs, however that well is an anomaly, and should not be relied upon as an example of the aquifer’s status. Dr. Brockway testified that the aquifer is inhomogeneous, and the upper fractured zone of the aquifer is discontinuous, so you must have factors align perfectly to draw water. (Ex. 3). Those aquifer characteristics were confirmed through the tests run by Chobani: four test wells drilled and described in the Wells Report. (Ex. 3).

Dr. Brockway further explained that deepening the wells tested at Chobani would not necessarily get any more water than they displayed in the completed tests. The pump test on MW-3 showed that it was possible to develop 300,000 million gallons in that zone—a “sweet spot,” according to Dr. Brockway, and therefore an improper indicator of the whole aquifer. MW-2 and 4 displayed very different results despite their location on the same westerly line as MW-3. MW-2 and 4 gave much lower quantities of potential water development, further displaying the inconsistency of the aquifer, but likely providing more accurate data, according to Dr. Brockway. Per the test results, Table 2 of Exhibit 3 showed the predicted drawdown of the City’s and closest Burk’s tractor wells—a definitive impact to those senior uses of water. (Ex. 3). Other wells in the area, like the Hankins Wells, are already unproductive. Adding additional wells to the area will further deplete the available groundwater supply and make a drawdown even more likely.

Because tests show that impacts will occur to City and Burks Tractor Wells, and because Chobani's primary proof of available water is one well (MW-3) in a very inhomogeneous aquifer, Chobani has failed to carry its burden of proving that its proposed permit will not reduce the quantity of water available under existing water rights. Further, the majority of the wells tested show that there is not available water to meet the needs of Chobani. Only MW-3—the “sweet spot” well—showed the potential to pump 3 cfs.

Chobani completed no further testing beyond those four wells and instead rests its entire premise on the success of one unique well—a fact that they admitted at the Hearing. Chobani has thus failed to show that there is sufficient water available for their purposes, and failed to carry its burden under another factor of Idaho Code §42-203A(5).

B. Chobani Did Not Meet Its Burden to Demonstrate That Its Permit Will Not Conflict with the Local Public Interest.

Chobani failed to provide sufficient evidence to support its contention that the proposed water right is in the local public interest. Chobani has the initial, and ultimate, burden of coming forward with evidence as to any factor affecting the local public interest of which it is knowledgeable or reasonably can be expected to be knowledgeable. *See* IDAPA 37.03.08.040.04(b)(ii).

Under Idaho Code § 42-203A(5), the Director may deny applications to appropriate water if the proposed use will conflict with the local public interest as defined in Idaho Code § 42-202B. That Idaho Code section defines “local public interest” as “interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” The court has determined that, by adopting the general phrase “local public interest,” the legislature “intended to include any locally important factor impacted by the proposed appropriations.” *Chisolm v. Idaho Dept. of Water Resources*, 142 Idaho 159, 164 (2005) quoting

Shokal v. Dunn, 109 Idaho 330, 338-339, 707 P.2d 441, 449-50 (1985). “Local public interest” should be read broadly so as to secure the greatest possible benefit.” *Id.* at 164. Factors of the local public interest may carry different weight depending on specific circumstances and interests involved, and both benefits and detriments must be considered. *Id.* at 164.

The hearing officer in *Chisolm* weighed various public interests including water conservation, job creation, economic activity generation, and non-injury to other water rights. There, the potential drawbacks were not found to outweigh the public interest, but here the result is different. Chobani’s proposed permit has the potential for several negative impacts to the local public interest, including the following: potential adverse impacts to existing water rights and water quality, Chobani’s proposal will likely create a drawdown in nearby community wells, potentially necessitating drilling deeper wells in the surrounding area and/or dewatering the aquifer on a local level. Chobani has alternatives that would not necessitate the use of an additional water permit—the proposed permit is redundant water for them and thus averse to water conservation. The worst of all risks to the public interest is the acute risk of a malfunction that may cause untreated wastewater to be discharged directly into the local aquifer. Once degraded, the aquifer would never be fully “healed.” Further, no information was gathered as to what effects injecting effluent into the aquifer may have—even without a spill, the wastewater could greatly damage the water quality of the aquifer on which the local area relies. The risk remains that accidents may occur, as have occurred in the past at Chobani, that could allow wastewater to enter the aquifer beyond what is intentionally placed into it. Therefore, under the public policy analysis, Chobani falls woefully short due to the plethora of potential public interest violations listed above.

Further, it is not the protestant's burden to establish that a project is not in the local public interest. *Shokal v. Dunn*, 109 Idaho 330, 339 (1985). The burden is on the applicant to show that the project is in the local public interest, or that there are factors that outweigh the local public interest. *Shokal v. Dunn*, 109 Idaho 330, 339 (1985).

Rather than carry its burden to prove that the proposed project will be in the public interest, Chobani has failed to even test the aquifer to understand the impacts that its injection wells could have on the aquifer and the public interest—with the potential to endanger an entire aquifer while reasonable alternatives exist that Chobani should utilize. Notably, excessive arsenic is a common problem with wells in the Chobani vicinity. By injecting water into the aquifer, potential interactions with the water in the aquifer could occur and contaminate the entire aquifer. Chobani's witness, Terry Scanlan, admitted at the Hearing that they have not tested the aquifer and the potential for such a catastrophe exists. It is entirely unknown what effect the injected water would have if mixed with water in the aquifer and what constituents may be mobilized through the injection program.

Therefore, not only has Chobani failed to meet the public interest burden by showing that benefits outweigh the drawbacks of their proposed project, but they have also failed to even attempt to indicate how they will avoid harm to the public interest by neglecting to conduct the necessary tests. Failing to investigate such possibilities shows that Chobani failed to meet the burden of proof and indicates that permit and associated mitigation plan is not in the local public interest and therefore violative of the Idaho Code.

C. Chobani Failed to Meet Its Burden to Demonstrate That Its Permit Application is Not Contrary to Conservation of Water Resources within the State of Idaho.

As discussed previously, Chobani has applied for 3 cfs even though the company already uses a large quantity of water provided by the City, and it is unclear whether the requested quantity is even available. Most concerning, Chobani does not need the water for which it has applied. Chobani currently has water rights delivered by the City that can be utilized for their reuse project without needing to create a new groundwater right—a fact that Chobani’s witness, Josh Reed, acknowledged at the Hearing. To create a new groundwater right unnecessarily is contrary to the conservation of Idaho’s water resources in this circumstance, particularly in light of the existing moratorium order.

Dillon Allen, witness for Chobani, testified that the City might not be able to meet Chobani’s demands, and a redundant supply of water was one of Chobani’s goals for the proposed permit. Redundancy is not a “beneficial use” of water in the state of Idaho and is contrary to reasonable use and conservation of the resource. Further, Rob Bohling, witness for the City, testified, as noted above, that the City would be able to deliver water to Chobani absent a catastrophic event—an event so large that Chobani would be unable to operate for other reasons, like an earthquake. When asked on cross-examination, Mr. Allen admitted that Chobani has not discussed seeking additional amounts of water from the City rather than pursuing this permit and Chobani does not intend to do so at this time. He also stated that he did not know whether the reuse project could be implemented without a new groundwater well. When questioned about the potential of using additional storage tanks to store water for reuse as an alternative to utilizing the public aquifer for personal storage purposes, Mr. Allen replied that additional storage tanks would be an “unnecessary cost—we have an aquifer.” No research was

done into the costs of additional storage tanks, according to Mr. Allen. Rather than investing money into storage tanks on their own property, Chobani is proposing to instead use a public aquifer to inject water into for purposes of mitigation of a new appropriation.

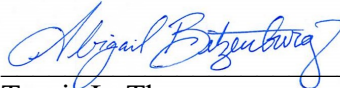
Endangering the water resources of Idaho by unnecessarily injecting water into the aquifer and attempting to tap a new groundwater right when reasonable alternatives exist is contrary to the conservation of Idaho's water resources. As such, Chobani's proposed use is contrary to Idaho Code §42-203A(5) and should therefore be denied.

CONCLUSION

Chobani's proposed permit and mitigation plan should be denied for failing to meet the applicable criteria under Idaho law. Chobani's proposed mitigation plan, relying upon water delivered by the City through its water rights, is unprecedented and not authorized by any statute or rule. Moreover, Chobani has not completed sufficient modeling and research to understand the impacts of that proposal—impacts that are likely to be negative for surrounding water users, including the City and the public who relies upon the aquifer. Finally, Chobani does not need the additional water for which it requests a permit—other courses of action exist that Chobani should pursue as reasonable alternatives to creating a new groundwater right. For the reasons listed above, the Applicant, Chobani, LLC., failed to meet its burden of proof and did not provide IDWR with sufficient information to approve this application for permit no. 47-17745. Therefore, the permit must be denied.

DATED this 2nd day of February, 2024.

MARTEN LAW LLP



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Attorneys for Protestant City of Twin Falls

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2024, I served a true and correct copy of the foregoing document as follows:

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