

Patrick D. Brown, ISB #4413
Patrick D. Brown, P.C.
516 Hansen Street East
P.O. Box 125
Twin Falls, ID 83303
Telephone: (208) 733-5004
Email: pat@pblaw.co

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DEPT OF WATER RESOURCES
SOUTHERN REGION

Attorney for Protestants James Michael
Hamilton and Sally Hamilton

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 47-17664
IN THE NAME OF:
ROBERT & JANA LINDERMAN

PROTESTANTS' BRIEF OPPOSING
APPLICATION

I. INTRODUCTION.

This case involves the Lindermans' Application for a domestic right to use .02 cfs of water to irrigate up to ½ acre on the Lindermans' property near Buhl, Idaho. The Hamiltons' have protested the Application. And, while applications for domestic uses are commonly granted due to the limited amount and type of use involved, this is not such a case.

Here, Lindermans' have applied for water from an "unnamed stream," then, at hearing, improperly attempted to change it to an application for "groundwater." Mr. Linderman contends, although he already has a domestic well, he may pump an additional 35 to 45 gallons per minute under the permit he has applied for.

The Protestants maintain that the Application should be denied. First, Lindermans' have attempted to amend the Application from an unnamed stream source to groundwater,

contrary to the rules. IDAPA 37.03.08.035.04. b. provides “[A]n application can be amended to clarify the meaning of the source of water but may not be amended to change the source of water.”

Second, the law dictates an applicant “... shall provide the detail of the proposed design, construction, and operation of the project and directly associated operations to allow the impact of the project to be evaluated.” IDAPA 37.03.08.040.04.b.iii. Mr. Linderman has avoided such disclosure needed by IDWR and Protestants to evaluate the impact. Instead, Mr. Linderman testified design and operation, which may include using a pump that runs at 35 to 45 gallons per minute, will depend upon what IDWR later prescribes. See, 119-126.¹

Third, the Lindermans’ have also not met their burden applying for and proving the issues required for the issuance of a permit under I.C. 42-203A, as is discussed below. The Application states it is for surface water from an unnamed stream, but Linderman testified it is actually for groundwater from drain tile. No proof was provided that using water from the drain tile will not reduce the stock water available to Sally Hamilton downstream. The water supply was not shown to be sufficient, and, in fact, Mr. Linderman testified that he was applying for this 2nd domestic right because the groundwater for the first draws down too much for irrigation of ½ acre. He has not shown the Application is made in good faith, as Linderman testified he intends to use the pumping system not only for the right water applied for but also under other imagined rights. ² Linderman proffered no conditions to limit

¹ In this brief, citations to the hearing transcripts list only the page number of the transcript. Hearings were held on March 10, 2021 and April 8, 2021. Volume I contains pages 1-72 and Volume II pages 73-172.

² The hearing officer should take administrative notice of the fact that Linderman’s have no other water rights, licenses, or permits which allowed diversion of groundwater from the vertical culvert or the pumping of water from the unnamed stream on their property to the culvert. In short, if the application is granted, it should provide for rate and volume metering which, in combination with the domestic well, may not exceed 13,000 gallons per day or in excess of .02 cfs.

use of the right, or other rights used in combination with it, to a certain, meaningful place or quantity of use despite his obligation to show the proposed design and operation.

Here, the evidence is that the Lindermans' have used, continue to use, and propose to use water under this Application in combination with other water or rights Linderman's contend they possess.³ Consequently, Lindermans' Application raises the issue of how or whether this proposed permit may be used in conjunction with other rights. Yet Linderman testifies the design, type of pump, meters, combined use, and other system design will be what IDWR later reveals, not what he was obligated to disclose before the hearing for evaluation of the proposed impact. The Application cannot be evaluated with any certainty without such disclosure. Therefore, it should be denied.

If the hearing officer is inclined to proceed otherwise, it should only grant the Application with strict conditions to protect from overuse of the proposed *de minimis* use, and from mixing use of this right with other water or rights Mr. Linderman contends he possesses. The facts elicited at hearing establish such a need to define the scope and use of the right:

II. EVIDENCE AND TESTIMONY.

1. The Exhibits, Including Declaration of Dave Patterson.

Exhibits A through J were admitted without objection. Additionally, admitted was Exhibit F, modified (with blue ink drawn by Mr. Linderman) and Exhibit 200, the hearings

³ . As the hearing officer has noted, this is an application hearing, not a compliance hearing focused on whether Lindermans' use of water on their property is within the bounds of the water rights and permits Lindermans' possess. However, Mr. Linderman admits his home already domestic well/right which has been disconnected from the sprinkler system for the lawn area because it drew down the groundwater. He further admits that about 2 1/2 acres of additional irrigation of pasture occurs and may continue through the same pump and sprinkler system he proposes to use under the Application. Therefore, if the hearing officer is going to grant the Application, she must provide conditions necessary to administer the permit in conjunction with the other uses.

officer's aerial map which identifies Sally Hamilton's property under the name of "Sara Baugh."

David Patterson was an expert hired by Protestants to locate underground piping systems on Lindermans' property. On December 10, 2020, Mr. Patterson located the drain tiles that collect groundwater and deposit it into a vertical culvert from which Lindermans' have been pumping water without lawful right to do so. Exhibit B, Declaration of Patterson and attachments, is the uncontested report of Mr. Patterson.

2. Tanner Butler.

Mr. Butler was Protestants expert who met Mr. Linderman on the property. After Mr. Linderman explained the current irrigation system, Mr. Butler inspected and measured it. 141-143. He testified the pump from the culvert which collects water from the drain tile pumps in the range of 35 to 45 gallons per minute. 145. To assure the right under the Application would not utilize more than the .02 cfs or 13,000 gallons per day, there would need to be a water meter on the discharge of the pump to give an accurate flow and volume. 146. A valve after the water meter would also need to be put on to restrict the flow to 9 gallons per minute. 146.

Mr. Butler was asked to consider the scenario proposed by Linderman under which water under the Application would be combined with other water rights pumped into the culvert from the red pump out of the stream. In other words, he was asked how to address multiple rights through the same pump in the culvert. 147. He opined there would not be a practical way to distinguish which right the water was coming from or which place of use it was going to. 147-148. One could physically restrict flow to the proposed ½ acre through a valve so that any additional flow would be redirected. However, such a system is not

practical because the pump curve fluctuates. 149-152. The amount of water flowing through a valve would change as the pressure fluctuated. So given the problem of variable pressure affecting the measurements, one should really have separate pumps for each different water right. 149-152.

Mr. Butler explained that, due to the complications described above, in over 20 years he has only seen water meters on domestic rights about 1% of the time. 156; 158. He believes it to be rare because of the complications and nightmares created by putting domestic rights and other rights on the same irrigation system. 165.

Linderman's attorney proposed Lindermans' be allowed to utilize 30 or 40 gallons per minute for a short period of time to irrigate so long as they do not exceed 13,000 gallons per day. Mr. Butler has explained, though, that pumping such a larger quantity of water over a shorter period of time will affect the water system and those downstream, due to the fluctuations in supply caused by the drawdown of pumping at a greater rate. 154. Those fluctuations could be considerable in terms of whether Sally Hamilton receives the water for her cattle. 154-155.

3. Mike Hamilton.

Mike Hamilton explained he and Sally Hamilton live about ½ mile downstream of the Linderman property . 5-6. (This property is labeled as being in the name of "Sarah Baugh" on Exhibit 200, which is Sally's former name. 44.) He additionally owns a parcel immediately north of the Linderman property. 6. Both "Sally's" parcel (the one downstream) and the parcel adjacent to Linderman have water rights for irrigation and stock water.

For the north parcel, Hamilton owns a water right that shares the same point of diversion as one of Lindermans' for which Exhibit F shows the point of diversion and place of

use. 7. Since 2017 when Hamilton acquired the north parcel, he has not seen Lindermans' water diverted through their common diversion point. 7.

The "blue line" Mr. Linderman drew on Exhibit F from 1400 East Road southward to where that line ends near the number "23" on Exhibit F is the stretch of creek bed out of which Sally Hamilton's right is diverted. 8-9; 19-20 (circled in blue on Exhibit C, modified). Downstream of that where the blue line ends is where Linderman's red pump out of the creek is located. 14-18. From there, creek water can be pumped up to the vertical culvert ("01 Pump" in p. 7, Exhibit B) along the path shown by the white pipe in Exhibit B. 17-19.

Since about 2016, Mr. Hamilton has observed Linderman using this "red pump" system to irrigate about 2 ½ acres on Linderman's property by lifting creek water to the vertical culvert. 22-23. He has seen Linderman use this system to run 3 of the "gun cart" sprinklers at once, with each using up to 16 gallons per minute. 27-28. One of Mr. Hamilton's concerns is this use of water, either stream water and subsurface water, depletes the flow of the creek which supplies stock water to about 35 cows downstream at Sally Hamilton's property. 23-24.

To address those concerns in 2019, Mr. Hamilton met with Mr. Linderman, his counsel, Corey Skinner from IDWR, and others on the Linderman property. 29-30. Mr. Skinner advised Mr. Linderman that he did not believe Lindermans' had sufficient rights to irrigate more than ½ acre. 30. Mr. Linderman has nevertheless continued to irrigate more than ½ acre. 30.

Mr. Hamilton does not object to the granting a permit to irrigate up to ½ acre using groundwater from the drain tiles, provided any permit is properly conditioned so that there are valves and meters to assure that that is the only water being diverted. 31-32. However,

he continues to oppose diversion from the creek, as the Application identifies diversion from a “unnamed stream,” by pumping out of the creek. 31-32 (See Exhibit C.)

4. Sally Hamilton.

Sally Hamilton, who travels past Lindermans’ a couple of times a day, has seen Mr. Linderman pumping out of the creek over the past couple of years causing her stock water from the creek downstream to be reduced into “mud holes.” 52-53. She did not have stock water problems prior to this pumping. 53. Sally, like her husband, would not object to the limited water right from the drain tiles with the appropriate meters and valves. 56. She does believe; however, metering and valves are necessary given the history of Mr. Linderman watering more acreage than he has rights for and with more water than is reasonable and necessary. 57.

5. Robert Linderman.

The Lindermans’ purchased the property involved in 2014. 78. Mr. Linderman admits he already has a domestic well but contends he cannot use that for irrigation of ½ acre of lawn because he understand it draws down the well. 166-67.67.

Linderman agrees that Exhibit A, Mr. Butler’s Declaration, accurately explains the irrigation systems on the property and the numbers at the pump. 112; 115-116.

Confrontations between Mr. Linderman and the Hamiltons’ over the use of water arose in the Spring of 2017. 105-106. Mr. Linderman then signed and filed the Application at issue here, Exhibit C, which seeks water from an “unnamed stream” and identifies the point of diversion as a “pump in stream”. 110. Linderman states he filed the Application “at IDWR’s request” and it was filled out by IDWR. 80.

Contrary to what is stated, Mr. Linderman does not intend to use water from an “unnamed stream.” 81. Instead at the hearing, he testified he intended to use “groundwater” collected from the drain tiles, 81-82; 91-94. He conceded the Application, if granted, should not allow him to use the “red pump” to pump water from the “unnamed stream” up to his vertical culvert where another pump supplies his irrigation system. 94.

But Linderman contends he could continue to divert stream water under 34-17431 or some other imagined water right through the same irrigation pump and system. 101-102. He cannot answer the question of how anyone would be able to distinguish the water going through the pump under one right and another. 102-103.

Mr. Linderman maintains the drain tiles have adequate water and his culvert never stops overflowing – “you can’t pump everything out of there that comes in there.” 87. ⁴ Even when pumping 35 to 45 gallons per minute, which is the uncontested range the pump draws, Mr. Linderman maintains his vertical culvert continues to overflow. 87- 88. Curiously, he did not address the relationship between his pumping that much water and the drying up of the stock water downstream at Sally Hamilton’s.

Nevertheless, Mr. Linderman intends to use the pump from the culvert which pumps in the range of 43 gallons per minute, unless otherwise directed by IDWR. 119-120. He does not propose putting conditions or restrictions on the permit so that it will not divert more than .02 cfs, nor even measuring it and the domestic well so the volume does not exceed 13,000 gallons per day or more than ½ acre of irrigation. 125-126.

⁴ If this is a true statement, one must wonder why there is a red pump to bring water from the creek. It is illogical to suggest that supplementing the supply at the culvert via the red pump would have been undertaken if the culvert already supplies more than can be pumped from it.

III. ARGUMENT.

1. The Application must be denied because it cannot be modified or amended at hearing to change the source to groundwater and because Lindermans' have not provided required details about design and operation to evaluate the impacts.

As has already been pointed out, IDAPA 37.03.08.035.04. b. provides "[A]n application can be amended to clarify the meaning of the source of water but may not be amended to change the source of water." No matter who helped Mr. Linderman fill out the Application, it may not be changed from the "unnamed stream" source to "groundwater."

Moreover, IDAPA 37.03.08.040.04.b.iii. mandates that Linderman disclose details of the proposed design, construction, and operation so IDWR and Protestants may evaluate the impact of the proposed operation. At best, Mr. Linderman has disclosed that his design, construction, and operation is unknown, as he contends it will be whatever IDWR at some point in the future tells him what it should be. See, 119-125. He even contends that it could include utilizing the red pump from the creek into the culvert to use some imagined water right in combination with the water under the Application. 101-103.

The Application should be denied because IDWR does not have the power to amend the Application to change the source to groundwater and, like the protestants, has not been provided with the information necessary to even know, let alone assess, the impact of what will be constructed and how it will be operated.

2. The Application must be denied because Lindermans' had not met their burden of proving the elements of I.C. 42-203A.

Under I.C. 42-203A, an applicant must prove the following regarding the proposed appropriation:

1. The appropriation will not reduce the quantity of water under existing rights;

2. The water supply is sufficient for the purpose for which the appropriation is sought;
3. The application is made in good faith and not for delay or speculation;
4. The applicant has sufficient financial resources to complete the proposed project;
5. The proposed use will not conflict with the local public interest;
6. The proposed use will not be contrary to the conservation of water resources within the State; and
7. The proposed use will not adversely affect the local economy of the watershed or local area.

IDAPA 37.03.08.45 supplements the statutory requirements with criteria for evaluating applications. Rule 45.01.a addresses reduction of the quantity of water under existing rights and provides a reduction occurs where the amount is reduced below the recorded, beneficially used amount and an existing right is made unusable. Here, there is no doubt that Sally Hamilton's stock water right is made an unusable "mudhole" when Linderman pumps as he proposes to do. Combining this with the unknown way in which Linderman proposes to operate, including use of other water through the same system without meters and valves, cannot be said to prove any of the above criteria.

The Protestants maintain Lindermans' have not met the burden of showing (1) the appropriation will not reduce the quantity under existing rights, (2) that the water supply is sufficient; (3) that the application is made in good faith, (4) nor that the use will not conflict with the local public interest. Lindermans' Application, even if entertained despite its improper attempt at amendment, should therefore be denied.

3. If the Application is granted, it should be strictly conditioned on installation of valves and meters to measure the rate and volume of flow from both the vertical culvert and the domestic well.

The Hamiltons' submit the Application should be denied for the reasons addressed above. However, if IDWR somehow finds it would be proper to grant the Application, it should be conditioned on strict, objective, requirements which restrict and measure flow so that the water applied for, in combination with the domestic well and any other water uses, does not exceed the authorized rate and volume of diversion of the respective rights.

IV. CONCLUSION.

Lindermans' Application has been filed, not as a good faith effort to obtain permission for a project which will satisfy the criteria of I.C. 42-203A, but to attempt to allow Mr. Linderman to continue to divert water which he does not have rights to utilize. Nevertheless, Mr. Linderman has sought to impermissibly change his Application so the source would be groundwater instead of water from a stream. He has not provided necessary details about how his system will be designed or operated, nor how it will be utilized in conjunction with other water he contends he has the right use through the system. He has not disputed with credible evidence that his past pumping has interfered with the stock water for Sally Hamilton, nor proposed conditions or mitigation. The hearing officer should hold he has not satisfied the requirements for the granting of the application for all of the reasons stated above. The application should be denied.

Dated this 4th day of May, 2021.



Patrick D. Brown

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of May, 2021, (s)he served a true and correct copy of the within and foregoing document upon the following named person(s) by the method indicated below:

Justin May Nathan Fowler Angstman Johnson 199 S. Capitol Blvd. Ste. 200 Boise, ID 83702	☐ U.S. Mail ☐ Facsimile ☐ Hand Delivery ☒ E-mail
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