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DEPT OF WATER RESOURCES
SOUTHERN REGION

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT TO
APPROPRIATE WATER
NO. 47-17664

APPLICANTS' CLOSING ARGUMENT

IN THE NAME OF:
ROBERT K. & JANA L. LINDERMAN

COMES NOW Applicants, Robert Linderman and Jana Linderman, husband and wife, by and through their counsel of record, Angstman Johnson and hereby submits Applicants' Closing Argument.

1. INTRODUCTION

This matter came before the Idaho Department of Water Resources ("IDWR" or "Department") as the result of an Application for Permit filed by Robert and Jana Linderman (Applicants) on May 24, 2017 (Hearing Exhibit C), and corresponding protests filed by Michael and Sally Hamilton ("Protestants" or "Hamilton"). Hearings regarding this application were heard on March 10, 2021, and again on April 8, 2021 (due to the absence of audio recordings from the morning hearing which occurred on March 10, 2021).

2. BACKGROUND INFORMATION

Applicants are owners of the property located at 4377 N 1400 E Buhl, ID 83316 ("4377 N") and applied for a permit to use 0.02 CFS of water for domestic use (Hearing Exhibit C). At the Hearing, the Applicant Robert Linderman (Linderman) testified that he filed this application

after discovering that a water right which he believed was properly transferred to him upon purchase of the 4377 N property, was in fact not on record with the Department as being a valid water right (Hearing Exhibit E). With the assistance of the Department, Linderman completed the application for permit number 47-17664 based on information contained in Hearing Exhibit E.

As a point of clarification and reiteration, it is noted that although 47-17664 indicates the source of the water is from an "Unnamed Stream" and the type and size of devices used to divert water from the source is a "Pump in the Stream," the more accurate information, which has been stated by Linderman from the outset of the protest, is that the source of the water is "Ground Water" and the type and size of devices used to divert water from the source is "Drain Tiles."

Throughout this entire process, including discovery, status conferences, and the hearing, Linderman has maintained that the water he has used and intends to use under this permit, is obtained from the ground through drain tiles which are located on his property. Furthermore, the purpose for which Linderman intends to use the water permit is for domestic use, defined in IC § 42-111 to allow for irrigation of up to one-half (1/2) acre of land and not to exceed thirteen thousand (13,000) gallons per day.

Linderman testified at the hearing that he understands and agrees that if granted this water right permit for domestic use, he will not irrigate more than a 1/2 acre of land, and only irrigate that Place of Use (POU) to be provided in the permit, and not exceed more than 13,000 gallons a day.

3. DISCUSSION

In deciding whether to grant a water right permit, the Idaho Department of Water Resources determines whether the application satisfies statutory criteria provided in IC § 42-203A, which is used to evaluate all applications to appropriate water.

Below is a list of the seven (7) criteria evaluated by the Department when making a determination whether to approve the application, deny the application, or approve the application with limitations/conditions. Each of these criteria will be discussed below in greater detail, together with an evaluation of each as provided in the Department's rules found in IDAPA 37.03.08.045:

1. Will the proposed appropriation reduce the quantity of water under existing water rights?
2. Is the water supply sufficient for the purpose for which it is sought to be appropriated?
3. Was the application made in good faith or for delay or speculative purposes?
4. Does the applicant have sufficient financial resources with which to complete the proposed project?
5. Will the proposed use conflict with the local public interest, where the local public interest is defined 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?

6. Will the proposed use be contrary to the conservation of water resources within the State of Idaho?
7. Will the proposed use 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?

1. Will the proposed appropriation reduce the quantity of water under existing water rights?

IDAPA 37.03.08.045.01.a states that a proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

While this application is protested by Hamilton, no evidence has been provided to support that any existing water rights would be reduced below the amount recorded by permit, license, decree or valid claim. In fact, Linderman has previously used water in the same manner as that requested in the application without limiting the use of any existing water rights. No evidence, expert opinions, or other substantive claims have been provided indicating a reduction in the amount of water available.

- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code;

No evidence, claims, or otherwise, have been provided which indicate a holder of an existing water right will be forced to an unreasonable effort or expense to divert his/her existing water right. Linderman's use of the water is derived from drain tiles which are located on his property and collected in a vertical culvert, which is then used either to irrigate his property, or overflows into the adjacent stream. The point being, that because the water to be used by Linderman is collected from drain tiles which run underground on his property, no one is forced to take efforts or expense to divert their existing water right, which is evidenced by the absence of any claims to the contrary.

- iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.

Nothing from any of the testimony provided by the Applicants or their experts, or any other parties even suggests that this is concern. The water is only used for irrigation purposes and as such is not made unusable in any way.

- iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

No evidence has been provided to prove or even allege that granting this water right would cause injury to another water right.

2. Is the water supply sufficient for the purpose for which it is sought to be appropriated?

IDAPA 37.03.08.045.01.b states:

The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment.

Linderman has testified that he intends to use the water right from 3/15 to 11/15 each year, and that at no time has the water been insufficient for the proposed use. To the contrary, Linderman testified that not only is the water from the drain tiles draining into the culvert year-round, but that at times the flow of water into the drain tiles exceeds the amount available for use by the irrigation system and that even with the irrigation system running, water will still divert to the overflow and directed to the stream.

3. Was the application made in good faith or for delay or speculative purposes?

IDAPA 37.03.08.045.01.c states:

The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if:

- i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all

applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry;

Linderman is the owner of the property at issue and upon which presently exists all of the necessary elements needed to use the water right as requested. It should be noted that Linderman purchased the property in 2016, and that the current drain tiles, irrigation pump and culvert where already in place and in use and had been for many years.

- ii. The applicant is in the process of obtaining other permits needed to construct and operate the project;
- iii. There are no obvious impediments that prevent the successful completion of the project.

Neither of these criteria apply in this matter, however, suffice it to say that Linderman made this application in good faith in an attempt to maintain what he believed was a preexisting valid water right.

4. Does the applicant have sufficient financial resources with which to complete the proposed project?

This consideration is not applicable in this matter as Linderman has no need to secure financing to fund any project as the devices for collection and distribution are already in place and are operational.

5. Will the proposed use conflict with the local public interest, where the local public interest is defined 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?

IDAPA 37.03.08.045.01.e states:

The Director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest:

- i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;
- ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and
- iii. An application which the Director determines will conflict with the local public interest will be denied unless the Director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest

The proposed use is for a domestic purpose and irrigation of up to a 1/2 acre and up to 13,000 gallons per day. It is clear from the testimony given at the hearing and information provided by the parties that this proposed use does not conflict with the local public interest.

6. Will the proposed use be contrary to the conservation of water resources within the State of Idaho?

IDAPA 37.03.08.045.02 provides that irrigation of 200 acres or less will not cause a significant reduction and as such is not contrary to the conservation of water resources within the State of Idaho.

7. Will the proposed use 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?

IDAPA 37.03.08.045.03 provides that if a proposed use is deemed to be a significant reduction, then the Director may consider the public interest. Given that Applicants' proposed use will not cause a significant reduction, this proposed use will not adversely affect the local economy.

4. CONCLUSION

At the end of the day, this matter is about an application to use 0.02 CFS to irrigate a designated 1/2 acre POU. The Applicant applied for this permit out of necessity, because he learned that the water right he thought he had when he purchased his property, was actually not valid according to IDWR. If this application is not approved, the Applicant does not have any other water rights available or any reliable means to irrigate his property.

Multiple attempts have been made by the Protestants throughout the course of this application and hearing process, to steer the conversation and attention away from the application itself and instead attempt to focus on issues of compliance, forfeitures, and other areas which have no bearing on the present application. Despite the many efforts of the Protestants to argue against why this application should not be allowed, a review of the criteria for evaluating applications under IC § 42-203A clearly shows that this application meets the criteria listed. The Protestants have failed to provide any evidence to the contrary and therefore, Applicant respectfully requests that IDWR approve the Application for Permit 47-17664.

DATED this 29th day of April 2021.

ANGSTMAN JOHNSON

By: /s/ Nathan A. Fowler
Nathan A. Fowler
Attorney for Applicants