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JUN 05 2018

DEPARTMENT OF  
WATER RESOURCES

Attorneys for Protestants Pearson Farms & Ranch, LLC and Nathan Jones

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JUN 06 2018

WATER RESOURCES  
WESTERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER NO.	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
81459	)	
	)	
IN THE NAME OF TRAIL FAMILY	)	
FARMS LLLP	)	
<hr/>		
IN THE MATTER OF EXCHANGE NO.	)	
81775	)	
	)	
IN THE NAME OF TRAIL FAMILY	)	
FARMS LLLP	)	
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Protestants Pearson Farms & Ranch, LLC and Nathan Jones, through undersigned counsel of record, hereby file this Motion for Summary Judgment, pursuant to IDWR Rules of Procedure 260 and 565 and Idaho Rule of Civil Procedure 56. This Motion is supported by a declaration of Dylan Lawrence, filed contemporaneously herewith.

Pursuant to Rule of Procedure 260.03, the Protestants request oral argument on this Motion. If the presiding officer determines that oral argument is not necessary pursuant to Rule of Procedure 565, then the Protestants respectfully request leave to file a reply brief within seven days of receipt of any response briefs filed pursuant to Rule of Procedure 270.02.

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## **INTRODUCTION**

Many disputed water right matters are factually complex and therefore do not lend themselves to resolution through summary judgment. This matter is different. Here, Trail Family Farms LLLP (“Trail” or the “Applicant”) has filed alternative transfer and exchange applications in order to divert water from a new location under water rights 61-7236A and 61-7236B. As a matter of law, neither of these applications can be approved.

The two water rights that are the subject of the pending applications are tied to three other, more senior water rights through a remark limiting their total combined diversions to 1.67 cfs. However, the three senior rights alone have a total combined diversion rate of 3.104 cfs. Therefore, since the partial decrees for the two junior rights were issued, there cannot have been any diversions of water under those rights. Instead, any diversions of water from the common point of diversion shared by all five rights must necessarily have been under the three senior rights.

The prohibition against enlargement applies to both transfer applications and exchange applications. If either application is approved, diversions from the proposed new point of diversion will necessarily result in enlargement, and there is no possible remark or condition of approval that could change this fact. Therefore, as a matter of law, both applications must be denied. Under these circumstances, proceeding with a hearing on those applications will be wasteful of the time and resources of the Department and the parties.

## **STANDARD OF REVIEW**

The Department has articulated its summary judgment standards as follows:

The Department's Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize motions for summary judgment. The rules do,

however, authorize the filing of pre-hearing motions, which would include motions for summary judgment. *See* IDAPA 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (*see* IDAPA 37.01.01.052), the Department relies on the standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment. A motion for summary judgment may be granted if a hearing officer determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56, I.R.C.P.

In the Matter of Sytle's Petition for Declaratory Ruling Regarding Distribution of Water to Water Right No. 95-0734, Order on Motions for Summary Judgment, at p. 3 (Sept. 6, 2017), available at <https://tinyurl.com/ybxa2gm6> (last visited June 1, 2018).

## FACTUAL BACKGROUND

### 1. Water Rights 61-7236, 61-7236A and 61-7236B

The permit application for 61-7236 was filed in 1975. (Lawrence Decl., Ex. A.) The application describes the source as "waste and seepage water (Little Canyon Cr.)."<sup>1</sup> (*Id.*, Ex. A, p. 1.) The applicant described his intent as follows:

Changes in division and ownership of land parcels, existing ditch rights, and a deepened channel for the creek which was caused by floods five years ago, make it wasteful and difficult for me to utilize my decreed waters on the same lands for which they were originally appropriated. It also makes it impossible for me to utilize my irrigation run-off waste water an seepage waters.

In order to establish a more effective and productive irrigation system, *I would like to transfer the decreed rights for this land to higher on the [Little Canyon] creek and be allowed to pump my waste and seepage waters out of the [Little Canyon] creek on to this land.*

(*Id.*, Ex. A, p. 2 (emphasis added).)

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<sup>1</sup> It appears "(Little Canyon Cr.)" was interlineated into the application when it was approved by Director Higginson. (*See* Lawrence Decl., Ex. A, p. 1.)

The Department conducted its beneficial use field exam in 1989. (Lawrence Decl., Ex.

B.) In the related report, the examiner Steve Lester, states:

Source: Note Permit shows source as “waste & seepage water (Little Canyon Creek),” which is also how source was advertised. ***Actually, the source is L.C. Creek water.*** Wastewater enters creek ***without any developed collection/delivery works*** and therefore becomes creek water (public water). The wastewater is from ***irrigated lands upstream of the pump*** for this water and contributes to L.C. Creek supply during irrigation periods.

(*Id.*, Ex. B, p. 4 (emphasis added).)

The report also notes that 61-7236 shares the “[s]ame pump and pipeline” as a point of diversion with water right 61-2000. (*Id.*) The remainder of this brief will refer to the pump in Little Canyon Creek in the SESE of Section 18 that serves as the point of diversion for 61-7236 and 61-2000 (and the split “children” rights thereof) as the “Creek Pump.”

The license for 61-7236 was issued in 1989. (Lawrence Decl., Ex. C.) Subsequently, in the Snake River Basin Adjudication, the SRBA court issued two partial decrees for the split “child” rights derived from 61-7236: The partial decree for 61-7236A was issued in 2000, for 0.86 cfs. (Lawrence Decl., Ex. D.) The partial decree for 61-7236B was issued in 2003, for 0.14 cfs. (*Id.*, Ex. E.) This brief will refer to these two rights collectively as the “Junior Rights.”

Both decrees for the Junior Rights identify the source as “waste water” from the same point of diversion in the SESE of Section 18 (*i.e.*, the Creek Pump) with a priority date of July 10, 1975, and the quantity element of both decrees contains a remark limiting the “total combined diversion rate” of 61-7236A, 61-7236B, 61-2000A, and 61-2000B to 1.67 cfs. (*Id.*, Exs. D, E.) Due to this combined use limitation remark, it is critical to also analyze 61-2000A and 61-2000B.

## **2. Water Rights 61-2000A, 61-2000B, 61-12189, and 61-12190**

The SRBA partial decree for 61-2000A was issued in 2000, for 1.044 cfs. (Lawrence Decl., Ex. F.) The SRBA partial decree for 61-2000B was issued in 2003, for 2.056 cfs. (Lawrence Decl., Ex. G.) Both decrees identify the sole source as “Little Canyon Creek” with a priority date of December 7, 1903, and both rights identify a point of diversion in the SESE of Section 18 (*i.e.*, the Creek Pump). (*Id.*, Exs. F, G.) For 61-2000A, it is the sole point of diversion, while 61-2000B has three additional points of diversion upstream of the SESE of Section 18. (*Id.*, Exs. F, G.) Critically, both partial decrees also contain a remark limiting the “total combined diversion rate” of 61-7236A, 61-7236B, 61-2000A, and 61-2000B to 1.67 cfs. (*Id.*, Exs. F, G.)

Water right 61-2000B was eventually split into water rights 61-12189 and 61-12190. Both of those “child” rights still identify their sole source as “Little Canyon Creek,” and both rights identify a point of diversion in the SESE of Section 18 (*i.e.*, the Creek Pump). (Lawrence Decl., Exs. H, I.) And, critically, both of those “child” rights still contain a remark limiting the “total combined diversion rate” of 61-7236A, 61-7236B, 61-2000A, 61-12189, and 61-12190 to 1.67 cfs. (*Id.*, Exs. H, I.) This brief will refer to water rights 61-2000A, 61-12189, and 61-12190 as the “Senior Rights.”

## **3. Summary of Key Water Right Terms**

Based on the above, and in order to fully appreciate the legal arguments that follow, it will be helpful to highlight certain key aspects of the discussion of the water rights above:

The Junior Rights have always been diverted from Little Canyon Creek, out of the Creek Pump. That the source on the partial decrees identifies the source as “waste water” does not change this fact.

The Junior Rights and the Senior Rights all share the same point of diversion—the Creek Pump—on Little Canyon Creek in the SESE of Section 18. For the two Junior Rights and 61-2000A, the Creek Pump is the only point of diversion. For 61-12189 and 61-12190, there are three additional upstream points of diversion on Little Canyon Creek.

All five of the Junior Rights and the Senior Rights include a combined use limitation remark limiting their total combined diversion rate to 1.67 cfs. In this regard, a simple chart of these rights will be helpful to reference as this brief proceeds:

<u>Water Right</u>	<u>Priority Date</u>	<u>Owner</u>	<u>Diversion Rate (cfs)</u>
<u>“Senior Rights”</u>			
61-2000A	12/7/1903	Trail Family Farms LLLP	1.044
61-12189	12/7/1903	Trail Family Farms LLLP	0.14
61-12190	12/7/1903	Williams, Heather P.; Williams, Travis T	1.92
Total Senior Rights			3.104
<u>“Junior Rights”</u>			
61-7236A	7/10/1975	Trail Family Farms LLLP	0.86
61-7236B	7/10/1975	Trail Family Farms LLLP	0.14
Total Junior Rights			1
TOTAL “SENIOR RIGHTS” AND “JUN- IOR RIGHTS”			4.104

#### **4. Transfer Application No. 81459 and Exchange Application No. 81775**

Trail filed its transfer application number 81459 (the “Transfer Application”) on February 15, 2017, seeking to add a point of diversion to water rights 61-7236A and 61-7236B on land owned by Travis Williams. (Lawrence Decl., Ex. J, pp. 1-2.) The source of the water would be a

“[c]ollection pond on the end of King Hill Irr. Dist. lateral.” (*Id.*, p. 2.) In other words, the source of water would not be Little Canyon Creek or waste water therein. On April 10, 2017, the Department sent a letter to Trail stating:

On February 15, 2017, you filed a transfer application for waste water rights authorized under water right 61-7236A and 61-7236B. The transfer application proposes to add a point of diversion at a point located at the end of the King Hill Irrigation District Canal for your place of use west of Little Canyon Creek.

Review of water right file 61-7236 shows that the application for permit submitted in August of 1975 contained a map outlining the point of diversion within the SESE ¼ ¼ Sec 18, Township 5 South, Range 10 East on Little Canyon Creek. The irrigation use is described by "allowing to pump waste and seepage water out of the creek on to this land." It is clear that the source of waste water is water collected from fields above the place of use and diverted from the creek. As indicated on the field exam that was conducted August of 1987, a more accurate source would be Little Canyon Creek. Nevertheless, water that enters this point of diversion is upstream of the proposed point of diversion, and is dependent upon the availability of flow naturally occurring.

Water at the proposed point of diversion is delivered via the King Hill Irrigation District Canal. This originates as Snake River water before it is wasted at the end of the canal. The source of wastewater being applied for under transfer no. 81459 is being considered different than the source described by water rights 61-7236A and 61-7236B.

Transfers do not authorize a change of source. An application for exchange pursuant to Section 42-240, Idaho Code may be a more appropriate process rather than an application for transfer. Criteria based on preventing an enhancement to the source is still reviewed however. An application which proposes to change a point of diversion to a new location where the water available is greater or more reliable is presumed to enlarge the water right, unless the proposed change is subject to conditions limiting diversion of water at the proposed new point of diversion to times when water is available and in priority at the original point of diversion.



If you concur with the information above, please withdraw the transfer application. You may seek the changes you desire by filing either an exchange or application for permit.

(Lawrence Decl., Ex. K.)

In response, Trail filed application for exchange number 81775 (the “Exchange Application”) on July 14, 2017, seeking to divert the entire combined 1 cfs diversion rate for the Junior Rights from the same new point of diversion proposed in the Transfer Application.

(Lawrence Decl., Ex. L.) Timely protests to the Exchange Application were filed by Protestant and Ark Properties on August 21, 2017, and a timely protest to the Transfer Application was filed by Protestant on October 10, 2017.

## LEGAL ARGUMENT

### **1. The Combined Use Limitation That Appears in the SRBA Partial Decrees Cannot Be Revisited or Revised in This Administrative Proceeding**

It is true that the combined use limitation included in all of the SRBA partial decrees for the Junior Rights and the Senior Rights differs from the one that appeared in the original 1989 license for 61-7236. (*See* Lawrence Decl., Ex. C.) However, that is of no relevance or legal import here. The Idaho Supreme Court has held that SRBA partial decrees are “conclusive,” and has strongly rejected attempts to “collaterally attack” SRBA partial decrees through subsequent administrative proceedings before the Department. *In re Distribution of Water to Water Right Nos. 36-02551 & 36-07694*, 160 Idaho 119 (2016). Therefore, the combined use limitations that appear in the partial decrees for the Junior Rights and the Senior Rights are legally binding, and cannot be revisited or revised through this or any other administrative proceeding.

## **2. Due to the Combined Use Limitation, Water Has Not and Cannot Be Diverted Under the Junior Rights**

As previously discussed, the Junior Rights and the Senior Rights all contain a remark limiting their total combined diversion to 1.67 cfs. However, the Senior Rights alone have a combined diversion rate of 3.104 cfs. Therefore, since the time the partial decrees were issued in 2000 and 2003, as both a factual and legal matter, there have been no diversions of water under the Junior Rights. Any diversions of water from the Creek Pump must necessarily have been pursuant to the Senior Rights, since they are senior in priority to the Junior Rights and exceed the 1.67 cfs limitation by themselves.

## **3. Enlargement Includes Increased Diversions of Water**

The Department may approve a transfer “*provided...the change does not constitute an enlargement in use of the original right....*” IDAHO CODE § 42-222(1) (emphasis added). The same prohibition against enlargement applies to water right exchanges. *Id.* at § 42-240(5). In both transfers and exchanges, the applicant bears the burden of proof to show that enlargement will not occur. *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 420 (2001); *In the Matter of Application for Exchange of Water Right Nos. 34-12050C and 34-10400 Filed in the Name of Shane Rosenkrance*, Preliminary Order, p. 7 (May 24, 2001), available at <https://tinyurl.com/y9q5yrvw> (last visited June 1, 2018) (denying exchange application because applicant did not carry burden of proving non-injury and non-enlargement). The Department “may consider consumptive use” in its enlargement analysis. IDAHO CODE §§ 42-202B, 42-222(1).

When a water right is enlarged, “[i]n effect, a separate water right is being created.” *Rangen, Inc. v. Idaho Dept. of Water Resources*, Memorandum Decision, at p. 9, Case No. CV-2015-1130 (5<sup>th</sup> Dist. Oct. 8, 2015), available at <https://tinyurl.com/ycp54le6> (last visited Feb. 24, 2018).

“This not only causes injury to junior appropriators, but also runs afoul of the prior appropriation doctrine if the proposed enlarged portion of the original right is accorded the same priority date as the original right.” *Id.* “Enlargement includes increasing the amount of water *diverted or consumed* to accomplish the beneficial use.” *Barron*, 135 Idaho at 420 (emphasis added).

Accordingly, one form of enlargement is when the “transfer would result in the use of water at a time when it was historically unavailable....” *Id.* According to IDWR’s transfer processing memorandum:

An application for transfer, which proposes to change a point of diversion from a surface water source to a new location where the water available is greater or more reliable, such as moving from the tributary of a stream downstream to the mainstem of the stream, is presumed to enlarge the water right, unless the proposed change is subject to conditions limiting diversion of water at the proposed new point of diversion to times when water is available and in priority at the original point of diversion.

(Lawrence Decl., Ex. M, p. 31.)

Sections 42-108 and 42-222(1) authorize a “change” in the point of diversion, but do not contemplate adding a new point of diversion through a transfer. The necessary implication is that, in order to add a new point of diversion, there must be a commensurate reduction of diversions from an existing point of diversion. Otherwise, enlargement occurs. This is the same reason a transfer cannot add a new beneficial use – even a non-consumptive one – without a commensurate reduction of existing uses:

*Adding* a new beneficial use to a water right without reducing the authorized amounts under existing beneficial uses constitutes an enlargement of the water rights. For example, *even though “hydropower” is a non-consumptive beneficial use, “hydropower” cannot be added to an irrigation right unless the irrigation portion of the right is reduced proportionately.*

In the Matter of Application for Transfer No. 79037 in the Name of P4 Production, *Preliminary Order Approving Transfer*, at p. 9 (Aug. 4, 2015), available at <https://tinyurl.com/ybqugcox> (last visited Feb. 24, 2018) (*emphasis added*).

**4. As a Matter of Law, Water Cannot Be Diverted From the New Point of Diversion Without Enlargement of the Junior Rights**

As the previous section establishes, enlargement is not limited to a situation in which the diversion rate or the number of acres on the “paper” water right increase. Enlargement also occurs when there will be an actual increase in diversions of water over what has historically been diverted, even if such diversions are still within the terms and limitations of the original water right.

Here, it is impossible for Trail to show any historical diversions of water under the Junior Rights since the time the partial decrees were issued in 2000 and 2003. In the language of the Department’s transfer processing memorandum, there have been and cannot be any circumstances “when water is available and in priority at the original point of diversion.” (Lawrence Decl., Ex. M, p. 31.) Therefore, any diversion of water from the new point of diversion, whether it is under an approved transfer or exchange, will as a matter of law constitute a prohibited enlargement, and there are no conditions of approval that can change or prevent that. It also bears repeating that the enlargement prohibition applies to both transfers and exchanges, and the applicant bears the burden of proof in both contexts.

Preparing for and participating in a hearing on the Transfer Application and the Exchange Application will be a monumental waste of the time and resources of the Department, the parties, and their representatives, when there is no way to avoid a prohibited enlargement. The Department should grant the pending Motion, and deny the Transfer Application and the

Exchange Application. If Trail desires to divert water from the facility that is the subject of the Applications, it should file a permit application as the Department suggested in its April 10, 2017 letter. (*See* Lawrence Decl., Ex. K.)

### CONCLUSION

For the forgoing reasons, the Protestants respectfully request that the Department grant this Motion, and deny Transfer Application No. 81459 and Exchange Application No. 81775.

DATED THIS 5th day of June, 2018.

Varin Wardwell LLC

A handwritten signature in blue ink, appearing to read "Dylan B. Lawrence", is written over a horizontal line.

Dylan B. Lawrence

Attorneys for Pearson Farms & Ranch, LLC and  
Nathan Jones

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2018, I caused the original of this document to be filed with the state office of the Idaho Department of Water Resources via hand delivery and a true and correct copy of the foregoing to be served by the method indicated below, and addressed to the following:

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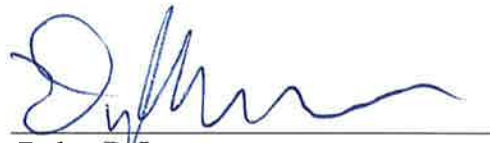
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