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DEPARTMENT OF  
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER NO.        )  
81482 IN THE NAME OF LITTLE WILLOW )  
IRRIGATION DISTRICT                    )

**PROTESTANTS' POST-HEARING  
BRIEF**

Thomas Roland ("Roland" or the "Protestant"), through undersigned counsel of record, hereby files this post-hearing brief pursuant to Department Rule of Procedure 564 and the Hearing Officer's instructions at the February 15, 2018 hearing.

**I. INTRODUCTION**

This matter involves an application for transfer (the "Application") filed by the Little Willow Irrigation District (the "District" or the "Applicant"), timely protested by Roland. (*See* Exs. 1, 2, 101, 102.) At the conclusion of the February 15, 2018 hearing, the Applicant suggested the parties each submit one post-hearing brief within fourteen days to address specific legal issues, which the Hearing Officer approved. This post-hearing brief addresses injury, enlarge-

ment, reuse of waste water, and fiduciary duties, and based upon instructions at the hearing, is limited to ten pages.

## II. LEGAL ARGUMENT

### A. Injury

#### 1. Law of Injury Generally

The Department may approve a transfer “*provided no other water rights are injured thereby....*” IDAHO CODE § 42-222(1) (emphasis added). The applicant “necessarily bears the burden of providing the Department with sufficient information to show non-injury to other water rights....” *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 418 (2001). For new water rights, the Department defines injury to include situations in which:

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.

Water Appropriation Rule 045.01(a)(i).

It was and still is the view of a majority of the court that the prior appropriator of the waters of a stream will not be permitted to change his point of diversion, if such change will injuriously affect the rights of subsequent appropriators as they existed at the time such subsequent appropriations were made; *for a subsequent appropriator has a vested right to a continuance of conditions as they existed when he made his appropriation.*

*Crockett v. Jones*, 42 Idaho 652 (1926) (emphasis added).

#### 2. Discussion of Evidence Relevant to Injury

The Application proposes to add a point of diversion from Little Willow Creek (the “Creek”), upstream of water rights 65-2240 and 65-5773 (the “Roland Rights”). (See Exs. 112, 113 (partial decrees).) District representatives have suggested the Roland Rights are not entitled to protection because they are located outside of the District. (See Ex. 120, p. 2 (Board minutes).) However, they are conflating two bodies of law. The District may not owe duties as

an irrigation district to the Roland Rights under Title 43 of the Idaho Code, but the Roland Rights are still entitled to the injury analysis required by Section 42-222(1).

Because the Application proposes to add (not replace) a new point of diversion and there are no records of the District's historical diversions from the Creek, the District cannot prove it will not divert more water from the Creek than it has in the past. (*See* Ex. 117, p. 2 (Shaw report).) Mr. Roland testified regarding the historical challenges irrigating with the Roland Rights, (*see also* Ex. 125 (C. Roland letter of 4/22/92)), and regarding how the effect on the Roland Rights was evident when a pump was placed in the Creek upstream in 1992. (*See also* Exs. 122 (J. Simpson letter of 7/22/92), 123 (D. Tuthill letter of 8/5/92).) According to expert witness David Shaw, "[r]educing the water supply available to [the Roland Rights], in this water short basin, will result in injury...." (Ex. 117, p. 1 (Shaw report).)

There was testimony that the District's Wilson diversion diverts the entire flow of the Creek. Even if this is true all of the time,<sup>1</sup> injury will still occur to the Roland Rights if the new point of diversion diverts additional water from the Creek. This is because the Wilson canal discharges water back to Little Willow Creek above the Roland Rights. The new point of diversion will result in less water reaching the Wilson diversion. Regardless of if and when the Wilson diverts the entire flow of the Creek, ultimately, the new point of diversion will reduce water in the Creek available to the Roland Rights. This is injury.

The Department has denied transfer applications in similar circumstances. In *Telford Lands*, the Department denied a transfer application based on the applicant's failure to prove non-injury, even though the protestant "raise[d] concerns" regarding (but did not affirmatively prove) injury. *In the Matter of Application for Transfer No. 76286 in the Name of Telford Lands*,

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<sup>1</sup> There is evidence this is not necessarily always the case. (*See* Ex. 117, p. 1 ("Photo 4 is the control structure on the Wilson Ditch showing water continuing in the Wilson Ditch and water returning to Little Willow Creek")) (Shaw report).)

LLC, Amended Preliminary Order Denying Application, at pp. 16, 19 (July 20, 2011), *available at* <https://tinyurl.com/ya8plhjj> (last visited Feb. 24, 2018).

## **B. Enlargement**

### **1. Law of Enlargement Generally**

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).

Again, the Applicant bears the burden. *Barron*, 135 Idaho at 420. 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) (“*Rangen*”). “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.*

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).

## **2. Discussion of Evidence Relevant to Enlargement**

Without historical diversion data from the Creek, the District cannot prove it will not increase historical diversions from the Creek. While the District may not intend to irrigate additional acres, this is not the only form of enlargement. Again, “increasing the amount of water ***diverted or consumed***” is also enlargement. *Barron*, 135 Idaho at 420 (emphasis added). The intent of the application is to capture “up to 200 inches” of “excess water” that bypasses the Nelson diversion and instead “goes to the Wilson or into the river.” (Exs. 119, 120 (Board minutes).) According to expert witness David Shaw:

Basing the diversion rate for the new point of diversion on the average water supply available indicates the intent to divert all water available at the new point of diversion during periods of average or lower flows in [the] Creek. Without records of historical diversions by the Applicant it will not be possible to determine if other diversions will be reduced to compensate for the additional diversion of water at the proposed new point of diversion.

(Ex. 117, p. 2 (Shaw report).)

## **C. Waste Water Reuse**

There was testimony suggesting the District diverts the entire flow of the Creek at multiple locations upstream of the Roland Rights. Presumably, the District believes the Creek downstream of these diversions consists entirely of irrigation return flow and, therefore, that this limits Protestant’s rights. A careful reading of prior judicial opinions demonstrates this is not the case.

## 1. The Roland Rights Are Decreed Water Rights

Even if the Roland Rights have historically diverted water already used for irrigation as a *factual* matter, this does not weaken the Roland Rights as a *legal* matter. “The moment the [canal] company permits water to go into that natural channel for the purpose of merely letting it run into Snake river, such water becomes public property, subject to appropriation.” *Twin Falls Canal Co. v. Damman*, 277 F. 331, 332 (D. Idaho 1920).

The Roland Rights are partial decrees for diversions of water from the Creek, with priority dates in 1920 and 1948. (Exs. 112, 113 (partial decrees).) They are diverted outside of the District and downstream of all of its points of diversion. The composition of the Creek at the Roland Rights is irrelevant, because they are diversions of water that is “public property, subject to appropriation” at the Roland points of diversion.

*U.S. v. Haga*, 276 F. 41 (D. Idaho 1921), does not change this conclusion. *Haga* was a priority dispute over water diverted by the defendant from Eight Mile Creek, a tributary to the Boise River fed by irrigation seepage derived from plaintiff’s upstream Boise River diversions. *Id.* at 41-42. *Haga* specifically relied upon the fact that the waters in Eight Mile Creek were no longer “flowing in their natural channels” (*i.e.*, the Boise River) to hold they were not subject to appropriation by defendant under Idaho statute. *Id.* at 44. In addition, the plaintiff had Boise River diversions and patrons to serve downstream of defendant’s Eight Mile Creek diversions. *Id.* at 42, 44.

Neither of these important aspects of *Haga* characterizes this case. Water diverted from the Creek under the Roland Rights is still diverted from its “natural channel,” and the District has no patrons to serve downstream of the Roland Rights. Given that *Haga* is not even a transfer case to begin with, it does not inform the Department’s evaluation of the Application.

## 2. The Right to Recapture Waste Water Does Not Vitate Injury and Enlargement

The Protestant does not dispute the general right of the District to recapture and re-use waste water through its existing points of diversion. *See, e.g., Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.* 101 Idaho 677, 680 (1980). Instead, he challenges the addition of a new point of diversion intended to divert more water than the District has historically diverted. The question here is, Does the general right to recapture waste water vitiate the statutory criteria in Section 42-222? According to Idaho courts, the answer is, “no.”

In *Colthrop v. Mountain Home Irr. Dist.*, the plaintiff alleged it relied on defendant’s waste water, and was therefore damaged when defendant ceased irrigating its ranch. 66 Idaho 173, 175 (1945). The plaintiff sued for monetary damages and for an injunction requiring the defendant to resume irrigating its ranch. *Id.* at 175-77. Critically, in addition to utilizing the defendant’s waste water, the plaintiff had its own decreed water rights. *Id.* at 175. The Idaho Supreme Court stated:

The injury which [plaintiff] urges against the right of [defendants] to change the point of diversion and place of use of the [defendant’s] water is not the kind of an injury that will prevent the making of the change. ***To prevent a change in the point of diversion and place of use of water, the injury, if any, must be to a water right.*** In the case at bar, it must be kept in mind, [plaintiff] does not plead that a change in the point of diversion and place of use of the [defendant’s] water would in any way injure the water or the right to use the water, *decreed* to the [plaintiff’s] ranch. ***Undoubtedly, if a change of the point of diversion and place of use of the [plaintiff’s] water actually injured [plaintiff’s] use or right to use the water decreed to the [defendant’s] ranch, the change could not be made.***

*Colthrop*, 66 Idaho at 180-81 (emphasis added); *see also A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746 (2005) (affirming subordination of enlargement diversions of waste water to junior rights).

The Roland Rights are “decreed” water rights. (Exs. 112, 113 (partial decrees).) Under *Colthrop*, they are therefore entitled to protection from injury in a transfer proceeding.

The Idaho Supreme Court's subsequent decision in *Application of Boyer*, 73 Idaho 152 (1952), does not change this outcome. In *Boyer*, a water right owner sought to move its water rights "approximately 18 or 20 miles down river." *Id.* at 155. The Big Lost River Irrigation District opposed the transfer, "portraying the repetitious horrendous effect upon the water table, urging that if this application be granted, others will follow suit...." *Id.* at 160-61. According to the District, "there would be no injury to any particular individual, but there would be general injury and damage because...there would be a tendency to lower the water table...." *Id.* at 161-62.

The protestant's "general" concerns in *Boyer* are not the type of injury analysis contemplated by Section 42-222(1), and *Boyer* therefore does not stand for a broader proposition limiting the Department's analysis of the Application. "Where, as here, a transfer results in the diminishment of return flow to a water source due to the consumptive use of that return flow by downstream water users, an affected junior appropriator *may appropriately complain of injury*, not enlargement."<sup>2</sup> *Rangen*, at 9.

There is another critical distinction between *Boyer* and the Application: Even if *Boyer* extends to transfers adding a point of diversion, *Boyer* only addresses injury, not enlargement. Indeed, the enlargement criterion was added to Section 42-222(1) in 1969, after *Boyer* was decided. See S.L. 1969, ch. 303, § 2, p. 905.

Other cases recognizing the general right to recapture waste water do not involve transfers and are therefore not relevant. See, e.g., *Hidden Springs Trout Ranch, Inc. v. Hagerman*

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<sup>2</sup> The "not enlargement" language does not affect the evaluation of enlargement here. A critical distinction between *Rangen* and this case is that, in *Rangen*, it was "undisputed that the transfer will not result in an increase in the rate of diversion or duration of diversion of the original right." *Id.* at 7. The narrow "enlargement" question in *Rangen* was whether consumptive use of return flows by other water right owners after the transfer constituted enlargement. *Id.* at 9. The *Rangen* court held that because Section 42-222(1) prohibits enlargement of "the original right," it does not prohibit additional consumptive use of return flows by water users with separate water rights. *Id.* at 9-10. Here, consumptive use will increase under the District's "original" rights, because District patrons do not own separate water rights.

*Water Users, Inc.*, 101 Idaho 677 (1980) (piping of ditch); *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217 (1950) (priority dispute over water diverted from drainage ditch); *Sebern v. Moore*, 44 Idaho 410 (1927) (priority dispute); *U.S. v. Haga*, 276 F. 41 (D. Idaho 1921) (priority dispute).

#### **D. Fiduciary Duties**

The fiduciary duty issue raised by the District is irrelevant to the criteria in Section 42-222(1). Roland will address this issue if and when it is raised in the appropriate forum.

### **III. CONCLUSION**

The Application proposes to add a new point of diversion for the express purpose of diverting more water than the District has historically diverted, in order to prevent that water from remaining in the Creek or reaching the Wilson diversion. This will result in enlargement of the District's water rights and injury to the Roland Rights. The District's general right to recapture waste water does not limit the injury and enlargement criteria in a transfer. Therefore, the Protestant respectfully requests the Department deny the Application.

DATED THIS 1<sup>st</sup> day of March, 2018.

Varin Wardwell LLC



Dylan B. Lawrence  
Attorneys for Thomas G. Roland, et al

DATED THIS 1<sup>st</sup> day of March, 2018.

Masingill Law, P.A.



Eben T. Masingill  
Attorneys for Thomas G. Roland, et al

## CERTIFICATE OF SERVICE

I hereby certify that on this 1<sup>st</sup> day of March, 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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