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Albert P. Barker, ISB #2867
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034
apb@idahowaters.com
Attorneys for Little Willow Irrigation District

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DEPARTMENT OF
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF:)
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APPLICATION FOR TRANSFER NO.) **LITTLE WILLOW IRRIGATION**
81482 IN THE NAME OF LITTLE) **DISTRICT'S POST HEARING BRIEF**
WILLOW IRRIGATION DISTRICT)
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)

COMES NOW Applicant, Little Willow Irrigation District ("Little Willow" or "District"), by and through its counsel of record, Barker Rosholt & Simpson LLP, as agreed to at the close of the hearing, and hereby files its post-hearing brief in support of its application for transfer to add a point of diversion for its existing water rights.

FACTUAL BACKGROUND

Little Willow Irrigation District provides water to just under 3,000 acres located along the Little Willow drainage through a combination of natural flow and storage rights. It holds approximately 14 cfs of natural flow in a series of decreed rights with priority dates ranging from 1897 to 1916.¹ This is not nearly enough water for Little Willow's water users. Little Willow also has two decreed storage rights. Its primary storage right is for the Paddock Reservoir with a 1913

¹ Water rights 65-64, 65-2067, 65-3130, 65-3132, 65-3133 and 65-3134.

priority date.² Little Willow's rights contain a combined use remark limiting delivery to one-inch per acre. The land in the District is all devoted to agricultural use and dependent on Little Willow deliveries. The natural flow rights typically run dry very early in the season so the water users must rely on Paddock Reservoir deliveries for most of the irrigation season. Paddock Reservoir rarely fills, so conservation of water for carryover to the next season is critical for Little Willow's water users.

Little Willow has several points of diversion along the channel of the Creek to divert its irrigation water into canals that deliver water to the individual properties. Water is measured by the ditch rider into the McIntyre, Bolton, Patton, Nelson and Wilson canals. Measurement is by flow meter in concrete structures at the diversion. The ditch rider was trained by the WD65 Watermaster, whose measurements confirmed Little Willow's measurements. Allotments are set for the water users each year based on the availability of storage water. Recent allotments range from 1.5 to 3.0 AFA. Ex. 13. The District has required installation of headgates at each delivery point so that water can be measured to each user. The existing delivery records show that the only water users in the system who have significantly exceeded their allotments have been the Rolands. Ex. 13 (*See* Cyril and Tom Roland – 2011, 2012, 2013, 2016 entries).

There is a ditch loss of 20-30% in the delivery system. The ditches extend from 12 to 17 miles in length along either side of the Creek. Return flow from the irrigated fields is recaptured either in the lower ditches or in downstream diversions. Near the end of the District all the water in the Creek is diverted at the Wilson diversion into the Wilson canals on either side of the Creek. The structure is a large concrete structure 6' wide and 5' tall that allows no Creek water to bypass the diversion. Ex. 19.

² Water right 65-2149; there is also a 1,600 AF storage right on Indian Creek, 65-2973.

Little Willow has proposed in this transfer to add a point of diversion between the Patton/Nelson diversions and the Wilson diversion. Ex. 1. This new diversion would consist of pumps to divert water to the Horst property (a Little Willow water user), which is located at the new proposed point of diversion. The pumps would allow the Horsts to pressurize and sprinkle their entire property, thus saving water, and would also allow water to be pumped to the Patton and Nelson ditches to deliver water to the users at the lower end of those ditches. Doing so will enable the ditch rider to more effectively manage deliveries, save water loss in the miles between the Patton/Nelson diversions and the new POD, avoid or reduce ditch overflow and washouts in those ditches and enable the ditch rider to divert less water at the Patton/Nelson diversions for later diversion downstream at the new POD. Keeping water in the Creek longer also reduces return flows and sedimentation of the Creek.

Tom Roland owns property irrigated from the Wilson ditches at the lower end of the District, is a Little Willow water user and is a current board member. Irene Roland, Tom's mother who is now deceased, owned property outside the District and immediately below. Three pumps in the Creek irrigate two parcels, one with a 1920 priority water right and the other with a 1948 priority water right.³ There are no measuring devices on the Roland's pumps. Neither parcel has the right to any storage water and neither right was decreed with the right to any waste water. Irene Roland's rights are junior to Little Willow's rights. Downstream of Irene Roland's property is a diversion structure into the Lower Payette Ditch which backs up water in the Creek to the Roland's property during the irrigation season.

THE APPLICATION

Little Willow seeks to add a point of diversion to its existing water rights, natural flow and storage. Little Willow does not seek to increase the rates of diversion. Nor does it seek to add any

³ Water right nos. 65-2240 and 65-5773.

acres. The application is not for a new water right.⁴ Rather, it follows the procedure for filing a transfer application.

THE PROTEST

Tom Roland protested the Application. Ex. 2. His protest claimed that the transfer would injure his water rights for his Little Willow property and would injure the water rights for the Irene Roland property. He has abandoned the first charge. All that is at issue is his second charge. He also complained about the adequacy of the notice, but that complaint has also been abandoned.

THE STANDARD

Idaho Code § 42-108 and § 42-222(1) allow a water user to file a transfer application to change the point of diversion of their water right. The Director is required to examine the application and he “shall approve the change in whole or in part, or upon conditions” if certain provisos are met. Other water rights are not to be “injured.” *In re Johnson*, 50 Idaho 573, 578 (1931). The change cannot be an enlargement in use of the original right except that a storage user can irrigate more acres as long as there is no injury to other rights. The change must be consistent with conservation of water resources of the State. The change must be consistent with the local public interest. The change cannot adversely affect the local economy or the agricultural base of the local area.

ARGUMENT

1. THE TRANSFER DOES NOT INVOLVE AN ENLARGEMENT

An “enlargement” is typically considered to be an increase in the number of acres irrigated, even where there may not be an increase in the diversion rate. *See* Idaho Code § 42-1426(1)(a). This application does not seek to enlarge the diversion rate or the number of acres. In fact, it is

⁴ Therefore, this application is completely different from the 1992 application by the Dahnkes that was withdrawn, and the Department suggested at that time filing a transfer application instead. *See* Ex. 123.

likely that the total amount of water diverted under the Little Willow rights will decrease as a result of increased sprinkler irrigation, reduced conveyance loss and greater reservoir carryover.

Protestant suggested at the hearing that there might be some increase in consumption if the new point of diversion allowed the District to get more water to the downstream ends of the Patton and Nelson ditches. This speculation of increased consumption is not enough to demonstrate enlargement. There is no evidence that the rights on the fields at the end of these ditches were abandoned or forfeited. Nor was there any testimony to suggest that the water saved through the admitted efficiency improvements would be outweighed by any greater consumption.

Protestant's speculation of possible enlargement is foreclosed by the Supreme Court's opinion in *In re: Permit No. 65-12842*, 122 Idaho 59 (1992). There, property owners sought to transfer water rights appurtenant to several different fields along Porter Creek, a tributary to the Payette River. The Director found that the water right to one field had been forfeited. Nevertheless, the Director approved, and the Supreme Court upheld, the transfer of the full water right to all three fields (in the amount of 1.6 cfs) because the right of 1.6 cfs had been diverted for two other fields. 122 Idaho at 61 and 63. In other words, as long as the applicant was not increasing his decreed diversion rate, there is no enlargement and no impediment to the transfer, even if he had not used his water on a particular field for the statutory five year period. *Id.*

Here, there is no evidence of any increase in acres irrigated; no evidence of forfeiture of any portion of the water right; no evidence that the fields were not irrigated; no evidence of any increase in use above the decreed water right amount of one-inch per acre; and no evidence of increase in total water use. There is no enlargement.

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2. THE TRANSFER IS CONSISTENT WITH CONSERVATION OF WATER RESOURCES AND WILL ENHANCE THE LOCAL AGRICULTURAL ECONOMY AND IS IN THE LOCAL PUBLIC INTEREST

This transfer is supported by the water users in the District as evidenced by the turn out to testify in support of the application. The ditch rider explained how this new point of diversion will make his water deliveries more efficient, result in less ditch loss and provide a more equitable distribution of water among the Little Willow water users. This testimony is undisputed. Mr. Roland conceded that greater efficiency in delivery is better for the Little Willow water users.

Mr. Horst explained how the new point of diversion will enable his family to put in more sprinklers, consolidate their points of delivery and ultimately conserve water for both his family property and for all water users on the system. This testimony is not disputed.

Ms. Craig, Mr. Towner, Ms. Stephens and Mr. Dahnke all testified in support of the increased efficiencies on the system and explained how the new point of diversion would enable the District to conserve water, increase storage carryover for dry years and provide greater security of water delivery that was so critical to maintaining the agricultural use of the nearly 3,000 acres of agricultural use in the District. They also explained how the new diversion will reduce sedimentation to the benefit of local water quality. This testimony was unrebutted. The transfer is consistent with and promotes the conservation of water resources of the state, supports the local agricultural economy and is in the local public interest.

3. IRENE ROLAND'S WATER RIGHTS ARE NOT INJURED BY THIS TRANSFER

The term "injury," as used in the transfer statute, requires "injury" to another water right and has no application to other types of claimed injuries. *In re Johnson*, 50 Idaho at 580; *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 181 (1945); *Hard v. Boise City Irr. and Land Co.*, 9 Idaho 589, 598 (1904). The alleged injury has to be a "real and actual injury," not a

“fanciful injury.” *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7 (1944). The crux of the Protest rests on the claim that the Irene Roland pumps might get less water.

There are many problems with Roland’s claim. Not the least of the problems is that he does not know how much water has been used on the Irene Roland property. There are no meters or measuring devices for these pumps. Mr. Roland and Mr. Shaw do not know how much water has been used on Irene Roland’s property, do not know how the new point of diversion will affect the pumps and do not know if there will be any actual injury.

Fear of injury is not a legally cognizable injury. *DeMoss v. City of Coeur d’Alene*, 118 Idaho 176 (1990). Here, Roland speculates that the new point of diversion might result in Little Willow increasing its diversions over what it has the right to divert. It will not. Little Willow is bound by its water rights, including the inch per acre at the headgate requirement.

Roland then speculates that less water will get to the Wilson diversion. The Wilson diversion already diverts all the water in the Creek to the District landowners. It does not allow any water to flow to the Irene Roland pumps. Even if there is less at the Wilson there is not necessarily more at the pumps. The Irene Roland pumps will continue to receive the runoff from the fields supplied by the Wilson ditches as well as the runoff from the fields at the lower end of the Patton and Nelson ditches. The transfer would allow the District to get more water to the end of those two ditches from the new point of diversion, thus increasing natural flows in that area. As the junior user, Irene Roland is not entitled to any natural flow from the Creek since Little Willow’s demand far exceeds the natural supply for most of the irrigation season, and is entitled to no storage water.

At the hearing, Mr. Shaw agreed on behalf of the Rolands that Little Willow cannot be compelled to waste water and that it has the right to recapture its waste water. Mr. Roland agreed

that the District has the right to improve its delivery efficiency. All of these concessions are merely concessions to what the law requires. Surface waste and seepage water is “subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to beneficial use.” *Sebern v. Moore*, 44 Idaho 410, 418 (1927); *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 222 (1950); *Linford v. GH Hall & Sons*, 78 Idaho 49, 53 (1956); *Hidden Springs Trout Ranch Inc. v. Hagerman Water Users*, 101 Idaho 677, 680 (1980). Here, the new point of diversion is within the boundaries of the irrigation district. Little Willow is not reaching beyond its boundaries to capture its water. *See Janicek Properties*, Subcase 63-27475, Memorandum Decision (May 2, 2008) (holding that Nampa & Meridian Irrigation District had the right to cease wasting water and recapture its waste water before the water got to Janicek’s property, located on the Purdim Slough in the boundaries of the District).

Idaho Code § 42-105 recognizes that a water user is entitled to divert its water into a natural waterway, comingle its water and then take it out later. The only limitation is that in doing so “the amount of water to which prior appropriators may be entitled shall not be diminished...” (emphasis added). Irene Roland is not a prior appropriator, and therefore any action that the District may take with respect to reclaiming its storage water is not subject to her claim of possible diminishment.

Clearly, Little Willow would be entitled to pipe or tile its ditches and do any other act that would reduce seepage and other return flows in a way that would maximize its reservoir carryover. Those actions might reduce the return flow to the Creek and might affect water available at Irene Roland’s pumps. Yet, there could be no complaint. Instead, Roland complains of the transfer.

This complaint is disposed of by the Supreme Court's decision in *In re Boyer*, 73 Idaho 152 (1952). There, Boyer applied to change the point of diversion of his private water rights. Big Lost Irrigation District protested claiming injury. The state engineer approved the transfer. The district court and the Supreme Court upheld the transfer. The trial court held that the right had not been abandoned or forfeited. The main contention in the case revolved around injury from the change in point of diversion. Relevant to this proceeding, the Court held:

It is axiomatic that no appropriator can compel any other appropriator to continue the waste of water whereby the former may benefit. *Sebern v. Moore*, 44 Idaho 410 at page 418, 258 P. 176; *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173 at page 179, 157 P.2d 1005; *Johnson v. Twin Falls Canal Co.*, 66 Idaho 660 at page 669, 167 P.2d 834. If respondent, by a different method of irrigation in Section 30 could so utilize his water that it would all be consumed in transpiration and consumptive use, Water Supply and Utilization, page 340, Baker & Conklin, John Wiley & Sons, 1930, and thus no waste water return by seepage or percolation to the river, no other appropriator—from the evidence herein—could complain. *Reynolds Irrigation Dist. v. Sproat*, 70 Idaho 217 at page 222, 214 P.2d 880. Instead of thus changing the method of use, respondent accomplishes the same result by changing the point of diversion, loss in transmission having been taken care of by stipulation. The rule that a junior appropriator has the right to a continuation of stream conditions as they were at the time he made his appropriation, could not compel respondent to continue to waste his water by use on Section 30. *Reynolds Irr. Dist. v. Sproat*, 69 Idaho 315 at page 334(7), 206 P.2d 774.

73 Idaho at 163-63 (emphasis added).

The same is true here. Little Willow is entitled to enhance the efficiency of its system by transferring a point of diversion. To the extent that waste water is reduced, a junior, like Roland, cannot interfere with those efficiency enhancements by preventing this transfer and insisting on higher rates of waste.

CONDITIONS OF APPROVAL

Little Willow agrees to measure the new point of diversion with measuring devices on the pumps. It agrees to record its existing measurements at the other point of diversions. It agrees to

continue to measure water at the headgates to ensure that allotments are not exceeded and that the water right conditions are complied with. Little Willow agrees not to use the new point of diversion to expand acreage irrigated in the District as a whole.

These conditions offer ample protection to junior users. The transfer should be approved.

DATED this 1st day of March, 2018.

BARKER RSHOLT & SIMPSON LLP



Albert P. Barker
Attorneys for Little Willow Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of March, 2018, I caused to be served a true and correct copy of the foregoing **LITTLE WILLOW IRRIGATION DISTRICT'S POST HEARING BRIEF** by the method indicated below, and addressed to each of the following:

Idaho Department of Water Resources
Hearing Officer, Jeff Peppersack
322 E. Front Street
Boise, ID 83702

____ U.S. Mail, Postage Prepaid
☒ Hand Delivered
____ Facsimile
____ Electronic Mail

Eben T. Masingill
Masingill Law, P.A.
P.O. Box 467
25 West Commercial St.
Weiser, ID 83672

☒ U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Facsimile
____ Electronic Mail

Dylan B. Lawrence
Varin Wardwell LLC
242 N. 8th Street, Suite 220
P.O. Box 1676
Boise, ID 83701-1676

☒ U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Facsimile
____ Electronic Mail



Albert P. Barker