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DEPARTMENT OF  
WATER RESOURCES

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Attorneys for Protestants Thomas G. Roland, et al

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

|                               |   |                                         |
|-------------------------------|---|-----------------------------------------|
| IN THE MATTER OF TRANSFER NO. | ) | <b>PETITION FOR<br/>RECONSIDERATION</b> |
| 81482                         | ) |                                         |
|                               | ) |                                         |
| IN THE NAME OF LITTLE WILLOW  | ) |                                         |
| IRRIGATION DISTRICT           | ) |                                         |

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Protestants Thomas G. Roland, et al, through undersigned counsel of record, hereby  
file this petition for reconsideration pursuant to Idaho Code Section 67-5243 and the  
Department's Rule of Procedure 730, as follows:

## INTRODUCTION

Within fourteen days after the issuance of a preliminary order, any party may file a petition for reconsideration. IDWR Rule of Procedure 730.02(a); Idaho Code § 67-5243(3). Protestant Roland files this petition, respectfully requesting the Department reconsider three aspects of its Preliminary Order. First, Roland believes Condition 3 should be revised to account for the District's junior storage right and to clarify that the measurement obligation does not cease once storage releases begin. Second, Roland believes the Department should more fully explain the conclusion that the injury criterion does not apply to the storage rights. Third, Roland believes the Department must deny the transfer application as to the District's junior storage right.

## ARGUMENT

### 1. Condition 3 Regarding Measurement Should Be Revised

The Preliminary Order's Condition 3 imposes certain measuring and recording requirements on the District. (Preliminary Order of 5/7/18, p. 8.) Because the Department has denied the District's transfer application as to its natural flow rights, but has approved the application as to the District's storage rights, it is necessary to differentiate between natural flows and storage water. (*See generally* Preliminary Order of 5/7/18, p. 7.) Roland agrees with this general concept,<sup>1</sup> but believes that Condition 3 needs to be revised in order to effectuate this concept.

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<sup>1</sup> Roland also agrees with the Department's conclusion that "LWID's natural flow water rights total 14.81 cfs." (*See* Preliminary Order of 5/7/18, p. 2.)

In this regard, it is important to recall that of the District's two "storage" water rights, one of them is junior to both of the Roland water rights. While the priority dates of the two Roland Little Willow Creek water rights are January 14, 1920 (65-2240) and April 1, 1948 (65-5773), (Hearing Exs. 112, 113), the priority date of the District's water right 65-2973 is March 2, 1967—junior to both Roland rights. (Hearing Ex. 6.1.) The sources on 65-2973 are Indian Creek (tributary to Little Willow Creek) and an "unnamed stream" (tributary to Indian Creek). (*Id.*)

In addition, the use of the phrase "prior to the release of storage water" suggests that measurements are not required at all once storage releases commence. Roland believes such measurements are necessary throughout the irrigation season, particularly given that there will presumably be instances in which Little Willow Creek includes both natural flow and storage releases.

Because of these factors, revisions to Condition 3 are necessary. Roland believes Condition 3 should read as follows:

The right holder shall measure and record the flow of water in Little Willow Creek at a location just upstream of the right holder's uppermost point of ~~re~~diversion (the McIntyre, diverting in the NE1/4NW1/4 of Section 13, Township 9 North, Range 3 West, B.M.) under ~~this~~its natural flow rights to determine the availability of natural flow for water rights with priority dates of April 1, 1948 and earlier. The amount of natural flow will be determined as the measured discharge in Little Willow Creek as described above, plus the discharge of the diversion ditch from Indian Creek and the unnamed stream into Paddock Reservoir, minus the discharge from Paddock Reservoir. Additionally, the right holder shall measure and record the quantity of water diverted under each of its natural flow water rights to determine its use of natural flow~~prior to the release of storage water under this~~

~~right~~. The right holder shall retain measurement records and make them available to the Department upon request.

**2. The Department Does Not Adequately Explain Why the Injury Criterion in Section 42-222(1) Does Not Apply to the Storage Rights**

The Preliminary Order states:

Once LWID begins releasing its storage water from Paddock Reservoir and utilizing the Little Willow Creek channel as part of its collection and distribution system, it can use and re-use all the water in the creek channel at the proposed point of diversion without injury to other water rights because all the water available from Little Willow Creek, at that point, is either the result of its storage water releases or return flow from natural flow or storage water controlled by LWID. *See Hidden Springs Trout Ranch, Inc.*, 101 Idaho at 681, 619 P.2d at 1134; *see* Idaho Code § 42-105(1). LWID is allowed to use and reuse its appropriated water by improving its system.

(Preliminary Order of 5/7/18, p. 7.)

Paraphrasing, the above passage essentially states that when storage releases or return flow are involved, the injury criterion in Section 42-222(1) does not apply. However, the two sources cited by the Preliminary Order do not stand for that proposition. Section 42-105(1) indeed authorizes the District to utilize Little Willow Creek as part of its collection and distribution system. Roland does not dispute this. However, Section 42-105(1) does not suggest that there are some circumstances under which the injury criterion in Section 42-222(1) does not apply. Similarly, as Roland noted in its Post-Hearing Brief, while the *Hidden Springs* case does “recognize the general right to recapture waste water,” it does not say anything about the injury criterion in transfer proceedings.

(Protestant’s Post-Hearing Brief of 3/1/18, pp. 8-9.)

The Department may indeed be correct on this issue, but the cited authorities do not stand for the proposition. In order to allow the parties to evaluate the issue, Roland respectfully requests the Department issue an order with additional analysis explaining the basis for this conclusion

**3. Under the Rules Cited by the Department, the Transfer Should Be Denied as to the Junior Storage Right 65-2973**

Even if the Department's conclusion above is correct, under its own stated rule, the transfer application should be denied as to water right 65-2973. According to the Department, "a '*senior appropriator*' retains his right to all of the water, including that which is lost through reasonable seepage, and thus may reclaim it, for instance, by improving his transmission system.'" (Preliminary Order of 5/7/18, p. 7 (emphasis added) (*citing Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681, 619 P.2d 1130, 1134 (1980).)

Again, the District's more junior storage right, 65-2973, has a priority date of March 2, 1967. (Hearing Ex. 6.1) The Roland Little Willow Creek rights are senior because they have priority dates of January 4, 1920 (65-2240) and April 1, 1948 (65-5773). (Hearing Exs. 112, 113.) Therefore, as to water right 65-2973, the District is not the "senior appropriator" under the language of the Preliminary Order and *Hidden Springs*, and the transfer application should therefore be denied as to that right.

**CONCLUSION**

Based on the foregoing, Roland respectfully requests that the Department issue an order that (1) includes Roland's suggested revisions to Condition 3; (2) more fully explains

the conclusion that the injury criterion does not apply to the storage rights; and (3) denies the transfer application as to water right 65-2973.

DATED THIS 21<sup>st</sup> day of May, 2018.

Varin Wardwell LLC

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

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

DATED THIS 21<sup>st</sup> day of May, 2018.

Masingill Law, P.A.

A handwritten signature in blue ink, appearing to read "Eben T. Masingill for", written over a horizontal line.

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of May, 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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