

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

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

**AMENDED PRELIMINARY ORDER
APPROVING, IN PART,
APPLICATION FOR TRANSFER
NO. 81482**

PROCEDURAL HISTORY

On February 21, 2017, Little Willow Irrigation District (“LWID”) filed Application for Transfer No. 81482 (“Application”) with the Idaho Department of Water Resources (“Department”). The Department published notice of the Application in the Independent Enterprise and the Weiser Signal American on April 19 and April 26, 2017. Thomas G. Roland, Irene J. Roland, and Clark C. Roland (“Protestants”) protested the Application.

The Department conducted an administrative hearing on February 15, 2018, in Boise, Idaho. Attorney Albert Barker represented LWID. Attorneys Dylan Lawrence and Eben T. Masingill represented Protestants.

LWID’s exhibits 12, 13, 14 and 19 (corrected from LWID’s exhibit 119) and Protestants’ exhibits 117, 118, 119, 120, 122, 123 and 125 were offered and admitted into the administrative record. The Hearing Officer officially noticed the Department’s water right files for the Application and for water right nos. 65-64, 65-2067, 65-2149, 65-2973, 65-3130, 65-3131, 65-3132, 65-3133, 65-3134, 65-2240, and 65-5773. LWID called James Tucheck, Larry Dahnke, Elizabeth Stephens, Bruce Horst, Richard Towner, and Sonja Craig as witnesses. Protestants called Thomas Roland and David Shaw, P.E. as witnesses.

On March 1, 2018, LWID and Protestants filed post-hearing briefs.

On May 7, 2018, the Hearing Officer issued a *Preliminary Order Approving, in Part, Application for Transfer No. 81482* (“Preliminary Order”).

On May 21, 2018, LWID filed its timely *Little Willow Irrigation District’s Petition for Reconsideration* (“LWID Petition”) and Protestants filed their timely *Petition for Reconsideration* (“Protestants’ Petition”). The arguments raised in the LWID Petition and Protestants’ Petition are addressed below.

ANALYSIS OF ISSUES RAISED

LWID Petition

The Preliminary Order denied the addition of a point of diversion for LWID's natural flow water rights due to injury and enlargement issues. *Preliminary Order* at 6. The Preliminary Order approved the addition of a point of redirection for LWID's storage water rights with conditions. Condition no. 2 states:

Water shall not be diverted from the additional point of redirection authorized under transfer no. 81482, located in NENW, Sec. 36, T09N, R04W, until demand by LWID shareholders, within the limits of its natural flow water rights, exceeds the natural flow supply in Little Willow Creek.

Id. at 8.

LWID requests that condition no. 2 be modified for two reasons. First, LWID requests that the condition "...be amended or clarified to provide that Little Willow may divert its natural flow rights at the new point of diversion prior to release of storage water, as long as the [Protestants] are not diverting from existing water right numbers 65-2240 and 65-5773 below the last diversion." *LWID Petition* at 2. LWID argues that Protestants cannot be injured if they are not diverting water at times when water is available. Although injury may be avoided in that circumstance, LWID has not addressed enlargement of its natural flow rights. Idaho Code § 42-222(1) states a transfer application can be approved if "...the change does not constitute an enlargement in use of the original right." As discussed in the Preliminary Order, LWID has not demonstrated that the proposed additional point of diversion will not enlarge its natural flow water rights. See *Preliminary Order* at 6.

Second, LWID requests that condition no. 2 should be modified to "...provide that water can be diverted from the additional point of diversion authorized by Transfer No. 81482, so long as the total natural flow diversion does not exceed 14.81 cfs." *LWID Petition* at 3. LWID argues that "[s]imply moving the point of diversion downstream does not harm [Protestants], as long as the total natural flow diverted does not exceed the 14.81 cfs [authorized under LWID's natural flow rights]." *Id.* at 2-3. Water users downstream will be injured if there is less water available to them as a result of the transfer, even if LWID's diversions do not exceed 14.81 cfs. LWID cannot demonstrate that its historic diversion of water will not be exceeded due to the transfer because LWID has not recorded its historic diversions. *Preliminary Order* at 3. LWID argues further that it has a point of diversion below the new point of diversion that "...would be able to take all the water in the creek, up to 14.81 cfs in any event, and [Protestants] are no better off." *LWID Petition* at 3. As discussed in the Preliminary Order, Protestants believe that water diverted into LWID's last diversion, to the Wilson Ditch, drives returns to Little Willow Creek to supply water to Protestants' pumps. *Preliminary Order* at 4. If that is the case, then Protestants would be better off if water is left in the Little Willow Creek channel to be diverted at LWID's last diversion.

Even if LWID could demonstrate that the additional point of diversion would not result in the diversion of more water under its natural flow water rights, LWID has not addressed the issue of enlargement in the use of water. As discussed in the Preliminary Order, the intent of the Application is to allow more equitable distribution of water, thus increasing the water supply to crops and increasing consumption of water. *Preliminary Order* at 6. The increased consumption of water due to the transfer would be enlargement. *Id.* Because LWID has not demonstrated the proposed additional point of diversion will not enlarge its natural flow water rights, the proposal must be denied as to the natural flow water rights. *Id.* The hearing officer will not modify condition no. 2 for the reasons argued by LWID.

Protestants' Petition

Protestants' Petition raises three arguments that are restated and addressed below:

1. Protestants Argue Condition No. 3 Regarding Measurement Should be Revised

Condition no. 3 states:

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 rediversion under this right to determine the availability of natural flow. 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.

Preliminary Order at 8.

Protestants argue that, "[b]ecause the Department has denied [LWID's] transfer application as to its natural flow rights, but has approved the application as to [LWID's] storage rights, it is necessary to differentiate between natural flows and storage water." *Protestants' Petition* at 2. Protestants point to LWID's storage right no. 65-2973 with a priority date that is junior to Protestants' rights. *Id.* at 3. Additionally, Protestants argue that "...such measurements [required in condition no. 3] 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." *Id.* Protestants seek to revise condition no. 3 to account for LWID's diversion to storage under right no. 65-2973 and to require flow measurements by LWID throughout the irrigation season. *Id.*

Condition no. 3 was not intended to differentiate between natural flow and storage water, but rather to determine when LWID's natural flow rights are no longer fully satisfied. However, upon reconsideration, and for reasons discussed below, the Hearing Officer concludes it is not necessary to know when LWID's natural flow rights are no longer fully satisfied to approve the Application for LWID's storage rights. The Hearing Officer will modify conditions for approval of the Application, including measurement requirements consistent with the discussion below.

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

Protestants' Petition paraphrases a part of the Preliminary Order by stating that "...when storage releases or return flow are involved, the injury criterion in Section 42-222(1) does not apply." *Protestants' Petition* at 4. That is not accurate. Idaho Code § 42-222(1) states: "The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in the use of the original right even though more acres may be irrigated, if no other water rights are injured thereby." The injury criterion does apply to the transfer of storage rights; the enlargement criterion does not, but only if the enlargement does not cause injury. *See Preliminary Order* at 7.

The Preliminary Order concluded that the proposed point of diversion will allow enlargement in use of water under LWID's storage rights, but injury will not occur because the water that will be rediverted at the proposed point of diversion "is either the result of storage water releases or return flow from natural flow or storage water controlled by LWID." *Id.* Upon reconsideration, it is not clear that natural flow will be unavailable at the proposed point of diversion at all times. Rather than attempting to justify LWID's historic practice regarding use of return flows to the Little Willow Creek channel, the Application approval should focus on the rediversion of storage water at the proposed point of diversion. Language will be added to the Analysis and Conclusions of Law Section to clarify the injury and enlargement analysis for LWID's storage rights.

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

Protestants argue that, because LWID's storage water right no. 65-2973 is junior in priority to Protestants' natural flow water right, the Application should be denied as to that right. *Protestants' Petition* at 5. Protestants point to the Preliminary Order's statement that 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* at 7, citing *Hagerman Water Users, Inc.*, 101 Idaho 677, 681, 619 P.2d 1130, 1134 (1980).

The Preliminary Order also cites Idaho Code § 42-105(1) which allows water diverted under a valid water right to be turned into a natural channel and reclaimed so long as prior appropriators are not injured. The Preliminary Order approved a new point of diversion in the Little Willow Creek channel for LWID to redivert storage water for use within its system. LWID's storage right no. 65-2973 is not senior to Protestants' rights in Little Willow Creek; however, right no. 65-2973 is a valid water right that authorizes diversion of water to storage when in priority that can be released into the Little Willow Creek channel and reclaimed pursuant to Idaho Code § 42-105(1). Since storage water released by LWID into the Little Willow Creek channel is already appropriated water in accordance with the prior appropriation doctrine, it is not available to satisfy Protestants' water right nos. 65-2240 and 65-5573. *See Washington Cty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943, 945 (1935) (once water is "diverted from the natural stream and stored" in a reservoir, it is "no longer 'public water' subject to diversion and appropriation" by others).

The transfer should not be denied as to LWID's storage right no. 65-2973 simply because it is junior to Protestants' water rights. Language will be added to the Analysis and Conclusions of Law Section consistent with this reasoning.

After considering the evidence in the record, the LWID Petition, and Protestants' Petition, the Hearing Officer issues the following Amended Preliminary Order Approving, in Part, Application for Transfer No. 81482:

FINDINGS OF FACT

1. LWID owns the following water rights for irrigation within its service area:

Water Right	Priority Date	Quantity	Use	Source
65-64	08/16/1897	4.00 cfs	irrigation	Little Willow Ck
65-2067	01/17/1908	4.94 cfs	irrigation	Little Willow Ck
65-2149	12/29/1913	50.00 cfs	irrigation	Little Willow Ck
65-2973	03/02/1967	36,400 afy	irrigation f/storage	Unnamed Stream Indian Ck
		110.00 cfs	diversion to storage	
		1,600 afy	irrigation f/storage	
65-3130	04/01/1878	0.22 cfs	irrigation	Little Willow Ck
65-3131	04/01/1892	1.05 cfs	irrigation	Little Willow Ck
65-3132	04/01/1878	0.70 cfs	irrigation	Little Willow Ck
65-3133	04/01/1892	1.40 cfs	irrigation	Little Willow Ck
65-3134	04/01/1916	2.50 cfs	irrigation	Little Willow Ck

Department water right files.

LWID's water rights are limited in combination to the irrigation of 2,826 acres in a single irrigation season. *Id.* The irrigation season is March 15 to November 15 for all LWID rights. *Id.*

2. LWID's natural flow water rights total 14.81 cfs. *Department water right files; Tucheck testimony.* LWID begins diverting natural flow from Little Willow Creek in the spring as needed and begins distributing storage water from Paddock Reservoir when water user demands exceed the natural flow supply in the creek. *Tucheck testimony.* Release of storage water typically begins in May or June. *Id.* LWID relies on storage water for 90 to 95% of its total water supply. *Dahnke testimony.* Paddock Reservoir only fills about one year in ten and shareholders are allocated a maximum of 3 afy per acre, but often receive much less, sometimes only 1 to 1.5 afy per acre. *Id.*

3. LWID serves shareholders along Little Willow Creek beginning about five miles downstream from Paddock Reservoir and running for about twelve miles along Little Willow Creek. *Department water right files.* LWID's service area ends about one mile upstream of the Little Willow Creek confluence with Big Willow Creek, which is about one mile upstream of the confluence with the Payette River. *Id.*

4. LWID diverts natural flow or rediverts storage water to its shareholders from the Little Willow Creek channel through a series of canal or ditch diversions. *Department water right files; Tucheck testimony*. The first diversion at the upstream end of the service area delivers water to the McIntyre ditch which runs along the south side of Little Willow Creek. *Tucheck testimony*. The second diversion, just downstream of the McIntyre ditch, delivers water to the Bolton ditch which runs along the north side of Little Willow Creek. *Id.* The next diversion, a few miles downstream, is the Patton-Nelson diversion which delivers water to the Patton ditch along the north side of the creek and the Nelson ditch along the south side of the creek. *Id.* The last diversion, located toward the end of the system, delivers water to the Wilson ditch. *Id.* LWID also diverts water from Little Willow Creek by pumping directly from the creek in a couple of locations within the LWID service area. *Id.* All of the LWID ditches either discharge into other ditches in the system or return water back into the Little Willow Creek channel. *Id.*

5. LWID currently measures but does not record flow diverted from Little Willow Creek into ditches in the LWID system.¹ *Id.* Once storage releases commence for the irrigation season, LWID measures and records flow diverted from ditches to shareholders' head gates and prepares an annual report of those diversions. *Id.*; *Exhibit 13*. The LWID ditch rider uses weirs installed in the ditches or a portable flowmeter to measure the flow diverted into ditches from Little Willow Creek or into shareholder head gates. *Tucheck testimony*. LWID requires measuring devices at all shareholder head gates, but not all shareholders have installed the required measuring devices. *Tucheck and Dahnke testimony*.

6. Once release of storage water commences for the season, LWID uses the Little Willow Creek channel as part of its system, which includes collection of runoff and returns to the channel and redistribution of water to shareholders. *Tucheck testimony*. For the remainder of the irrigation season, LWID diverts all the water in the Little Willow Creek channel through its diversions. *Id.* During those times, LWID diverts as much as it can or is needed into the McIntyre and Bolton ditches and then diverts 100% of the remaining flow through the Patton-Nelson diversion to attempt to satisfy shareholder demands. *Id.* At times, ditch capacities and conditions limit the amount of water that can be diverted to meet all the demands for water from shareholders, especially from shareholders located towards the ends of the ditches. *Id.* Water that returns to the Little Willow Creek channel below the Patton-Nelson diversion is again diverted at the Wilson diversion to avoid losing water downstream beyond the LWID system. *Id.* There are a limited number of shareholders using water from the Wilson ditch, so water diverted from Little Willow Creek into the Wilson ditch is sometimes more than needed. *Id.* Excess water in the Wilson ditch and runoff from the LWID system below the Wilson diversion returns to the Little Willow Creek channel downstream of the Wilson diversion. *Id.*; *Dahnke testimony*.

7. LWID filed its Application to add a point of diversion on Little Willow Creek, between the Patton-Nelson and Wilson diversions, to LWID's natural flow and storage water rights. *Application file; Dahnke testimony*. LWID proposes to pump water at the proposed point of diversion, using one or more pumps, from Little Willow Creek and convey the water through pipelines to the Patton and Nelson ditches and to the Horst property (a shareholder in LWID). *Dahnke testimony*. The purpose of the Application is to recapture water returning to Little Willow

¹ LWID is within Water District 65, but there are no separate water district reports of LWID diversions from Little Willow Creek. *Tucheck testimony*.

Creek to allow for better distribution of water within the LWID system. *Id.* The Application proposes to divert no more than 4 cfs at the new point of diversion. *Application file.*

8. The additional point of diversion would benefit the LWID system as follows:
 - allow recapture of return flows to Little Willow Creek before they reach the Wilson diversion to avoid losing water from the LWID system;
 - enable more equitable distribution to shareholders who rely on their water supply from ditches up-gradient of the Wilson ditch;
 - conserve storage water;
 - extend the water supply in-season through saved storage water;
 - increase storage carryover;
 - increase crop production through better water supply;
 - reduce washouts and losses from ditches by reducing the need to divert high flows into the ditches in order to convey sufficient water to users at the ends of the ditches;
 - reduce runoff and sediment back to Little Willow Creek;
 - eliminate some head gates on ditches by delivery through a pipeline, therefore freeing up some ditch capacity for other users.

Tucheck, Dahnke, Stephens, Horst, Towner and Craig testimony.

9. Protestants own two water rights from Little Willow Creek for irrigation purposes. *Roland testimony.* Water right 65-2240, with a priority date of January 14, 1920, authorizes 1.80 cfs for irrigation of 89 acres. *Department water right files.* Water right 65-5773, with a priority date of April 1, 1948, authorizes 0.46 cfs for irrigation of 23 acres. *Id.* Protestants divert water under these two water rights from Little Willow Creek downstream of LWID's last diversion (Wilson ditch) and outside of the LWID service area. *Roland testimony; Department water right files.* Protestants are also shareholders in LWID for some lands within the LWID service area and receive water from the Nelson, Patton and Wilson ditches. *Tucheck and Roland testimony.*

10. Protestants' water rights 65-2240 and 65-5573 are junior in priority to the natural flow water rights of LWID. Protestants' water supply is typically short under those junior rights, especially in the early part of the irrigation season. *Roland testimony.* Protestants believe that the water that is diverted into the Wilson ditch by LWID is the primary driver for water that returns back to Little Willow Creek to supply Protestants' pumps in Little Willow Creek. *Roland and Shaw testimony.* Protestants allege that the additional point of diversion proposed in the Application will enlarge the use of water under the LWID water rights and reduce the amount of water available at the Protestants' points of diversion on Little Willow Creek. *Id.; Department Application file.*

EVALUATION CRITERIA

Idaho Code § 42-222(1) states in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not 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, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby.

Idaho Code § 42-105(1) states in pertinent part:

The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed, but in reclaiming the water so mingled, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage. The use of natural waterways to commingle and reclaim water shall be subject at all times to the supervision and control of the director of the department of water resources and shall be subject to the regulation of the watermaster within an established water district. The amounts of water turned into or diverted from all natural waterways are subject to the requirement of measurement and reporting.

ANALYSIS AND CONCLUSIONS OF LAW

Enlargement of the Original Right and Injury to Other Water Rights

The Application involves the proposed transfer of both LWID's natural flow and storage water rights, which will be discussed separately below.

Natural Flow Water Rights

LWID's natural flow water rights only provide a small portion of its total irrigation supply. *Dahnke testimony*. Nevertheless, the Application proposes to add a point of diversion from Little Willow Creek for LWID's natural flow water rights, so the potential for injury and enlargement must be evaluated. See Idaho Code § 42-222(1) (stating a transfer application can be approved "in whole, or in part, or upon conditions, provided no other water rights are injured thereby, [and] the change does not constitute an enlargement in use of the original right. . .").

"Under I.C. § 42-222(1), the director may consider historical consumptive use, as defined in Idaho Code § 42-202B, as a factor in determining whether a proposed transfer would result in an enlargement in use or injure other water rights." *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 419, 18 P.3d 219, 224 (2001) (footnote omitted). "Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use." *Id.* at 420, 18 P.3d at 225. LWID "bears the burden of providing the Department with sufficient information to show non-injury to other water rights" and "non-enlargement." *Id.* at 418-19, 18 P.3d at 223-24.

With respect to the question of injury, when natural flow is available to satisfy LWID's water demand during the early part of the irrigation season, LWID diverts only what is necessary to meet shareholder demands within the limits of its natural flow water rights. *Tuheck testimony*. The balance in Little Willow Creek, if any, passes downstream to other appropriators. The addition of a point of diversion for LWID natural flow water rights has the potential to increase diversions from Little Willow Creek (even if the increased diversion rate falls within the authorized diversion rates under LWID's natural flow water rights) and reduce downstream flow during times when natural flow would otherwise be available in the creek downstream of the LWID system. Such reduction in flow could injure water users such as the Protestants, who are typically short under their water rights 65-2240 and 65-5573, especially in the early part of the irrigation season. See *Crockett v. Jones*, 42 Idaho 652, 249 P. 483, 484 (1926) (holding "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...."). LWID does not record flow diverted from Little Willow Creek into ditches in the LWID system. *Tuheck Testimony*. Therefore, LWID cannot quantify its historical diversions of natural flow from Little Willow Creek. LWID has not met its burden to provide the Department with sufficient information to show non-injury to other water rights from the Application's proposal to add a point of diversion to LWID's natural flow water rights.

With respect to the question of enlargement, increased diversions at the proposed point of diversion from Little Willow Creek could increase consumption of water by LWID shareholders. Increased diversions at the new point of diversion may be offset by reduced diversions to upstream

ditches. However, the intent of the Application is to allow more equitable distribution of water to shareholders, especially those at the ends of the ditches that may not receive as much water due to conveyance losses. *Dahnke, testimony*. An improved water supply to crops could increase consumption of water by those crops. Such increased consumption beyond what has historically been used by shareholders due to the addition of the point of diversion is enlargement. *Barron*, 135 Idaho at 420, 18 P.3d at 225. LWID has not demonstrated that the proposed additional point of diversion will not enlarge its natural flow water rights. The Application should, therefore, be denied with respect to LWID's natural flow water rights.

Storage Water Rights

When LWID's demand for natural flow from Little Willow Creek exceeds the natural flow supply available from the creek, LWID begins releasing its storage water from Paddock Reservoir. *Tucheck testimony*. At that time, and for the remainder of the irrigation season, LWID diverts all water (remaining natural flow, all storage, and all return flows) from the creek into its distribution system. *Id.* During those times, LWID diverts as much as it can or is needed into the McIntyre and Bolton ditches and then diverts 100% of the remaining flow through the Patton-Nelson diversion to attempt to satisfy shareholder demands. *Id.*

The potential benefits of LWID's proposed point of diversion include a reduction in washouts and losses from ditches by reducing the need to divert high flows into ditches. *Tucheck, Dahnke, Stephens and Horst testimony*. Reduced diversions at LWID's upstream points of diversion or redirection could mean natural flow is available, at times, for diversion at the proposed point of diversion. However, as discussed above, LWID's diversion of natural flow at the proposed point of diversion must be denied. Accordingly, the proposed point of diversion must be limited to redirection of LWID's storage water rights.

As also discussed above, the addition of a point of diversion for LWID's system has the potential to increase the diversion and consumption of water by LWID shareholders. The potential benefits of the additional point of diversion include more equitable distribution of water to shareholders, allowing an improved water supply and extended season for shareholders. *Tucheck, Dahnke, Stephens, Horst, Towner and Craig testimony*. An improved water supply and extended season could improve crop production, increasing consumption of water.

For a transfer of storage water, increased consumption of water is not an enlargement in use of the original right if no other water rights are injured. *See* Idaho Code § 42-222(1) (stating "the transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby."). Therefore, LWID may increase consumption under its storage water rights via the transfer so long as no other water rights are injured. The storage water released by LWID into the Little Willow Creek channel is water that LWID already appropriated in accordance with the prior appropriation doctrine and is unavailable for appropriation by others. *See Washington Cty. Irr. Dist.*, 55 Idaho at ____, 43 P.2d at 945 (once water is "diverted from the natural stream and stored" in a reservoir, it is "no longer 'public water' subject to diversion and appropriation" by others). Idaho Code § 42-105(1) allows LWID to turn that storage water into Little Willow Creek and to reclaim that storage water so long as "the amount of water

to which prior appropriators may be entitled shall not be diminished.” To prevent injury in reclaiming its storage water, LWID’s diversion of water at its proposed point of diversion should be limited to the amount released from storage and flowing in the Little Willow Creek channel past its upstream points of diversion or rediversion.

Protestants argue that LWID has not met its burden to demonstrate that injury to other rights will not occur because LWID does not have historic records of flow measurements at its points of diversions from Little Willow Creek. *Shaw testimony; Protestants’ Post-Hearing Brief* at 2. So long as LWID only rediverts water at its proposed point of diversion that LWID has already appropriated pursuant to its storage water rights, then historic records are not necessary to demonstrate that injury will not occur. However, LWID must measure and record: 1) storage water released from Paddock Reservoir under its storage water rights, and 2) water available in Little Willow Creek just below each diversion point upstream of the proposed point of diversion. With those measurement and recording requirements in place to demonstrate that LWID is only rediverting storage water, the Application’s proposal to add a new point of diversion to LWID’s storage rights can be approved without injury to other water rights.²

Conservation of Water Resources

The Application is consistent with the conservation of water resources within the State of Idaho because it will reduce losses and allow for more efficient distribution and use of water within the LWID system.

Local Public Interest

Idaho Code § 42-202B(3) defines “local public interest” as “the interests that the people in the area directly affected by a proposed water use have in the effects of such water use on the public water resource.” The Application is in the local public interest because, in addition to the benefits to shareholders of LWID discussed above, the proposed point of diversion could reduce runoff and sediment back to Little Willow Creek. *Towner testimony*.

Other Criteria

Other criteria required for evaluation of transfers under Idaho Code § 42-222 do not apply in this case.

² Measurement may be necessary for regulation by the watermaster in Water District 65 for other purposes beyond the scope of this decision.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 81482 is **APPROVED** for water right nos. 65-2149 and 65-2973, subject to the conditions below, and **DENIED** for water right nos. 65-64, 65-2067, 65-3130, 65-3131, 65-3132, 65-3133, and 65-3134.

Transfer Approval Conditions for Water Right Nos. 65-2149 and 65-2973

1. Diversion of water from the additional point of rediversion authorized under transfer no. 81482, located in NENW, Sec. 36, T09N, R04W, shall not exceed a maximum diversion rate of 4.00 cfs.
2. Water diverted from the additional point of rediversion authorized under transfer no. 81482, located in NENW, Sec. 36, T09N, R04W, is limited to the amount released from storage under water right nos. 65-2149 and 65-2973 and bypassed into the Little Willow Creek channel beyond each of the authorized points of rediversion upstream of the additional point of rediversion.
3. The right holder shall measure and record the flow of storage water released into the Little Willow Creek channel under this right to confirm the amount available to be rediverted at the additional point of diversion authorized under transfer no. 81482. Additionally, the right holder shall measure and record the quantity of storage water bypassed into the Little Willow Creek channel at each of its points of rediversion under this right as necessary to confirm the amount of water available for rediversion at the additional point of rediversion authorized under transfer no. 81482. The right holder shall retain measurement records and make them available to the Department upon request.
4. Right nos. 65-64, 65-2067, 65-2149, 65-2973, 65-3130, 65-3131, 65-3132, 65-3133, and 65-3134, when combined, shall provide no more than 0.02 cfs per acre when measured at the field head gate.
5. This right is limited to the irrigation of 2826 acres within the boundaries of the Little Willow Irrigation District in a single irrigation season. Combined right nos. 65-64, 65-2067, 65-2149, 65-2973, 65-3130, 65-3131, 65-3132, 65-3133, and 65-3134.
6. Basin 65 General Provisions No. 3, the Separate Streams General Provision, does not apply to appropriations of water after October 18, 1977.
7. This water right shall be administered as being from a SEPARATE SOURCE PURSUANT TO BASIN 65 GENERAL PROVISION NO. 3. If the holder of this right seeks to change the right pursuant to Idaho Code Section 42-222 or successor statute, nothing in this general provision shall preclude any other person or entity from demonstrating that such change in use would cause injury to its water right or from receiving any relief provided by law in the event of injury.
8. The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) (2003) and authorized pursuant to I.C. Section 42-1411(2)(h) (2003). The data comprising the digital boundary are incorporated herein by reference and are stored on a cd-rom disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.

9. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 65.
10. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.
11. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
12. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Dated this 7th day of June 2018.



Jeff Peppersack
Hearing Officer

CERTIFICATE OF SERVICE

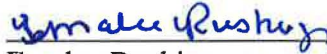
I HEREBY CERTIFY that on this 7th day of June 2018, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the following:

**RE: Amended Preliminary Order Approving, in Part, Application for Transfer No. 81482
Explanatory Information to Accompany a Preliminary Order**

ALBERT P BARKER
BARKER ROSHOLT & SIMPSON LLP
PO BOX 2139
BOISE ID 83701-2139

EBEN T MASINGILL
MASINGILL LAW PA
25 WEST COMMERCIAL ST
PO BOX 467
WEISER ID 83672

DYLAN B LAWRENCE
VARIN WARDWELL LLC
242 N 8TH STREET STE 220
PO BOX 1676
BOISE ID 83701-1676


Emalee Rushing
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.