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Department of Water Resources
Eastern Region

Attorney for Applicants/Protestants

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT
TRANSFER APPLICATION NO. 81039 IN
THE NAME OF WALLACE AND PERMIT
NOS. 78-12439 IN THE NAME OF
KALINOWSKI AND 78-12447 IN THE
NAME OF HENLEY

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT

COMES NOW, the Protestants/Claimants, James and Sandra Henley and Edward Kalinowski, by and through their counsel of record, Shelley M. Davis of the law firm Barker Rosholt & Simpson LLP, and pursuant to IDAPA 37.01.01.260 and Idaho Rule of Civil Procedure 56(c), move this Court for an Order of Summary Judgment, dismissing transfer application no. 81039 and recommending that permits be issued for water right nos. 78-12439 and 78-12447, for the reasons set forth below.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This proceeding was initiated with the filing of the above referenced two applications for permit, and the transfer application. Edward Kalinowski (hereinafter "Kalinowski") filed application for permit no. 78-12439 on May 2, 2016, seeking to appropriate the water from springs emanating on land owned by Kalinowski that is unappropriated. *See* water right backfile for 78-12439. On July 12, 2016, Michael and Eulla Wallace (hereinafter "Wallaces") filed application for transfer no. 81039 seeking to transfer the points of diversion for decreed water

right no. 78-10067 to lands owned by Kalinowski and Henley and to divert the water claimed by Kalinowski and Henley in their applications. *See* transfer application backfile no. 81039. Shortly thereafter, James L. and Sandra J. Henley (hereinafter “Henleys”) filed application for water right no. 78-12447 also on July 12, 2016, seeking to appropriate unappropriated spring water that emanates on land owned by the Henleys. *See* water right backfile for 78-12447. The Wallaces protested both the Henleys’ and Kalinowski applications for permit, and the Henleys and Kalinowski protested the Wallaces transfer application. *Id.*

A pre-hearing conference was set for December 1, 2016, in the proceedings on the Wallaces’ transfer application. Shortly before the pre-hearing conference, then acting-counsel for the Wallaces sent two executed affidavits to counsel for Kalinowski and Henleys, suggesting a review of the information contained therein, and seeking the opportunity to discuss resolution. The two affidavits were of applicant Eulla Wallace, and Leonard Wallace, father of applicant Michael Wallace. Affidavit of Shelley M. Davis in Support of Motion for Summary Judgment, (“Davis Aff.”), Exs. 1 and 2. Ms. and Mr. Wallace both state that they received and reviewed a December 7, 2006, letter from the Idaho Department of Water Resources acknowledging the filing of an SRBA claim for water right no. 78-10067 and requesting evidence of priority. Davis Aff., Ex. 1, ¶ 5 ex. C, Ex. 2, ¶ 7 ex. C. Ms. Wallace states that the letter included “a ‘computer generated print-out’ of his claim showing what we now know were two incorrect points of diversion for the springs claimed.” Davis Aff., Ex. 1, ¶ 5. Both Ms. and Mr. Wallace affirmatively state that they received and reviewed the Idaho Department of Water Resources preliminary recommendation for decreed water right 78-10067 in December 2006 “which described two incorrect points of diversion in T19N, R2E, Sec 9 SENWSW, Lot 3, and T19N, R2E, Sec 9, SENWSW, Lot 3 county of Adams.” Davis Aff., Ex. 1 ¶ 6, ex E, and Ex. 2 ¶ 8. Ms.

Wallace also states that the November 6, 2007, partial decree entered for water right no. 78-10067 included “the same two incorrect points of diversion[.]” *Id.*, ¶ 7. No objection was filed to the IDWR recommendation, nor was any effort made to correct the partial decree before the SRBA court. Instead, when the Wallaces reviewed the partial decree in 2016 they “promptly filed an Application for Transfer to correct the locations of the points of diversion[.]” Davis Aff., Ex. 1, ¶ 8.

Both affidavits also assert that the springs located on the Kalinowski and Henleys’ property are “the sole source of water for the [claimants’] property.” Davis Aff., Ex. 1, ¶ 9, Ex. 2, ¶ 10. This statement is, at best, misleading. Mr. Wallace does recognize that a well was drilled on the property. *Id.* This well supplies such abundant water that excess water was provided to the neighboring Theile property until an altercation occurred between Mrs. Theile and Mr. Wallace. Affidavit of James Henley in Support of Motion for Summary Judgment, (“Henley Aff.”), ¶ 4. Prior to the altercation, Mr. Theile estimated that the excess water that was provided to him from the Wallace well was approximately 4-5 gallons per minute. *Id.*, ¶ 5. To put this into perspective, Mr. and Mrs. Henley’s well produces a total of 4-5 gallons per minute and is sufficient to provide domestic water to their 3,900 square foot, 3 bedroom home, and to irrigate approximately a half acre of lawn, flower beds and garden. *Id.*, ¶ 6.

The pre-hearing conference was held on December 1, 2016, and shortly thereafter the parties stipulated to consolidate the two applications for permit and transfer application into the proceeding currently before this Hearing Officer. This motion follows.

ARGUMENT

I. Only the SRBA Court Can Grant the Wallaces the Relief Requested and the Transfer Application Must be Denied and Dismissed:

The Wallace's filed their transfer applications presumably in reliance on the December 21, 2009, IDWR Transfer Processing Policies and Procedures memorandum authored by Jeff Peppersack. Davis Aff., Ex. 3. In that memorandum, the Department takes the position that "[a]n application for transfer may also be required to correct errors in licenses or decrees." *Id.*, p. 3. No subsequent guidance has been issued regarding this portion of the transfer policies of the Department since the Idaho Supreme Court issued its opinion in *Rangen, Inc. v. Idaho Dept. of Water Resources*, 159 Idaho 798, 367 P.3d 193 (2016). In light of that opinion, however, the IDWR guidance permitting an IDWR transfer proceeding to be undertaken to 'correct' an SRBA decree is impermissible.

In *Rangen*, the underlying IDWR action was a delivery call initiated by Rangen against junior users. *Rangen v. IDWR*, 159 Idaho at 800, 367 P.3d at 196-197 (2016). During the course of the administrative proceedings the Director, acting as Hearing Officer, also interpreted Rangen's decreed water rights in strict conformance with the elements of the decree, which eliminated Rangen's ability to divert from other water sources as it had historically done. *Id.* Rangen appealed, and the District Court affirmed the Director's interpretation of the decrees. *Id.* at 803, 367 P.3d 198.

On appeal the Supreme Court recognized that I.C. § 42-1420 demands that "a decree entered in a general adjudication such as the SRBA is conclusive as to the nature and extent of the water right." *Rangen*, 159 Idaho at 804, 367 P.3d at 199. In *Rangen*, as in this case, when the recommendation for Rangen's water rights was issued by the Department, the point of diversion was not the same as the point of diversion requested in the claim. There too, Rangen did not object to the recommendation and the water right was decreed with a point of diversion that differed from that claimed by Rangen. *Id.* at 805, 367 P.3d at 200. The district court ultimately

held that “if Rangen disagreed with how its water rights were recommended and ultimately decreed, it had an opportunity and responsibility to voice its concerns in the appropriate forum – the SRBA.” *Id.* at 806, 367 P.3d 201. “The district court reasoned that this was necessary because the SRBA is a forum where all parties to the adjudication would have been afforded appropriate notice of Rangen’s arguments and been given the opportunity to respond.” *Id.* Ultimately the Supreme Court affirmed the district court, holding that “[a]ny interpretation of Rangen’s partial decrees that is inconsistent with the plain language would necessarily impact the certainty and finality of the SRBA judgments and, therefore, requests for such interpretations needed to made in the SRBA itself.” *Id.*

In their affidavits both Mr. and Ms. Wallace admitted that they both reviewed the IDWR recommendation including the incorrect points of diversion, as well as reviewing the partial decrees issued in 2007 also including the incorrect points of diversion. *Supra.* Neither took any action before the SRBA court during those proceedings to attempt to correct the recommendation or partial decrees. As the *Rangen* Court held, “[i]f [Wallaces] wanted [their] water rights to be interpreted differently, [they] should have timely asserted that in the SRBA.” *Id.* This is not a proper proceeding to attempt to correct, interpret or modify an SRBA decree. Only the SRBA court has the power to accomplish what the Wallaces have requested of this Hearing Officer. As such, the transfer application must be denied.

II. A Recommendation to Issue Permits for Application Nos. 78-12439 and 78-12447

Should Issue:

The Wallaces are the only protestants to the Henleys’ and Kalinowski applications for permit. A review of the protests reveals that the basis for the protest is the Wallaces mistaken belief that the water right decree no. 78-10067 appropriated the water in the springs to them. The

record belies that assumption. Both Mr. and Ms. Wallace admit that the water right decree no. 78-10067 provides no points of diversion for that right on either of the springs located on the Kalinowski and Henley property. *See Davis Aff.*, Ex. 1, ¶¶ 5, 6, and 7, exs. C, E, and F; also see Ex. 2, ¶ 8, ex. E. Therefore, the water is unappropriated and available to appropriation to the Henleys and Kalinowski. "The right to appropriate unappropriated water is guaranteed by article XV, section 3 of the Idaho Constitution." *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 9, 156 P.3d 502, 510 (2006), *quoting Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655 (1982).

Both the Henleys' and Kalinowski applications are complete, and have satisfied all of the requirements of the Department. The deadline to protest the applications has long since passed. Accordingly, there is no just reason to delay a recommendation that permits be issued for both applications.

CONCLUSION

For the foregoing reasons, the applicants/protestants, James and Sandra Henley and Edward Kalinowski respectfully request that this Hearing Officer grant this Motion for Summary Judgment and Deny and Dismiss transfer application no. 81039, and further issue a recommendation that permits be issued for water right application nos. 78-12439 and 78-12447.

DATED this 27th day of March, 2017.

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis
Attorney for Applicants/Protestants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of March, 2017, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be filed with or served upon the following parties by the indicated methods:

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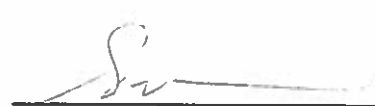
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