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

IN THE MATTER OF APPLICATION FOR
TRANSFER NOS. 79357 and 79380 (in the
name of Thomas & Dorothy Leno)

**APPLICANT'S RESPONSE IN
OPPOSITION TO PROTESTANTS'
PETITIONS FOR RECONSIDERATION
OF FINAL ORDERS**

COME NOW, Applicant THOMAS LENO and Intervenor CEDAR RIDGE DAIRY LLC (hereinafter "Applicant"), by and through counsel of record, and pursuant to the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*), hereby files this consolidated response in opposition to the *Protestant's Request for Director's Reconsideration of Final Order* ("Petition")¹ filed by Ed Smith, Betty Slifer, Pam Ritter, Leslie Ellsworth, Martin Hackard, Lynn & Barbara Stephens, and Jeanie McCreary (collectively "Protestants").

For the reasons set forth below, the Applicant respectfully requests the Director to deny the Protestants' Petition and affirm the *Final Orders* in the above-referenced cases (as clarified as requested by the Applicant's petition).²

SUPPORT DATA

IN FILE # 47-17589

¹ Although filed individually by certain Protestants, the petitions for reconsideration are all identical. For convenience and efficiency the Applicant is filing a single consolidated response in both transfer cases.

² On October 21, 2015, the Applicant filed petitions for reconsideration requesting issuance of corrected water right forms and removal of three sentences in the "summary" section of the final order for transfer no. 79380.

INTRODUCTION

The Protestants dispute the Director's correction of the Hearing Officer's proposed conditions to the season of use and priority date elements of the water right. In doing so, the Protestants mischaracterize the record in this matter, as well as the Applicant's position in its exceptions to the preliminary orders. Moreover, the Protestants provide no valid legal or factual reasons to change the Director's decision. Therefore, the Director should affirm the final orders and deny the Protestants' petitions for reconsideration.

ARGUMENT

Issue #1: Season of Use

I. The Protestants Provide No Legal or Factual Basis to Shorten the Season of Use.

The applications for transfers for Dairies #2 and #3 (nos. 79357 and 79380) requested a change to the water right's season of use from the irrigation season (4/1 to 10/31) to year round (1/1 to 12/31) for stockwater and commercial use. The Director properly found no injury to area domestic water rights, that ground water levels in the Berger area are stable or rising, and that any drawdowns associated with winter groundwater use would be "minimal." *See Final Orders* at 3. Accordingly, the Director approved the proposed season of use as requested by the Applicant. *See id.*

The Protestants urge the Director to reconsider and adopt the Hearing Officer's proposed season of use of 5/1 to 9/30, or cut the authorized season by seven months. *See* Petition at 1. The Protestants contend the shortened season is necessary to mimic the original season of use for irrigation purposes and to follow the Twin Falls Canal Company's typical irrigation season. The Protestants' argument completely misses the reason for the transfers in the first place. Contrary to the Protestants' characterizations, the Applicant requested IDWR to change the purpose of use

from irrigation to stockwater and commercial use on Dairies #2 and #3. As testified to at the hearing by Ryan Visser, the Applicant requires water year-round for stockwater and commercial purposes at the two dairies. Visser Testimony (Part B, Track 6, 0:24:00 – 0:26:00); *see also Final Order* at 8, FF 20 (T79357); *Final Order* at 8, FF 21 (T79380). Unlike crops, dairy cows and the associated operations to produce milk require water on a year-round basis, not just during the irrigation season, or for the five months suggested by the Hearing Officer. Although peak water requirements will occur in the summer months the additional water can and will be used year round.

The Director properly found that the transfer would not result in an enlargement of the water right, even though the purpose and season of use would change. *See Final Order* at 14, CL ¶¶ 17-18 (T79357); *Final Order* at 14, CL ¶¶ 23-24 (T79380). Accordingly, there is no unlawful enlargement or “expansion” of the water right as suggested by the Protestants. Moreover, the Protestants’ claims about a lack of “back-fill” of water from October to April are unfounded. *See* Petition at 1. Indeed, the Director properly found that the groundwater between the original point of diversion and the proposed points of diversion in the transfers is hydraulically connected, both as a matter of fact and law. *See Final Order* at 5 (T79357); *Final Order* at 5 (T79380). The Protestants’ request to limit the season of use to only five months is misplaced, not supported by the evidence in the record or Idaho law, and therefore should be denied.

Further, the Protestants wrongly suggest that the Twin Falls Canal Company water right season of use (3/15 to 11/15) is “acceptable” to the Applicant. *See* Petition at 1. Although the Applicant included an “alternative” argument in its exceptions briefs, the Applicant did not “concede” its primary argument that the Hearing Officer erred and that the season of use should

be changed to 1/1 to 12/31. *See Applicant's Exceptions* at 15 (T79357), at 14-15 (T79380).

Moreover, the Applicant's alternative argument was merely pointing out the inconsistencies in the Hearing Officer's decision regarding the irrigation season should the Director accept a shortened season of use. Contrary to the Protestants' claim, any shortened season of use was not acceptable to the Applicant and the Director properly granted the Applicant's exception on this issue. *See Final Order* at 3 (T79357); *Final Order* at 3 (T79380).

As described above, the Protestants have not provided any meritorious argument to change the Director's decision on the season of use issue. Therefore the Director should affirm the year round season of use for the water rights at Dairies #2 and #3 and deny the Protestants' petitions for reconsideration.

Issue #2: Priority Date

In addition to the season of use limitation, the Protestants also ask the Director to advance the water right's priority date on reconsideration. *See* Petition at 2. Similar to the season of use issue, the Protestants offer no meritorious arguments on reconsideration, other than to claim it would be "unjust" or not "fair" or "equitable." *See* Petition at 2. Although the prior appropriation doctrine has been described as "harsh," it is well-settled water law in Idaho. *See* Idaho Const., Art XV, § 3; Idaho Code § 42-602; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 800 (2011) ("It is the unquestioned ruled in this jurisdiction that priority of appropriation shall give the better right between those using the water"). The fact the Protestants do not like a senior water right being transferred to the area is not a legal reason to change the priority date. Indeed, the Protestants provide no legal or factual basis for their arguments.

Instead, the Protestants vaguely reference "existing water rights" and "wells" as being threatened by future water right administration if the Applicant retains the December 25, 1970

priority date. Presumably the referenced water rights or wells are “domestic” uses. As noted in the exceptions brief, the Protestants have no valid basis to claim that future water right administration would affect their “domestic” water uses. *See Applicant’s Exceptions Brief* at 16 (T79357); *Brief* at 16 (T79380); referencing CM Rule 20.11. Accordingly, the Protestants’ claims about loss of water or the “cost to defend and remedy their water loss” due to the water right’s 1970 priority date are unfounded. The Director rightly rejected this speculative argument and corrected the Hearing Officer’s errors. *See Final Order* at 3 (T79357); *Final Order* at 3 (T79380).

Moreover, the Protestants ignore the fact that water right 47-17589 was partially decreed with a priority date of December 25, 1970. Ex. 2. The Protestants and the Department are bound by the terms of that decree. *See* I.C. § 42-1420(1) (“The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system”). In this case the Hearing Officer had no basis or authority to change the terms of the water right, a protected private property right interest under Idaho law. *See* I.C. § 55-101(1); *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101 (1983). Again, the Director properly corrected this error in the *Final Orders*.

In sum, the Director’s decision is correct and supported by the evidence in the record as the Hearing Officer had no legal or factual basis to advance the priority date. *See Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388 (1982) (“Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder”). Since the Protestants cannot show any error in the Director’s decision on this point, the *Final Orders* should be affirmed.

CONCLUSION

The Director properly corrected the Hearing Officer's erroneous decision concerning the season of use and priority date for the water rights subject to the transfers. The Director's decision on these points is supported by Idaho law and substantial evidence in the record. The Protestants have provided no meritorious argument that would warrant reconsideration. Therefore, the Applicant respectfully requests the Director deny the Protestants' Petition.

DATED this 29th day of October, 2015.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

*Attorneys for Thomas Leno and Cedar Ridge Dairy,
LLC, and Four Sisters Dairy, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2015, I served the original *Applicant's Response in Opposition to Protestants' Petition for Reconsideration of Final Orders* and true and correct copies by email and by depositing same in the United States mail, postage prepaid, addressed to the following:

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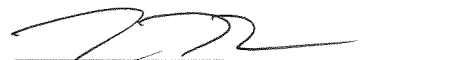
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