

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

|                                         |   |                    |
|-----------------------------------------|---|--------------------|
| <b>IN THE MATTER OF APPLICATION</b>     | ) |                    |
| <b>TO APPROPRIATE WATER NO. 98-7859</b> | ) |                    |
| <b>IN THE NAME OF RICHARD ANTHONY</b>   | ) | <b>PRELIMINARY</b> |
| <b>VILLELLI AND MARIE VICTORIA</b>      | ) | <b>ORDER</b>       |
| <b>VILLELLI REVOCABLE TRUST</b>         | ) |                    |
| <hr/>                                   | ) |                    |

On May 4, 2007, the Richard Anthony Villelli and Marie Victoria Villelli Revocable Trust ("Villelli Trust") filed an application to appropriate water with the Idaho Department of Water Resources ("IDWR"). IDWR assigned water right number 98-7859 to the application. The full filing fees were not received until June 19, 2007, at which time the application was complete. Notice of the application was published and protested by the following individuals and entities:

Janet Orndorf, Don Schied, Bill Sills, John T. Day, Doreen Ethlyn Williams, John Tesar, and Idaho Department of Fish & Game. Prior to the hearing, Janet Orndorf, Don Schied, Bill Sills, and John Tesar conditionally withdrew their protests. The condition of withdrawal stated the following:

That Mr. Villelli will agree that minimum streamflows will be established by the Department of Water Resources for Round Prairie Creek at the proposed point of diversion and said minimum streamflows shall have priority over the proposed Villelli water permit no. 98-7859.

On April 25, 2008, Charles E. Corsi, Regional Supervisor for the Panhandle Region of the Idaho Department of Fish and Game ("Fish & Game"), wrote a letter to IDWR stating the following:

We will agree to withdraw our Protest if the applicant is willing to agree to: 1) a minimum stream flow of 2.0 cfs for Round Prairie Creek and 2) that under no circumstances should the minimum flow of the Moyie River be violated as a result of this withdrawal.

The April 25, 2008 letter generated correspondence between Fish & Game and IDWR about the interpretation of the agreement. A letter written by the hearing officer on August 28, 2008, explained that Fish & Game agreed that the conditional language requiring "a minimum

streamflow of 2.0 cfs” was intended to mean that “no more water would be diverted to fill Mr. Villelli’s water right than could be diverted without the streamflow falling below 2.0 cfs.” In addition, the hearing officer wrote:

Round Prairie Creek discharges into the Moyie River upstream from the established Moyie River minimum stream flow reach. The IDWR decision approving the minimum stream flow considered data from the USGS gage you referred to that measures flows in the Moyie River, and determined that the gage was too far upstream of the minimum flow reach to determine that availability within the minimum stream flow reach. There is not an active stream gaging station within the minimum flow reach. Furthermore, water rights on the Moyie River are not regulated by a water master. I interpret your statement as a general recognition of the first-in-time first-in-right foundation of the prior appropriation doctrine, and not as an expectation of current active regulation. As a result, I would not condition any approval with specific language to address your concerns other than a general condition that would subject the water right to other water rights bearing senior priority dates.

If Fish & Game’s withdrawal is dependent on an expectation that any water right approved for the Villelli application will be actively regulated with other water rights, including the Moyie River minimum stream flow, Fish & Game should appear at the hearing and advocate its position as a party. Non-appearance will be interpreted as acquiescence that immediate regulation is not expected.

A hearing was conducted in Bonners Ferry, Idaho on September 4, 2008. Fish & Game did not appear at the hearing.

On September 16, 2008, Fish & Game filed a *Stipulation* with IDWR. The agreement conditionally withdrew Fish & Game’s protest contingent upon inclusion of the following language in the permit limiting diversion of water:

Owner shall not divert water under this water right when the flows in Round Prairie Creek fall below 2.0 cfs, as measured immediately below the point of diversion of this water right.

The use of water under this water right will in no way affect the rights or use of water of senior water users, including, but not limited to, minimum stream flow right no. 98-07704.

Based on the evidence presented at the hearing, the hearing officer finds, concludes, and orders as follows:

## FINDINGS OF FACT

1. Application no. 98-7859 proposes the following:

|                            |                                                                  |
|----------------------------|------------------------------------------------------------------|
| <b>Source:</b>             | Round Prairie Creek, tributary to the Moyie River                |
| <b>Point of Diversion:</b> | NENW <sup>1</sup> , Section 34, Township 65 North, Range 02 East |
| <b>Place of Use:</b>       | W1/2, NE, Section 34, Township 65 North, Range 02 East           |
| <b>Proposed Priority</b>   | June 19, 2007                                                    |

| Flow Rate                         | Storage Volume                 | Purpose of Use          | Season of Use |
|-----------------------------------|--------------------------------|-------------------------|---------------|
| 4.3 cubic feet per second ("cfs") |                                | Diversion to Storage    | 1/1 to 12/31  |
| 4.3 cfs                           |                                | Wildlife                | 1/1 to 12/31  |
|                                   | 100.64 acre-feet ("af")        | Wildlife Storage        | 1/1 to 12/31  |
| 4.3 cfs                           |                                | Recreation              | 1/1 to 12/31  |
|                                   | 100.64 af                      | Recreation Storage      | 1/1 to 12/31  |
| 4.3 cfs                           |                                | Fire Protection         | 1/1 to 12/31  |
|                                   | 100.64 af                      | Fire Protection Storage | 1/1 to 12/31  |
|                                   |                                |                         |               |
| <b>Total Flow = 4.3 cfs</b>       | <b>Total Volume =100.64 af</b> |                         |               |

2. Round Prairie Creek discharges into the Moyie River below the proposed point of diversion. A minimum stream flow in Moyie River downstream of the mouth of Round Prairie Creek is established by water right no. 98-7704, held by the Idaho Water Resource Board. Water right no. 98-7704 protects a minimum stream flow in the Moyie River of 354 cfs from April 1 through July 31 and protects a minimum stream flow of 149 cfs from August 1 through March 31.

3. Villelli Trust owns property adjoining Round Prairie Creek. Villelli Trust owns a residential home located next to a pond that receives water from Round Prairie Creek. The pond will hereafter be referred to as "Pond no. 1" or "Wright Lake."

4. Evidence suggests that Pond no. 1 was once a natural lake or pond. In the 1930's, the owner of the Villelli Trust property built a dike that increased the size of the pond.

5. In 1947, the owner of the Villelli Trust property filed application for water right no. 98-2137 seeking to appropriate water for the storage of water in Pond no. 1. Water right no. 98-2137 was licensed in 1949, and authorizes the storage of 10.0 acre feet in Pond no. 1 for stockwater purposes.

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<sup>1</sup> Public land survey descriptions in this decision without a fraction following a two alpha character descriptor are presumed to be followed by the fraction "1/4." In addition, all public land survey descriptions are presumed to be based on the Boise Meridian. All locations are in Boundary County.

6. An adjoining land owner perfected water right no. 98-7324, which bears a priority date of January 7, 1980, and was licensed in 1989. Water right no. 98-7324 authorizes diversion of 6.0 acre feet from Pond no. 1 for irrigation.

7. Richard Villelli ("Villelli") perfected water right no. 98-7641 authorizing diversion of 3.9 acre feet from Pond no. 1 for irrigation of 1.3 acres and for fire protection. Water right no. 98-7641 bears a priority date of May 13, 1988, and was licensed in 1996.

8. Villelli Trust, or its predecessor and trustee Richard Villelli, acquired the property adjoining Round Prairie Creek in 1977. At the time the property was purchased, an 18 inch culvert delivered water from Round Prairie Creek into Pond no. 1. In 2007, the old 18 inch diameter culvert rusted out and Villelli replaced the culvert with another 18 inch diameter pipe. The elevation of the pipe invert is set to divert water from Round Prairie Creek when the flows in Round Prairie Creek are higher than base flows. At base flows of two to approximately ten cfs, the invert of the culvert is set high enough that water will not flow into Pond no. 1.

9. Approximately 200 feet downstream from the inlet to Pond no. 1, a four foot diameter corrugated metal pipe has been placed in Round Prairie Creek. The four foot diameter corrugated metal pipe is a part of an embankment crossing constructed across Round Prairie Creek. Upstream of the four foot diameter corrugated metal pipe, Round Prairie Creek is a braided stream. Beavers dam the braided stream channels causing changes in water level elevations. The four foot diameter culvert is partially filled with sediment. All of the scattered flows of Round Prairie Creek gather at the embankment crossing where the four foot diameter culvert is located and pass through the culvert to the other side of the embankment.

10. In 2005, Villelli excavated a meadow area south of Pond no. 1. Prior to the excavation, a channel from Pond no. 1 flowed to the meadow area, and the meadow area would fill with water during high flows. As flows dropped, however, the meadow area dried. Villelli excavated the meadow area and installed an 18 inch conduit, located approximately 870 feet southeast of the inlet to Pond no. 1 that discharges water from Pond no. 1 into the newly constructed Pond no. 2.

11. Villelli completed the excavation and construction related to Pond #2 in the spring of 2007. Villelli installed two dry hydrants to supply fire protection to his home, a guest home, and one other home in the area. In addition, Villelli purchased additional dry hydrant piping for installation and use by the local fire district.

12. Pond no. 2 is 4-5 acres in surface area and is approximately an average depth of four feet deep. Based on these dimensions, the maximum water that can be stored in pond no. 2 is 20 acre-feet.

12. Department staff measured the elevations of water conveyance pipes located on the Villelli property. The invert of the inlet pipe to Pond no. 1 is approximately 0.5 feet higher than the elevation of the top of the sediment in the four foot diameter embankment crossing pipe in Round Prairie Creek. The invert elevation of the outlet pipe from Pond no. 1 to Pond no. 2, located approximately 870 feet to the southeast of the inlet to Pond no. 1, is 1.1 feet above the

inlet invert elevation and 1.6 feet above the sediment of the embankment crossing pipe located in Round Prairie Creek. As a result, water will flow into Pond no. 1 when the water depth is 0.5 feet deep above the sediment in the four foot diameter crossing if the water level in Pond no. 1 is at or below the elevation of the inlet pipe invert. Pond no. 1 will fill until the water depth of the water in the inlet pipe is approximately 1.1 feet deep. Water will then begin discharging from Pond no. 1 into Pond no. 2 through the outlet pipe from Pond no. 1.

13. Because of the elevations of the three pipes discussed above, the inlet pipe to Pond no. 1 can also be an outlet pipe from Pond no. 1. During high flows when water exceeds 1.1 feet deep measured from the invert of the inlet to Pond no. 1, water flows into Pond no. 1 and discharges from Pond no. 1 into the excavated area hereafter referred to as Pond no. 2. When water depths in Round Prairie Creek drop below 1.1 feet depth at the Pond no. 1 inlet pipe invert, water from Pond no. 1 water should cease to flow into Pond no. 2, and water from Pond no. 1 should back flow through the inlet pipe and into Round Prairie Creek. Backflow should continue until the water level in Pond no. 1 is equal to the water surface elevation of Round Prairie Creek or the inlet pipe invert elevation, whichever is less.

14. When the elevations of the pipes were measured, Department staff observed water from Pond no. 1 backflowing to Round Prairie Creek and also discharging into Pond no. 2. It is possible that water could flow out of Pond no. 1 in two directions if the flows of Round Prairie Creek drop quickly and the level of Pond no. 1 is in excess of 1.1 feet above the elevation of the inlet pipe to Pond no. 1. If there is significant inflow into Pond no. 1 from springs or other sources of water, the level in Pond no. 1 could be maintained at a higher elevation. The relationship of the flows in the two outlet pipes was not established at the hearing.

15. In August of 2007, Keith Franklin, an employee of IDWR, measured flows of 1.7 cfs in Round Prairie Creek. Franklin measured flow in Round Prairie Creek at the location of the four foot diameter corrugated metal pipe. This measurement location is the only location where the braided flows are adequately collected in a single channel and can be measured. The site is also somewhat stable, although it silts in with mud, and water elevations can change based on beaver activities and movement of the braided channels upstream.

16. The summer of 2007 was a very dry year. Flows of 1.7 cfs represent the extreme base flows of Round Prairie Creek. Flows in Round Prairie Creek easily could exceed the 4.3 cfs sought for appropriation by this application. During high flow events, water levels in the creek can be six feet higher than the elevation of base flow in Round Prairie Creek.

17. Based on the expected head elevation at the inlet pipe to Pond #1 the 18 inch diameter inlet pipe could flow 4.3 cfs during high flow events.

18. Round Prairie Creek flows at a higher rate at the Villelli Trust diversion than flows downstream where Round Prairie Creek discharges into the Moyie River. The hearing officer determines that the flows percolate into the ground water for a portion of that distance.

19. Doreen Williams owns water right no. 98-4012 claiming diversion of 0.03 cfs for domestic and stockwater uses from Round Prairie Creek. Claim no. 98-4012 asserts a priority

date of 1910. The point of diversion for water right no. 98-4012 is located downstream from the Villelli Trust proposed point of diversion.

20. There has always been sufficient water at the Williams point of diversion to satisfy water right no. 98-4012.

21. At a flow rate of approximately 2.0 cfs at the Villelli point of diversion, there is always surface water flowing from the Villelli property to where Round Prairie Creek discharges into the Moyie River.

22. A flow of 4.3 cfs is a substantial diversion of water from a small creek like Round Prairie Creek, particularly during low flow periods.

23. Villelli stipulated that the proposed water right will always be diverted via gravity flow, and that no pumping system would be employed to divert water from Round Prairie Creek.

### **ANALYSIS**

Protestants Doreen Williams and John Timothy Day are concerned about the maintenance of continued flows in Round Prairie Creek. Tim Day testified that the reduction in flows of Round Prairie Creek downstream of the Villelli Trust property is a result of a rock or basalt intrusion into Round Prairie Creek that backs water up in Round Prairie Creek, and does not allow water to continue to flow down Round Prairie Creek during low flows. Tim Day speculated that during low flows, the impoundment of water above the intrusion causes evaporation that might exceed the outflow of Round Prairie Creek. While there may be significant loss because of the braided and scattered nature of the stream channels above this purported rock intrusion, the hearing officer does not believe that this hypothesis would account for a loss of the entire flows of Round Prairie Creek. The hearing officer believes that there are seepage losses that occur from the location of the Villelli property to where it discharges into the Moyie River.

It may be that the flows in Round Prairie Creek need to be protected to also protect the fisheries resource. The future analysis of these values may and should affect the ability of Villelli to continue to divert water for private aesthetic and wildlife uses.

### **CONCLUSIONS OF LAW**

1. Idaho Code § 42-203A states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes,

or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will 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; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. Idaho Code § 42-202B(3) defines local public interest:

“Local public interest” is defined as the interests that the people in the area affected by a proposed water use have in the effects of such use on the public water resource.

4. Diversion of water proposed by this application could reduce flows in the Moyie River below the minimum streamflow authorized by water right no. 98-07704 held by the Idaho Water Resource Board. To prevent reduction of minimum stream flows authorized by water right no. 98-07704, Fish & Game and Villelli agreed that Villelli would not divert water under express conditions set forth in the preface to the findings of fact of this order. By conditioning an approved permit with the language of the agreement, the minimum stream flow will be protected.

5. Diversion of water proposed by this application will not reduce flows for any other water rights.

6. At least during periods of high flow in Round Prairie Creek, there is sufficient water in the creek to satisfy the purpose sought by the application.

7. Villelli has completed most if not all of the construction for the proposed appropriation. As a result, Villelli has not filed the application in bad faith, for delay, or for purposes of speculation.

8. Because of the preconstruction, Villelli has sufficient financial resources to construct the project.

9. Large diversions out of a small stream for private aesthetic or wildlife uses may not be in the public interest if the diversion diminishes the public value of leaving water in the stream. These public values include a public interest in fishery habitat, continuous migration corridors, and overall health of the stream and riparian areas.

10. The quantity of water necessary to satisfy the private aesthetic or wildlife purpose is difficult to quantify.

11. Unrestricted diversions of large quantities of water for private aesthetic and wildlife uses should not replace the public values listed above.

12. In addition, there may be a need for consideration of upstream future consumptive uses from Round Prairie Creek that a large appropriation for aesthetic and wildlife uses would prevent. A private, large, nonconsumptive use as proposed should not forever prevent smaller consumptive upstream appropriations if the future proposals for consumptive use are found to be in the public interest.

13. Any permit issued for this application should be made junior and subordinate to future upstream consumptive uses and subject to any future minimum stream flow established to protect public interest values.

14. With restrictions subordinating the right to future appropriations and minimum streamflows as set forth above, the proposed appropriation is not contrary to conservation of water resources within the state of Idaho.

### **ORDER**

IT IS HEREBY ORDERED that application to appropriate water no. 98-7859 is **Approved**, subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before December 01, 2009.

Subject to all prior water rights.

Water shall not be diverted for fire protection use under this right except to fight or repel an existing fire.

After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to use power records to determine the amount of water diverted and shall annually report the information to the Department.

Use of water under this right shall be non-consumptive.

Recreation use is for swimming, fishing and boating.

Wildlife, recreation, and fire protection storage is for added capacity in an existing pond and the addition of a separate pond that shall not exceed a storage volume of 100.6 acre feet.

This right shall be junior and subordinate to future water rights authorizing the diversion and use of water from Round Prairie Creek and its tributaries, including ground water for consumptive uses and water rights for minimum instream flow, except that this right shall not be subordinate to future water rights for private use authorizing similar wildlife, recreation, and/or aesthetic uses.

Water shall not be diverted under this water right when the flows in Round Prairie Creek fall below 2.0 cfs, as measured immediately below the point of diversion of this water right.

The use of water under this water right shall in no way affect the rights or use of water of senior water users, including, but not limited to, minimum stream flow right no. 98-07704.

DATED this 18<sup>th</sup> day of December, 2008.

A handwritten signature in cursive script, reading "Gary Spackman", written over a horizontal line.

GARY SPACKMAN  
Hearing Officer

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19<sup>th</sup> day of December, 2008, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Preliminary Order and Explanatory Sheet for "Responding to Preliminary Orders..." when a hearing was held.

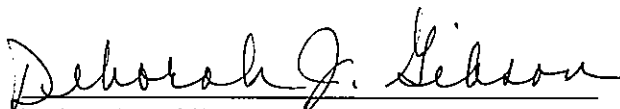
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