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Attorney for Protestant, Stuart R. Weimer

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

IN THE MATTER OF APPLICATION FOR
EXCHANGE OF WATER RIGHT NOS. 65-
3222 AND 65-8290 IN THE NAME OF PTR,
INC.

POST HEARING REPLY BRIEF

COME NOW Stuart Weimer and Rhonda Weimer by and through their attorneys of record, Hoagland, Dominick & Hicks, and hereby submit this Post Hearing Reply Brief concerning the above-referenced Application for Exchange.

Weimer's take exception to the representation of factual background submitted by PTR with respect to the claim that landowners have historically followed a rotation schedule. The fact is, that Mr. Kane has attempted to force a rotation schedule on Mr. Weimer and Mr. Weimer has not recognized the authority of PTR or Kane to impose such a schedule and is litigating that fact in the District Court.

PTR claims that it is costly to maintain the ditch. That is demonstrated by their failure to do so. Little, if any, money has been actually expended in the maintenance of the delivery system for irrigation water appurtenant to the lands of both the Applicant and the Protestant. This has been the problem. This is precisely why Weimers' protest this

Application. Unless conditions are placed upon the transfer of the point of diversion of these water rights which will ensure the delivery of the remaining water in such a way that Weimers' will be able to irrigate at a rate of least 50 gallons per minute, twenty-four (24) hours a day, seven days a week, the transfer of the water rights will indeed harm the Weimers' because the applicant's incentive to maintain the ditch will be diminished.

The argument has never been that there was insufficient water to satisfy Weimers' need. The argument has always been that PTR has allowed the carrying capacity of the lateral which carries the water subject to these water rights precisely so that the self serving argument can be made that the system has deteriorated to the point that water needs to be diverted. It is easy to see here what has happened when one analyzes the history since the involvement of the Kanes.

The Applicant suggests that Weimers' have waived any right to protest this Application. It is respectfully submitted that Weimers' did not waive their right to protest because Stewart Weimer's vote for approval of the Application was not an intentional relinquishment of a known right or advantage. Weimer's testimony clearly indicates that he was, at the time of the vote, unaware of the fact that water rights had yet to be claimed and that he had an opportunity to file for ownership of the water rights appurtenant to his property. The Doctrines of Waiver and Quasi Estoppel are therefore inapplicable to the facts of this matter.

Bolstering the argument that Weimer clearly did not waive the right to protest are the actions of the parties since the vote was taken. PTR has done little or nothing to maintain the ditch, therefore allowing the carrying capacity of the lateral to be diminished. While Weimer has installed a weir and pump on his property for purposes of

irrigating by way of a removable water canon all with PTR's knowledge and acquiescence.

If anyone should be estopped from protesting, it is PTR that should be estopped from attempting to force Weimers' into a rotation schedule. That issue is a matter for another forum.

Weimer was led to believe that this forum was the proper forum to address the ownership of the water rights when his Application and Application Fee were returned by the Department. His testimony supports the fact that he did not file a claim to the Water Rights in the Snake River Basin Adjudication and had not filed an action with the SRBA or any other court requesting that the water right be decreed in his name. Weimer believed, and still does believe, that his opportunity to claim an ownership interest in the water right lies in this forum. Weimers' claim to ownership of the water rights is indeed relevant and appropriate under the circumstances.

Finally, Weimers' reiterate their position that the application should be denied or , in the alternative, that approval of the application to transfer water rights or any portion of water rights be conditioned upon the requirement that the Applicant improve and maintain the delivery system serving Weimers' land in such a way that he will be entitled to and capable of drawing of gallons per minute, twenty-four (24) hours a day, seven days a week during the irrigation season to irrigate his property and will not be unlawfully enforced to adhere to a rotation system or scheme.

RESPECTFULLY submitted this 23rd day of February, 2005.


George G. Hicks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of February, 2005, I served the foregoing Closed Hearing Brief Reply by having a true and complete copy personally delivered or by facsimile and/or by depositing the same in the United States Mail, postage prepaid thereon, and addressed to:

S. Bryce Farris
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Hand Deliver	_____
U.S. Mail	<u>X</u> _____
Facsimile	<u>X</u> _____
Overnight Mail	_____



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