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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.)
_____))

PTR, INC.'S POST-HEARING BRIEF

COMES NOW PTR, Inc., by and through its attorneys of record, Ringert Clark Chartered, and hereby submits this Post-Hearing Brief concerning the above-referenced Application for Exchange and the hearing that was held on January 25, 2005, Gary Spackman presiding as the Hearing Officer.

I. INTRODUCTION/FACTUAL BACKGROUND.

PTR, Inc. is an Idaho corporation which delivers irrigation water to approximately 195 acres of land which is located north of Scriver Creek in Garden Valley, Idaho. PTR, Inc. is the owner of three water rights, Water Right No. 65-3222 (2.90 cfs), 65-8290 (.32 cfs) and 65-3223 (.54 cfs), which are all diverted from Scriver Creek.¹ At one time, the lands served by the water rights were

¹ Partial Decrees were issued for these water rights on March 7, 2003 in the Snake River Basin Adjudication. The Partial Decrees were issued in the name of Pine Tree Ranch, PTR, Inc.'s successor, who conveyed ownership of the water rights to PTR, Inc.

delivered through three separate ditches, but they have now been combined into one irrigation ditch that diverts water from Scriver Creek, delivers water to land above the bluff and above Middle Fork Road, including to the properties currently owned by Stuart Weimer, Jack and Sandra Kane and Swain and Shelly Granieri, and then delivers the water to the land below the bluff and adjacent to the Middle Fork of the Payette River. The land below the bluff and adjacent to the Middle Fork of the Payette River consists of approximately 120 acres and is hereinafter referred to as the “River Ranch Property.”

The diversion from Scriver Creek and the irrigation ditch that delivers the water rights currently has insufficient capacity to divert and deliver all of the water rights (3.76 cfs) to all of the lands, including the River Ranch Property. Because of the limited capacity of the diversion and ditch, the landowners have historically followed by a rotation schedule. Moreover, the condition of the buried pipe which delivers the water over the bluff and to the River Ranch Property is in extremely poor condition, has broken several times, and is undependable and expensive to maintain.

In order to address the limited capacity of the ditch which diverts from Scriver Creek, and to negate the costly maintenance and repair of the pipe that delivers water over the bluff and to the River Ranch Property, PTR looked at alternative means to efficiently deliver the water rights to the River Ranch Property. One such alternative included allowing the River Ranch Property to divert its portion of the water rights from an existing pump owned by Dr. Don Walker from the Middle Fork of the Payette River. The remaining portion of the water rights would continue to be diverted from Scriver Creek and delivered through the existing irrigation ditch to the lands above the bluff.

On July 7, 2002, PTR’s Board of Directors, including the Protestant, Stuart Weimer, voted unanimously to file an Application for Exchange to add a point of diversion from the existing pump

on the Middle Fork of the Payette River, which is upstream from the confluence of Scriver Creek, in order to more efficiently deliver water to the River Ranch Property. The proposal was essentially to change the source of the water rights delivered to the River Ranch Property from Scriver Creek to the Middle Fork of the Payette River.

On or about March 28, 2003, PTR, Inc. filed an Application for Exchange of Water (hereinafter "Application") pursuant to I.C. § 42-240. The Application addresses only two of the three water rights because Water Right No. 65-3223 (.54 cfs) is not appurtenant to the River Ranch Properties. The Application proposes to divert up to 2.17 cfs, from the total of 3.22 cfs available from Water Right Nos. 65-3222 (2.90 cfs) and 65-8290 (.32 cfs), at the pump diverting from the Middle Fork of the Payette River. The remainder of Water Right Nos. 65-3222 and 65-8290 (1.05 cfs), along with all of Water Right No. 65-3223 (.54 cfs), would continue to be diverted from Scriver Creek and served by the existing ditch. Thus, 1.59 cfs would be diverted from Scriver Creek and continue to be served by the existing ditch, and up to 2.17 cfs would be diverted from the pump in the Middle Fork and serve the River Ranch Properties.

On July 16, 2003, Weimer filed a Protest to the Application claiming that the Application will injure water rights appurtenant to his land. A hearing was then held on January 25, 2005, with Gary Spackman presiding as the Hearing Officer.

II. ANALYSIS.

A. Issues Raised by Stuart Weimer.

i. Sufficient water is available to satisfy Weimer's water needs.

Weimer's property lies above the bluffs and is served by the diversion from Scriver Creek and the existing irrigation. Weimer is the first users on the ditch and has 6.2 acres of land which is

served by PTR's water rights (3.6 acres is in the valley below the existing ditch and along Scriver Creek and is served by Water Right No. 65-3223, and 2.6 acres lies above the bluffs, to the north of the existing ditch and is served by Water Right Nos. 65-3222 and 65-8290).²

Again, the Application does not include Water Right No. 65-3223 because it is not appurtenant to the River Ranch Property and is only appurtenant to the 34 acres along Scriver Creek. Of those 34 acres, 3.6 belong, or at least did belong at the date of the Hearing, to Weimer. Thus, 3.6 of Weimer's acres will clearly not be impacted by this Application because the Application does not propose to exchange, alter or modify 65-3223. Additionally, the Application will not injure Weimer, or his 2.6 acres which are served by Water Right Nos. 65-3222 and 65-8290, because PTR will continue to deliver the water rights which are appurtenant to his property just as it did before the Application. If the Application is approved, there will be 1.59 cfs which will continue to be diverted from Scriver Creek and delivered through the existing ditch. The 1.59 cfs which will remain in the existing ditch is sufficient water to irrigate the approximately 76 acres which lies above the bluff and includes all of Weimer's property. Accordingly, Weimer's protest is completely irrelevant.

ii. Weimer has waived or is estopped to protest this Application.

The facts showed that Weimer, as a board member of PTR, approved of the Application for Exchange on July 7, 2002. Weimer did not deny that he approved of the Application or that he signed the document, which clearly indicated his approval of Application. Instead, Weimer testified

² Weimer erroneously contends that he has 8.8 acres covered by the water rights because he is double counting the 2.6 acres which are served by both 65-3222 and 65-8290. However, IDWR's shape files clearly show that Weimer is only entitled to irrigate a total of 6.2 acres.

that because he later developed the belief that he individually owned a portion of PTR's water rights, he now protests the Application.³ However, Weimer is prevented by the doctrines of waiver and estoppel from even protesting the Application due to his prior approval.

“Waiver is a voluntary, intentional relinquishment of a known right or advantage. Waiver is foremost a question of intent.” *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 735 P.2d 1047 (Ct.App. 1987). The doctrine of quasi estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with its prior position.” *Willig v. State, Dept. of Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). These two doctrines are directly on point as to Weimer's protest. There is no question of Weimer's intent back on July 7, 2002 to relinquish his right to protest, disapprove or dispute the Application, because he clearly supported and approved of the Application. Consequently, Weimer waived any right to now protest the Application. In addition, it would be unconscionable to allow Weimer to take such inconsistent positions to the detriment of PTR. On the one hand he supported of the Application back in 2002, but on the other hand he now is protesting the same Application he supported because he erroneously contends he has an ownership interest in the water right.

While it is clear that the Application will not injure Weimer or the portion of the water rights which are appurtenant to his land in any way, for arguments sake, even if it could be found that there was some injury to Weimer it should not be considered by the Hearing Officer. Weimer has essentially signed off on this Application and he has waived any right he would now have to claim that the Application injures him. IDWR should treat the waiver or estoppel like stipulation to

³ For the reasons stated, *infra*, Weimer does not have a valid claim that he individually owns a portion of the water rights, and even if he did, it has no bearing on whether this Application should be approved.

withdraw the protest and the issues or concerns of Weimer should be considered resolved.

iii. Weimer's claim that he owns the water rights is irrelevant.

Weimer testified that the reason he changed his position on the Application from supporting it in July of 2002, to now protesting it, is his belief that he individually owns a portion of the water rights which are appurtenant to his land. It should be initially pointed out that whether he does have an ownership interest in the water rights is irrelevant to this Application because regardless of whether he has an ownership interest or not, he will still only have 6.2 acres of irrigated land. The water rights are appurtenant to those 6.2 acres regardless of whether PTR owns the water rights, and PTR is not proposing to change that fact by this Application. Thus, the issue of ownership of the water rights is irrelevant.

Moreover, the water rights are currently in the name of PTR, Inc. and were decreed to PTR's predecessor, Pine Tree Ranch. Weimer acknowledged that he did not file a claim to the water rights in the Snake River Basin Adjudication (SRBA) and he has not filed an action with the SRBA or any other Court requesting that the water rights be decreed in his name. For that matter, he has lost any opportunity to challenge the decree in the SRBA. For these reasons, when Weimer attempted to change the ownership of the water rights, IDWR informed him that PTR owned the water rights and that he is entitled to beneficial use of the water rights but does not own or control those rights. The bottom line is that not only is the issue of whether Weimer owns an interest in the water rights irrelevant to this Application, these proceedings involving the Application for Exchange are not the appropriate forum for Weimer to claim an ownership interest in the water rights.

B. Issues/Concerns of the Hearing Officer.

One concern raised by the Hearing Officer was whether this Application for Exchange would

constitute an enlargement based upon the fact that the ditch is currently not capable of delivering all of the water rights. The straight-forward answer is that no this Application will not constitute an enlargement because there has been no forfeiture or loss of the water rights, and PTR still has every right to use the water and put it to beneficial use.

The SRBA Court has previously held that the running of the forfeiture period of I.C. § 42-222 is tolled with the filing of a claim in the SRBA until such time as the partial decree is issued. *See Wood v. Trout, Subcase 65-05663B, Memorandum Decision and Order on Challenge; and, Order of Partial Decree* (March 9, 2002). The Court then stated that once the partial decree is issued for the water right, the period for non-use begins to run anew, and the water right holder has five years within which to put the water to beneficial use before the decreed right is subject to forfeiture. *Id.*

In this matter, PTR Inc.'s water rights were decreed in the SRBA in March of 2003. The water rights are for a total of 3.76 cfs and appurtenant to approximately 195 acres of land. The water rights have not been forfeited and are not subject to forfeiture until at least five years from the date the partial decrees were issued. PTR has every right, during this five year period, to find a means to put the entire water rights to beneficial use. There is no such thing as anticipatory forfeiture. PTR could file a transfer, an exchange such as this, improve the existing ditch or system, file an application for extension of time or place a portion of the water rights in the water bank. The point is that PTR still has the valid right to beneficially use the entire water rights and there can be no enlargement by their attempting to do so. Thus, there simply is no enlargement by this Application because the use of the water rights which have been decreed is not increasing, and the Application proposed to beneficially use the water rights on the lands which the decreed water rights are appurtenant. PTR is simply proposing to change the source of the decreed water rights for lands

which the water rights are already appurtenant.

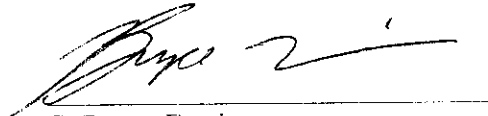
Another concern raised by the Hearing Officer involved the quantity of water available in Scriver Creek. Both Mr. Kane and Mr. Weimer testified that there is more than sufficient water available in Scriver Creek during the entire irrigation season for PTR to divert 1.59 cfs into the existing ditch and still leave 2.17 cfs in Scriver Creek. The evidence presented at the hearing was that PTR diverts from Scriver Creek below the south side users, and at all times during the irrigation season there is more than sufficient water flowing down Scriver Creek. Further, Mr. Kane testified that PTR, Inc. intended to put a measuring device near the diversion from Scriver Creek, and that could be used to ensure that no more than 1.59 cfs is being diverted from Scriver Creek if this Application is approved and the River Ranch Property is diverting from the pump in the Middle Fork. Dr. Walker testified that the pump currently did not have the capacity to divert the entire 2.17 cfs, but that it could be metered or sized to ensure that no more than 2.17 cfs is diverted from the Middle Fork. Thus, there are sufficient safeguards to ensure that there is no enlargement of the water rights.

III. CONCLUSION.

For the reasons set forth herein, PTR Inc.'s Application for Exchange should be approved. Weimer has not provided a valid reason that the Application will cause injury to the water rights appurtenant to his land. In addition, the Application will not constitute an enlargement in use of the decreed water rights and complies with all other requirements of I.C. § 42-240.

DATED this 15th day of February, 2005.

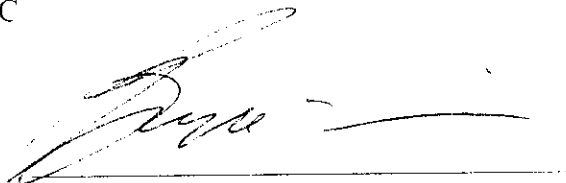
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S. Bryce Farris

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document hand delivered to the following on this 15th day of February, 2005:

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