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Department of Water Resources
Eastern Region

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS)
FOR TRANSFER NO. 83160)
IN THE NAME OF JEFFREY) **SURFACE WATER COALITION'S**
AND CHANA DUFFIN) **BRIEF ON QUESTIONS OF LAW**
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COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal
Company, and Twin Falls Canal Company (hereafter collectively referred to as "Surface Water
Coalition," "Coalition," or "SWC"), by and through counsel of record, and hereby file this *Brief
on Questions of Law* in the above-captioned matter.

The answers to the legal issues identified in the May 26, 2020 Request for Briefs and the Stipulated Statement of Facts (“Stipulation”) reveal that the application for transfer would result in an unlawful enlargement and otherwise violate I.C. § 42-222(1). *See Request for Briefs*. Consequently, for the reasons set forth below, the Hearing Officer should deny the above-captioned transfer applications as a matter of law.

UNDISPUTED FACTS

On April 2, 2019, Jeffrey and Chana Duffin (“Applicants”) filed Application for Transfer No. 83160 with the Idaho Department of Water Resources (“IDWR”). The application seeks to change the place of use for Water Right No. 35-7667 (“35-7667”), an irrigation ground water right. Vern Duffin filed the original application for permit for water right 35-7667 on February 2, 1977. *Stipulation* ¶ 5. At that time Mr. Duffin verified there were no other water rights used for the same purposes (irrigation) on the property. *Stipulation* ¶ 7. However, despite this representation, there were actually sixty (60) shares from the Aberdeen-Springfield Canal Company (“ASCC”) issued in his name for irrigation on the same property. The shares were appurtenant to the land at least as of April 24, 1970 and remained so except for a brief period around October 20, 1987. *Stipulation* ¶¶ 3, 4. The Applicants have held the shares in their names since December 31, 2011. *Id.* Therefore, there is no dispute that at the time Vern Duffin applied for a ground water right, the entire place of use was covered by surface water with ASCC shares.

After Vern Duffin allowed the permit to lapse, he submitted a completed Proof of Beneficial Use form to IDWR on June 11, 1992, fifteen years after the initial application. *Stipulation* ¶ 12. Despite the property having surface water from ASCC for over 26 years, the August 1996 field exam indicated there were no other water rights associated with the place of use for water right 35-7667. *Stipulation* ¶ 14. This directly conflicted with the Field Exam Notes

which identified the presence of the ASCC shares next to “OTHER WATER RIGHTS SAME POU.” *Stipulation* ¶ 15. Based on the field exam, water right 35-7667 was ultimately licensed on December 24, 2001. *Stipulation* ¶ 20.

Prior to the Transfer Application, Jeffrey and Chana Duffin leased 35-7667 into the Idaho Water Supply Bank (“WSB”) for 2017. *Stipulation* ¶ 28. The Department restricted the water right for supplemental rentals only. In other words, the rental place of use would have to already be covered by a surface water right in order for the lease to qualify for approval. *Water Supply Bank Lease Contract No. 632*, at 17 (May 19, 2017). This condition was consistent with the state of water rights at the time Vern Duffin applied for and proved up on 35-7667 as the existing place of use was already covered by surface water shares. The supplemental nature of water right 35-7667 was therefore recognized by the WSB rental agreement limitation. The Applicants are now attempting to convert the status of 35-7667 to a primary water right and double the acreage historically irrigated pursuant to the ASCC shares and 35-7667. The SWC protests the enlargement that would result from granting the transfer application. The SWC also asserts that granting the application is contrary to the conservation of water resources of the state of Idaho and the local public interest.

After holding several status conferences and prehearings, the parties stipulated to a Statement of Facts and the relevant legal issues. The Department adopted the Stipulation and identified the legal issue of “does Application 83160 satisfy the transfer review criteria set forth in Idaho Code § 42-222(1).” *Request for Briefs* at 2. Based on the narrower issues identified by both parties in the Stipulated Statement of Facts, the relevant legal issues are:

(1) Does the proposed transfer constitute an enlargement of the original right? More specifically, is water right 35-7667 a supplemental ground water right or otherwise limited in its exercise and cannot be used as a primary ground water right at the new proposed place of use?

(2) Is the proposed transfer contrary to the conservation of water resources within the State of Idaho?

(3) Will the proposed transfer conflict with the local public interest? What is the potential effect of the proposed water use on the public water source?

See Stipulation at 12.

ARGUMENT

Idaho Code § 42-222 sets forth the factors the Department must consider when evaluating a transfer application. The Department is required to examine all the evidence and available information and may only approve the [transfer] provided “the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and the change is in the local public interest.” I.C. § 42-222(1). “Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use, exceeds the amounts or beneficial use authorized under the water rights prior to the proposed transfer.” *IDWR Transfer Processing No. 24*, at 28 (Dec. 21, 2009). In determining whether a transfer will result in an enlargement, the Department can consider whether the involved water rights are stacked. “[W]ater rights are ‘stacked’ when two or more water rights, generally of different priorities and often from different sources, are used for the same use and overlie the same place of use.” *Id.* “An application for transfer proposing to ‘unstack’ one or more water rights used for irrigation or other use, without changing all the rights for the same use, is presumed to enlarge the water right.” *Id.* “A supplemental irrigation right is a stacked

water right authorizing the diversion of water for irrigation from a secondary source to provide a full supply for crops when used in combination with a primary right.” *Id.* at 29. “An application for transfer proposing to change a supplemental irrigation right to a use as a primary water right for irrigation or other use **will be presumed to enlarge the supplemental right.**” *Id.* (emphasis added).

IDWR has no authority to approve a transfer application that results in an enlargement of a supplemental junior ground water right that was developed on the same place of use as a senior surface water right. Moreover, such a change is contrary to the conservation of water resources of the state and adverse to the local public interest. The Applicants should not be allowed to ignore the historical attributes surrounding water right 35-7667, and wrongly elevate a supplemental ground water right into a primary right thereby doubling the irrigable acres under the current rights. The Hearing Officer should deny the transfer application accordingly.

I. IDWR Should Deny Application 83160 as it Would Result in an Unlawful Enlargement of the Water Right.

The first legal issue identified in the *Stipulation* is whether the proposed transfer constitutes an enlargement, and more specifically whether 35-7667 is a supplemental ground water right. The term “enlargement” has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996); *See* I.C. § 42-1426(1)(a). An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion. *Id.* Further, an increase in the volume of water diverted is an enlargement and is not allowed under I.C. § 42-1425. *Id.* Moreover, “[A] water user cannot obtain a transfer that constitutes either an enlargement of the water right or otherwise injures

water rights existing on the date of the change.” *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (citing *Fremont–Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996)).

Here, it is the Applicants’ burden to provide sufficient evidence of non-enlargement. *Barron v. Idaho Dep’t of Water Res.*, 135 Idaho 414, 418-19, 18 P.3d 219, 223-24 (2001). A supplemental right is “an additional appropriation of water to make up a deficiency in supply from an existing water right.” *Id.* 135 Idaho at 416, 18 P.3d at 221 (emphasis added).

It is undisputed that the original applicant, Mr. Duffin, owned 60 shares of ASCC surface water rights for use on the same 60 acres identified as the place of use when he filed application for permit no. 35-7667. In Vern Duffin’s original application for water right 35-7667, IDWR incorrectly noted “None” for “other rights on the same place of use.” *Backfile* at 20.^{1 2} The failure to address the 60 ASCC shares is in contradiction to the actual water use on the ground at the time and the Field Exam Notes from August 1996 where it is stated there are 60 shares of ASCC on the same place of use as water right 35-7667.

The inadvertent failure to note the existence of surface water rights on the place of use for 35-7667 does not change the fact that surface water rights were appurtenant to the property and should not impact the supplemental nature of 35-7667. Indeed, water right 35-7667 was applied for after the shares were made appurtenant to the same place of use. The shares were appurtenant

¹ The only other right IDWR identified is water right 35-7525 which had “lapsed” at the time of the application. There is no mention in Vern Duffin’s 1977 application of the ASCC shares which were appurtenant to the property as early as 1919. Even in the December 21, 2001 license review, IDWR stated that no rights overlap the place of use for water right 35-7667. *Backfile* at 38. However, in that same review, the Department elected to not advance the priority. *Id.* Even in the April 1997 Beneficial Use Field Report, the Field Examiner again erroneously states there are no other water rights with the same place of use. *Backfile* at 40.

² A transfer application “must include a separate list of individual water rights, other than those proposed to be changed, and a description of water supplied by a canal company, irrigation district, or municipality, that provide water currently used in the same diversion system or at the same place of use as the rights(s) proposed to be transferred.” *IDWR Transfer Processing No. 24*, at 8 (Dec. 21, 2009).

first and therefore constitute the primary water right on the property. The secondary application for a ground water right would only be to make up for any deficiency in the 60 shares to cover the place of use, thereby making 35-7667 a supplemental ground water right.

The supplemental nature of 35-7667 has been recognized by IDWR before. Condition 13 of Water Supply Bank Lease Contract No. 632, which leased the full water right 35-7667 for 2017, states **“This right may only be rented for use as a supplemental right in conjunction with a primary surface water right.”** (emphasis added). Despite being presented with the WMIS data from 1997 to 2016, the Water Supply Bank remained unconvinced that the ground water right was primary and restricted its rental capacity to only supplemental uses.

Furthermore, in a letter from Steve Howser (ASCC General Manger), produced for the WSB application, Mr. Howser stated that the canal company does deliver water to the parcel in the WSB lease application. Mr. Howser stated that ASCC has records of shares being appurtenant to the parcel since December 19, 1919, not just 1970 (which still pre-dates the application for permit for water right 35-7667). Mr. Howser stated that water delivery was provided via the “Company’s Head Gates M-56-5, M-57-8 and [their] ‘N lateral spill ditch.”” *Water Supply Bank Lease Contract No. 632*, at 17 (May 19, 2017).

Importantly for this case, Mr. Howser stated that “as this spill ditch often has spill flow, shareholders need to order water only when there is no spill water present. What’s more, water intentionally let into this ditch for delivery is often charged to another head gate owned by the recipient to facilitate delivery recording, as seems to be the case for this parcel.” *Id.* (emphasis added). Therefore, Mr. Howser was unable to “provide daily delivery records for this parcel.” *Id.* He did, however, state that Mr. Duffin’s head gate showed an increase of 80 miner’s inches over normal for a week in July of 2016 which Mr. Howser states “would correspond to the amount

[he] suspect[s] is necessary to deliver 55 miner's inches to the pump in the N lateral spill, and would also correspond to a period of little or no operational spill at N lateral." *Id.* Therefore, there is no information concerning the specific amount of water diverted under the ASCC shares.³ Instead, there is merely WMIS data for ground water diversions. *See Stipulation* ¶ 26. Without the corresponding surface water diversion data, it would be premature at best to elevate 35-7667 to a primary water right. This information was sufficient for the Water Supply Bank to conclude in 2016 that water right 35-7667 was a supplemental water right and condition it appropriately.

The supplemental nature of the water right is further corroborated by a previous transfer: Transfer No. 80538. In that transfer, the applicants Jeffrey and Chana Duffin proposed to move a portion of water right 35-7667 to a new place of use and add a new point of diversion. *Transfer No. 80538*, at 2 (Nov. 25, 2015). Through that transfer the Applicants only moved 0.2 cfs and 40 acre-feet, to irrigate 10 acres. *Transfer No. 80538*, at 3. The proposed place of use, unlike the property in this case, "also receive[d] water from the Aberdeen-Springfield Canal Company." *Id.* at 4.⁴ The Applicants considered water right 35-7667 to be a supplemental water right by ensuring that the proposed place of use was served by a similar surface water right to avoid an enlargement of the ground water right. It is only now that the Applicants are claiming that the ground water right is primary and does not need to be restricted to a supplemental use on property already serviced by surface water. Again, the current position is contrary to the history of the water right's development, the previous conditioning of the WSB, and how the Applicants

³ "Insufficient data will be grounds to reject the application because the department will not be able to ascertain if the right will be enlarged." *IDWR Transfer Processing Memorandum No. 24*, at 29.

⁴ "[T]he place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right at a different place of use without, by definition, enlarging the original right or the supplemental right proposed for transfer, so long as the primary rights at the original and proposed places of use provide comparable water supplies." *IDWR Transfer Processing Memorandum No. 24*, at 28.

themselves have treated the same right in the past. All of these facts demonstrate that 35-7667 is clearly supplemental to the ASCC shares.

Allowing the right to be transferred off the current place of use to be used on new lands without appurtenant surface water shares constitutes an unlawful enlargement of the supplemental right. See *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996); *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 419, 18 P.3d 219, 224 (2001). "An enlargement may include such events as an increase in the number of acres irrigated under an original water right." *A & B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist.*, 141 Idaho 746, 751, 118 P.3d 78, 83 (2005) (citing *Id.*). Under the original water rights, the primary 60 ASCC shares, and the secondary ground water right 35-7667, only 60-acres were authorized for irrigation. If IDWR approves the present transfer, the current 60-acres will be irrigated with the sixty ASCC shares, and an additional 55-acres will be irrigated under the proposed place of use nearly doubling the number of irrigated acres than was previously irrigated.

As such, IDWR must deny any transfer application that would enlarge the use of a water right, or alternatively must adequately condition the transferred right to ensure compliance with or mitigate for the supplemental water right's restricted use. Therefore, the Transfer Application, as presented, must be denied.

II. IDWR Should Deny Application 83160 as it is Contrary to Conservation of Water Resources under I.C. § 42-222(1).

For any application for transfer, the Department must consider whether the proposed use of water is a beneficial use consistent with the conservation of water resources within the State of Idaho. Under IDWR's Transfer Memorandum, the Department must consider whether the proposed transfer would be compatible with the objectives and policies of the State Water Plan

(“SWP”) pertaining to beneficial use and conservation of water resources. As part of the SWP, Idaho’s first comprehensive aquifer management plan (CAMP) was developed for the Eastern Snake River Plain Aquifer (“ESPA”). The ESPA CAMP was adopted by both the Idaho Water Resource Board and the Idaho Legislature. The plan implements a phased approach to achieve a designated water budget change through a mix of management actions including ground-to-surface water conversions. *State Water Plan*, at 18. One of the main objectives of the SWP is water management, which seeks to encourage integrated, coordinated, and adaptable water resource management and the prudent stewardship of water resources across the Eastern Snake Plain. *Id.* at 6.

An application which seeks to promote a supplemental ground water right within the ESPA to a primary water right, and then transfer the ground water to new acres while continuing to completely irrigate the current place of use with surface water and doubling the total irrigated acres violates CAMP and the State Water Plan.

By increasing the consumptive use of water, the Application contradicts the objectives of the SWP and the conservation of water resources in the State of Idaho. Therefore, the Hearing Officer should deny the Transfer Application for failing to meet the criteria contained in I.C. § 42-222(1).

III. IDWR Should Deny Application 83160 as it is Contrary to the Local Public Interest in Idaho Code § 42-222(1).

The public policy of the State of Idaho concerning the use of ground water for irrigation is set forth in various code provisions. For example, Idaho Code § 42-231 states: “It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things

reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.”

IDWR has a responsibility to weigh such compliance when reviewing water right transfer applications under I.C. § 42-222(1). IDWR must “examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided...the change...is in the local public interest as defined in section 42-202B, Idaho Code.” I.C. § 42-222(1) (emphasis added). ‘Local public interest’ is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” I.C. § 42-202B(3). Idaho Courts have determined that by adopting the general phrase “local public interest,” the legislature “intended to include *any locally important* factor impacted by the proposed appropriations.” *Chisholm v. Idaho Dep’t of Water Res.*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005) (quoting *Shokal v. Dunn*, 109 Idaho 330, 338-39, 707 P.2d 441, 449-50 (1985)). “‘Local public interest’ should be read broadly so as to secure the greatest possible benefit.” *Id.* “Factors of the local public interest carry different weight depending on the specific circumstances and interests involved, and both the benefits and detriments must be considered.” *Id.*

The statute authorizes evaluation of “the effects of [the proposed] use on the public water resource.” *N. Snake Ground Water Dist. v. Idaho Dep’t of Water Res.*, 160 Idaho 518, 524, 376 P.3d 722, 728 (2016) (citing I.C. § 42-202B(3)). However, when determining whether the application conflicts with the local public interest, the Director will consider the following, “along with any other factors he finds to be appropriate,”: (i) The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short

and long term, and the stability of revenue and employment gains; (ii) the effect the project will have on recreation fish and wildlife resources in the local area affected by the proposed use; and (iii) an application which the Director determines will conflict with the local public interest will be denied unless the Director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest.” IDAPA 37.03.08.045.01.e.

That being said, these “elements of the public interest are not intended to be a comprehensive list.” *Shokal v. Dunn*, 109 Idaho 330, 338, 707 P.2d 441, 449 (1985). The “relevant elements and their relative weights will vary with local needs, circumstances, and interests.” *Shokal*, 109 Idaho at 339, 707 P.2 at 450. IDWR has previously weighed criteria such as fish and wildlife habitat, aquatic life, recreation, aesthetics, transportation and navigation values, water quality, proposed benefit to the applicant, the economic effect, assuring minimum stream flows, discouraging waste, encouraging conservation, and compliance with planning and zoning ordinances. See Amber L. Weeks, Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest in Response to the Statutory Silence of Water Codes, 50 Nat. Resources J. 255, 275 (2010). Importantly, “it is not [the] protestant’s burden of proof to establish that the project is not in the local public interest. The burden of proof is upon the applicant to show that the project is either in the local public interest or that there are factors that overweigh the local public interest in favor of the project.” *Id.*

Under the Transfer Processing Memorandum No. 24 “when there are one or more significant questions about whether a particular transfer would be in the local public interest, additional information from the applicant or comments from other state or local governmental entities that have germane expertise on local public interest issues must be sought.” *IDWR*

Transfer Processing No. 24, at 33 (Dec. 21, 2009) (emphasis added). “Whether the proposed transfer would be compatible with the objectives and policies of the State Water Plan pertaining to the local public interest.” *Id.* at 34. “Whether the proposed transfer would comply with local government and state government...policies affecting the public water resource.” *Id.*

Under the broad interpretation of local public interest, applications that result in an enlargement and do not conserve the water resources of the state of Idaho are contrary to the local public interest in sustaining the ESPA. As proposed, the Transfer Application seeks to promote a supplemental ground water right to a primary right and expand the number of acres irrigated under the current rights by nearly double. The Applicants have allegedly increased the quantity of surface water diverted in the past few years, and are now intending a full conversion of ground water to surface water for the current place of use with no reduction in the amount of actual diversion of ground water. Such an action violates the local public interest as it would increase the consumptive use of water within the Eastern Snake Plain.

Furthermore, the Transfer Application is within the ESPA moratorium area. Because this area had experienced “consecutive years of drought” with the “residual effects of the drought...evident in ground water levels, spring flows and anticipated stream flows,” the Director of IDWR issued a moratorium on new consumptive uses of groundwater within the ESPA in 1993. *Amended Moratorium Order*, ¶ 2 (April 30, 1993). In that Order, the Director noted “[g]round water aquifers have become stressed by the reduction in natural recharge due to changes in diversion and use of surface waters throughout the basin and by the increase volume of pumping occurring to augment scarce surface water supplies.” *Id.* ¶ 3. Because the chronic drought and increased depletion of ground water, the Director issued a moratorium on issuance of permits to divert and use ground water from the ESPA and tributary drainages in order to

“protect existing water rights.” *Id.* ¶ 5. The practical impact of this Transfer Application would be to nearly double the consumptive use under the current rights without mitigating the added strain on the already drought-ridden ESPA. The resulting enlargement directly conflicts with the plain language of the *ESPA Moratorium Order*. Under the broad interpretation of the local public interest, any application that increases the stress to the over-appropriated ESPA is contrary to a direct Order from the Director of IDWR cannot be allowed. It is the Director’s duty to “control the appropriation and use of the ground water of this state...and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources.” I.C. § 42-231. This Transfer Application would undoubtedly increase the volume of water used under the current water rights.⁵ Because this Application would fly in the face of the *Moratorium Order* and cause the harm protected against therein, it is not in the public interest and should be denied.

There is no showing or allegation by the Applicants that the Transfer Application is in the local public interest. In fact, the undisputed evidence shows just the opposite. Approving this application constitutes an unlawful enlargement of a supplemental ground water right in violation of I.C. § 42-222(1). Such a violation cannot be in the local public interest as a matter of law. The Hearing Officer should deny the Transfer Application for failing to satisfy the requirements of 42-222(1).

CONCLUSION

The Hearing Officer requested briefing on whether the Transfer Application satisfies the requirements of I.C. 42-222(1). Based on precedent, and a plain language interpretation of the statutes, Idaho Code § 42-222 would prohibit the approval of a transfer that would result in an

⁵ Approving the application in contradiction to the Moratorium Order is similarly in violation of I.C. § 42-222(1)’s ‘conservation of water resources’ requirement.

enlargement of existing water rights. If the Applicants' Application is approved, it would result in nearly doubling the number of acres currently being irrigated and would increase the amount of water being diverted and consumed for irrigation.

The Water Supply Bank, the historical context, and the Applicants themselves have all treated 35-7667 as a supplemental right. Allowing the ground water right to be transferred and used as a primary right would result in an enlargement of the right, does not conserve the water resources of the State of Idaho, and is not in the local public interest as required under I.C. § 42-222(1).

For the above reasons the Coalition respectfully requests the Hearing Officer to deny the application.

DATED this 17th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2020, I served a true and correct copy of the foregoing *Surface Water Coalition's Brief on Questions of Law* on the following by the method indicated:

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