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

IN THE MATTER OF APPLICATIONS FOR TRANSFER 83471, 83915 AND 83918 IN THE NAME OF ROCKY MOUNTAIN WATER EXCHANGE	**APPLICANT'S ARGUMENT BRIEF**

Applicant Rocky Mountain Water Exchange, LLC ("Applicant" or "RMWE"), by and through its attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby files *Applicant's Argument Brief*. This brief is also supported by the *Declaration of Robert L. Harris in Support of Applicant's Argument Brief* submitted contemporaneously herewith (the "*Harris Declaration*"). RMWE filed applications for transfer nos. 83471, 83915, and 83918 to move ground water rights to the Jefferson Greens Estates subdivision at the request of the Jefferson Greens Estates Homeowners Association, Inc. to resolve an unauthorized ground water use situation. 83471, 83915, and 83918 (the "Transfers") were each protested by the A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, and Minidoka Irrigation District, a collective group of large canal companies and irrigation districts self-referred to as the Surface Water

Coalition (the "Coalition").

IDAPA 37.01.01 "contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of Idaho." Rule 001.02.[1] The above-entitled matter consolidating the Transfers is a contested case before the Idaho Department of Water Resources ("IDWR" or "Department"). Rule 564 permits the Hearing Officer to request briefs from the parties to a contested case setting forth arguments and positions on any questions of law in the case.

This brief is being submitted in accordance with the *Notice of Hearing, Scheduling Order, and Request for Argument Briefs* to address questions of law arising from the consolidated contested cases for the Transfers. After counsel for both the Applicant and the Coalition submitted proposed questions on these questions of law, Hearing Officer James Cefalo (the "Hearing Officer") requested a brief addressing the following questions:

> 1. Does Idaho Code § 42-222 prohibit the approval of a transfer which would result in a water user violating the approval conditions of a separate water right?
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> 2. If Applications 83471, 83915 and 83918 were approved, would the approval cause Jefferson Greens Estates Subdivision to be in violation of Condition No. 3 of water right 25-14162, which states: "Irrigation water for lawns, gardens, landscaping, and common areas is provided by a separate pressurized surface water system with appurtenant canal shares of the North Rigby Irrigation Canal Company, Inc. (Stock Certificate No. 216, issued on 8/24/2000)."?
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> 3. Do the conditions of water rights 01-7017 and 35-7720 require the water right holder to use surface water right 01-7017 as a primary source or water and ground water right 35-7720 as a supplemental source of water?
>
> 4. Do Idaho Code §§ 31-3805 or 67-6537 prohibit or constrain the approval of Applications 83471, 83915 and 83918?

[1] Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

I. APPLICABLE LEGAL STANDARDS.

A. Statutory Interpretation.

Questions 1 and 4 illicit responses to questions that invoke questions of statutory interpretation of certain Idaho statutes. In a decision issued within the past month, the Idaho Supreme Court issued an opinion that describes very well the standards and principles for interpreting a statute (in that case, Idaho Code § 32-719) which standards and principles are applicable here:

> The interpretation of a statute is a question of law this Court reviews de novo." *State v. Smalley,* 164 Idaho 780, 783, 435 P.3d 1100, 1103 (2019).
>
> > The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.
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> *State v. Dunlap,* 155 Idaho 345, 361-62, 313 P.3d 1, 17-18 (2013).
>
> On the other hand, "if the statute is ambiguous, this Court must engage in statutory construction to ascertain legislative intent and give effect to that intent." *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cty.,* 159 Idaho 84, 87, 356 P.3d 377, 380 (2015). However, the courts "are not free to rewrite a statute under the guise of statutory construction." *State v. Doe,* 147 Idaho 326, 329, 208 P.3d 730, 733 (2009).
>
> > To ascertain the legislature's intent, this Court examines the literal words of the statute, the context of those words, the public policy behind the statute, and the statute's legislative history. [*State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1999)]. Courts must construe a statute "under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *City of Sandpoint v. Sandpoint Indep. Highway Dist.,* 126 Idaho 145, 150, 879 P.2d 1078, 1083

> (1994). Finally, Idaho has recognized the rule of *expressio unius est exclusio alterius*—"where a constitution or statute specifies certain things, the designation of such things excludes all others." *Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene,* 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978).

Saint Alphonsus Reg'l Med. Ctr., 159 Idaho at 87, 356 P.3d at 380.

> "When the meaning of a statute is unclear, resort may be had to the legislative titles and statutory headings to aid in ascertaining legislative intent." *Burch v. Hearn,* 116 Idaho 956, 957, 782 P.2d 1238, 1239 (1989). However, "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.,* 331 U.S. 519, 528-29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). "For interpretive purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." *Id.* at 529, 67 S.Ct. 1387. Additionally, statutes relating to the same subject matter—or those that are *in pari materia*—must be construed together. *In re Adoption of Doe,* 156 Idaho 345, 350, 326 P.3d 347, 352 (2014). Accordingly, sometimes "[a] reading of the provision in the context of the entire chapter is [ ] enlightening." *New Phase Inv., LLC v. Jarvis,* 153 Idaho 207, 210, 280 P.3d 710, 713 (2012).

Nelson v. Evans, Docket No. 47069, at 6-7 (May 21, 2020).

When statutory interpretation by an administrative agency is involved, Idaho law describes how the appropriate level of deference to that administrative agency interpretation is determined:

> The Idaho Supreme Court has clarified that while conclusions of law are freely reviewable, in an appeal of agency actions, a four-prong test must be applied to determine the appropriate level of deference to be given to an agency construction of a statute. *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 571, 21 P.3d 890, 893 (2001). If the four-prong test is met, then courts must give considerable weight to the agency's interpretation of the statute. *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998). The Court must first determine if the agency has been entrusted with the responsibility of administering the statute at issue. *Hamilton*, 135 Idaho at 571, 21 P.3d at 893. Second, the agency's statutory construction must be reasonable. Third, the Court must determine that the statutory language at issue does not expressly treat the precise question at issue. Finally, the fourth prong requires the Court to make a determination of whether any of the rationales underlying the rule of deference are present. *Id.*

Herrmann v. State, 162 Idaho 682, 685, 403 P.3d 318, 321 (Ct. App. 2017). The fourth prong of the above-described test has been further elaborated upon:

> The fourth prong requires the court to look for the rationales underlying deference. The rationales to be considered include:
>
> > (1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation.
>
> *Preston v. Idaho State Tax Comm'n,* 131 Idaho 502, 505, 960 P.2d 185, 188 (1998). "If the underlying rationales are absent then their absence may present 'cogent reasons' justifying the court in adopting a statutory construction which differs from that of the agency." *J.R. Simplot Co.,* 120 Idaho at 862, 820 P.2d at 1219. When only some of the rationales are present, the court must balance the supporting rationales, as all are not weighted equally. *Id.* at 862, 820 P.2d at 1219. "If one or more of the rationales underlying the rule are present, and no 'cogent reason' exists for denying the agency some deference, the court should afford 'considerable weight' to the agency's statutory interpretation." *Id.* at 862, 820 P.2d at 1219.

Canty v. Idaho State Tax Com'n, 138 Idaho 178, 184, 59 P.3d 983, 989 (Idaho 2002).

B. Water Right Interpretation.

Questions 2 and 3 illicit responses to questions that invoke questions of water right interpretation. Of the three water rights in the Hearing Officer's questions, two of them—01-7017 and 35-7720—received decrees in the Snake River Basin Adjudication, while the third water right (25-14162) was obtained through the statutory permitting process. While a decreed water right has been judicially verified, a licensed water right has been validated by IDWR and is a perfected water right. Idaho Code § 42-220 provides that the legal rights in water rights granted by license and by court decree are the same:

> **Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right**; and all rights to water confirmed under the provisions of this chapter, **or by any decree of court**, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is

> granted. . . . provided, that when water is used for irrigation, **no such license or decree of the court** allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown **to the satisfaction of the department of water resources in granting such license, and to the court in making such decree**, that a greater amount is necessary, and **neither such licensee nor any one claiming a right under such decree**, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, . . .

Idaho Code § 42-220 (emphasis added). Accordingly, "[e]xcept for clerical errors, or licenses that include a term limit or a condition authorizing subsequent review, the Department does not have authority to reconsider the elements of a license after the appeal period has passed." *In the Matter of Application for Transfer No. 82640 in The Name of Clinton K. Aston*, Amended Preliminary Order Approving Transfer at 14 (October 29, 2019).

Because licensed and decreed water rights have the same legal effect, the principles of interpretation for SRBA partial decrees are the same for interpreting water right licenses. "The Snake River Basin Adjudication ('SRBA') was commenced by order dated November 19, 1987." *Hagerman*, 130 Idaho at 729, 947 P.2d at 402. The SRBA was a "general stream adjudication ... where thousands of claims and potential parties are involved" to adjudicate all of the water rights in the Snake River Basin throughout Idaho. *In Re SRBA Case No. 39576 Subase No. 37-00864*, 164 Idaho 241, 244, 429 P.3d 129, 132 (2018). The partial decrees issued in the SRBA in relation to individual water rights are final orders of the Court, not subject to subsequent collateral attack. In the case of *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 155, 408 P.3d 899, 910 (2018), the Idaho Supreme Court explained:

> Absent BCID undertaking appropriate proceedings to set aside a final judgment under Idaho Rule of Civil Procedure 60(b), we emphasize that the decrees are conclusive and final, which comports our general reluctance to allow already-decreed water rights to be relitigated. *See, e.g., City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017) ("Furthermore, it is equally clear from the plain language of the decree that recharge is not listed as an authorized use

> under the purpose of use element of 181C. Claiming, at this stage, that recharge is an authorized use of 181C, is nothing more than an impermissible collateral attack...."); *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016) ("Allowing IGWA to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process."); *Rangen*, 159 Idaho at 806, 367 P.3d at 201 ("Any interpretation of Rangen's partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself."); *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) ("Finality in water rights is essential."). Finality is for good reason, especially in water law; otherwise, the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures. *See* Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 56 (2016).

In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532, 163 Idaho at 155, 408 P.3d at 910.

The Idaho Supreme Court has described the appropriate process of interpreting water right partial decrees:

> When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. [*A&B Irr. Dist. v. Idaho Dep't of Water Res.*], 153 Idaho [500,] 523, 284 P.3d [225,] 248 [(2012)]. If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. *Cf. Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) ("If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own words."). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf. Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 850, 367 P.3d 228, 245 (2016) ("Where terms of a contract are 'reasonably subject to differing interpretations, the language is ambiguous....'" (quoting *Clark v. Prudential Prop. and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003))). Whether ambiguity exists in a decree "is a question of law, over which this Court exercises free review." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)).
>
> Water rights are defined by elements. *See* I.C. §§ 42-1411(2); *see also City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012) ("The elements listed [in section 42-1411(2)] describe the basic elements of a water right."); *Olson v. Idaho Dep't of Water Res.*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). Idaho Code sections 42-1411(2) and 42-1411(3) comprise a list of elements that define a

> water right. Under Idaho Code section 42-1412(6), a water decree "shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable." ... Thus, a water decree must either contain a statement of [each element] or incorporate one, but not both. *Markel Int'l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 (2012) ("The word 'or' ... is '[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.' "); *In re Snook*, 94 Idaho 904, 906, 499 P.2d 1260, 1262 (1972) ("The word 'or' ... is given its normal disjunctive meaning that marks an alternative generally corresponding to 'either'....").

City of Blackfoot v. Spackman, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017) (footnote omitted).

When interpreting a contract or decree, courts and administrative hearing officers must begin with the document's language and determine whether it is ambiguous. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 454, 259 P.3d 595, 600 (2011). "Whether an ambiguity exists in a legal instrument is a question of law." *Id.* at 455, 259 P.3d at 601. To determine whether ambiguity exists, tribunals must solely "begin[] with the document's language." *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). From that legal determination:

> In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical.

Knipe Land Co., 151 Idaho at 454-55, 259 P.3d at 600-01 (quoting *Potlatch Education Ass'n*, 148 Idaho at 633, 226 P.3d at 1280 and omitting internal citations and quotations).

Blackfoot developed the law of interpreting water right partial decrees by specifically noting that because a water right decree "shall contain or incorporate a statement of each element of [the] water right," is cannot do both; it "must either contain a statement of [each element] or incorporate one, but not both." *Blackfoot*, 162 Idaho at _____, 396 P.3d at 1188-89. (citations

omitted). The *Blackfoot* decision strongly indicates that there cannot be implied water right conditions or a case of implied incorporation of a document into a water right decree. *See id.* Thus, a water right decree is, in effect, an integrated contract, *i.e.*, a merged document that is the "complete and exclusive statement of the terms of the contract." *Anderson & Nafziger v. G. T. Newcomb, Inc.*, 100 Idaho 175, 180, 595 P.2d 709, 714 (1979) (citation omitted). An integrated document is subject to the parol evidence rule. *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). This means that "extrinsic evidence of prior or contemporaneous representations or negotiations are inadmissible to contradict, vary, alter, add to, or detract from the instrument's terms." *Kepler-Fleenor v. Fremont Cnty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012) (citation and internal quotation marks omitted).

Regarding ambiguities, the Idaho Supreme Court has explained:

> "Ambiguities can be either patent or latent." *Swanson v. Beco Constr. Co., Inc.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). "Idaho courts look solely to the face of a written agreement to determine whether it is [patently] ambiguous." *Ward v. Puregro Co.*, 128 Idaho 366, 369, 913 P.2d 582, 585 (1996). "A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist." *In re Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995).

Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013). If there is an ambiguity—either patent or latent—the tribunal can look beyond the four corners of the document (here, the water right partial decrees and licenses) and determine the meaning of the language, which is a factual question. *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709, 720, 330 P.3d 1067, 1078 (2014) ("If a contract is ambiguous, its interpretation is a question of fact" (citation and internal quotation marks omitted)).

With all of the above said, both Judge Wildman of the SRBA and the Idaho Supreme Court have been extremely reluctant to find any ambiguity, uncertainty, or alternative meaning (either

patent or latent) within partial decrees issued by the SRBA. *See, e.g., Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 203 (2016) ("the name Martin–Curren Tunnel is not ambiguous and does not create a latent ambiguity in Rangen's partial decrees"); *United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 408 P.3d 52 (2017); *Memorandum Decision and Order on Challenges Final Order Disallowing Water Right Claims*, p. 5 (Twin Falls County, Fifth Jud. Dist. – SRBA, *In Re SRBA Case No. 39576, Subcase Nos. 65-23531 and 65-23532*, Oct. 7, 2016) *aff'd by Black Canyon Irrigation*, 163 Idaho 54, 408 P.3d 52; *Order Denying Petitioner's Second Motion for Reconsideration* and *Order Denying Motion to Amend Petition and Complaint* (Camas County, Fifth Jud. Dist., *Cash v. Cash et al.*, Jan. 12, 2018). Judge Wildman has explained that "[i]t would constitute a serious turmoil and confusion for this Court to issue partial decrees [on the late claims,] which contradict the precise language, intent and effect of that final judgment [i.e., the prior partial decrees]." *Memorandum Decision and Order on Challenges Final Order Disallowing Water Right Claims*, p. 5 (Twin Falls County, Fifth Jud. Dist. – *SRBA, In Re SRBA Case No. 39576, Subcase Nos. 65-23531 and 65-23532*, Oct. 7, 2016). For that reason, the court concluded "that the late claims were extinguished by operation of the plain language of the [prior] final judgment. To find otherwise would offend the plain language of the final judgment and result in contradictory court decrees." *Id.*

Conditions contained in a water right are recognized as further description or limitiation on the elements of the water right. For permits, Idaho Code § 42-203A(5) allows the Director to "grant a permit upon conditions." The perfected permit is then licensed pursuant to Idaho Code § 42-219 wherein the license issued must bear "the number of the permit under which the works from which such water is taken were constructed." Such license must therefore incorporate any permit conditions which are part and parcel to the description of how the water right can be used,

and in some instances, additional conditions can also be added to the license as necessary. *See Idaho Power Co. v. Idaho Dep't of Water Res.* (In Re Licensed Water Right No. 03-7018), 151 Idaho 266, 255 P.3d 1152 (2011) (Department had authority to include a term condition in Idaho Power's license, even though such a condition was not included in the original permit). As a result of including these conditions in a license, "[s]uch license **shall be binding upon the state** as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right[.]" Idaho Code § 42-220 (emphasis added).

The binding effect of conditions in a water right license remains unchanged in the formal adjudication of a water right license. With claims submitted in an adjudication (such as the SRBA), the claim form requires inclusion of "conditions of the exercise of any water right included in any decree, license, approved transfer application or other document," Idaho Code § 42-1409(j), the report of the Director requires inclusion of the same conditions, Idaho Code § 42-1411(2)(j), and the final step of the adjudication process—issuance of the partial decree—is required to "contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code." Idaho Code § 42-1412(6). In other words, if conditions limiting the exercise of a water right exist, they must be expressly included in the adjudication claim to be expressly contained in the water right decree.

In addition, however, some conditions contained within water rights are for descriptive or other informational purposes only and are not directives or further limitations on the basic water right elements directed to the water right owner unless such conditions contain the word "shall". The Idaho Supreme Court specifically addressed this situation in *Telford Lands LLC v. Cain*, 154 Idaho 981, 988–89, 303 P.3d 1237, 1244–45 (2013) (with emphasis added):

> In connection with this assignment of error, the Cains also argue that the district court ignored conditions placed on the water rights of Telford Lands and

PU Ranch that required them to transport the water from their two wells by means of the Moore Canal. In opposition to the Ranchers' motion for partial summary judgment, the Cains attached to their memorandum water right reports printed from the website of the Idaho Department of Water Resources. With respect to Telford Lands, the reports included as one of the conditions of approval the statement, "Water delivered through the Moore Diversion and Timberdome Canal." The PU Ranch water right report included a statement, "No more than 2.90 cfs or 435 acre feet per annum shall be injected into the Moore Canal." The Cains argued that this showed there was an existing means for Telford Lands to transport water from its well. In response, the Ranchers presented the affidavit Ernest Carlsen, who had been a 33–year employee of the Department. He stated that the Department uses the word " shall" when requiring the water right holder to do or not to do something and that it "will sometimes include remarks in a transfer approval that are added for explanatory purposes only, generally to provide information to the state-employed water master to aid in on the ground delivery of water diverted under the water right." He then averred that the statement regarding the use of the Moore and Timberdome Canals did not use the word "shall" and so did not require that the water be delivered through those canals, but rather "it informs the watermaster that as of the date of the transfer approval, water actually is delivered through the Moore and Timberdome Canals." The Ranchers also filed the affidavit of James Cefalo, the Water Resources Program Manager for the Department's eastern regional office, who stated that Ernest Carlson's affidavit is consistent with the Department's current policy. In its decision granting the Rancher's motion for partial summary judgment as to their condemnation claim, the district court wrote that "identification of a delivery system in a permit, license, transfer application or other similar document is for descriptive purposes only and has no binding effect for purposes of the pending motions."

The Cains filed a motion for reconsideration, in which they argued, among other things, "It is not the province of this court to render a nullity the conditions that have been legitimately imposed by an administrative agency of the State of Idaho." They relied for their argument upon the affidavit of Dr. Charles E. Brockway, who stated that in addition to the elements of water rights listed in Idaho Code section 42–1411(2), "the rights themselves also contain additional conditions of approval and sometimes remarks relative to each of these water rights" and that "[t]he additional conditions of approval further explain and define the water rights and provide direction to the Watermaster for administration of the right." Notably lacking from Dr. Brockway's carefully crafted affidavit was any assertion that the specific statements at issue were mandatory requirements for exercising the water rights. **He did not mention or refer to those statements in his affidavit. The district court did not err in holding that these statements were not mandatory requirements for exercising the water rights.**

With the foregoing in mind, the Applicant's position on each of the Hearing Officer's questions is addressed in turn below.

II. ARGUMENT.

A. Does Idaho Code § 42-222 prohibit the approval of a transfer which would result in a water user violating the approval conditions of a separate water right?

When faced with a transfer application, Idaho Code § 42-222 provides the Department (if there is no protest) or the Hearing Officer (if there is a protest) with three options: (1) approve the transfer; (2) deny the transfer; or (3) approve the transfer with conditions. The specific language from this statute outlining these options is emphasized here:

> The director of the department of water resources shall examine all the evidence and available information and **shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby**, 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 is in the local public interest as defined in section 42-202B, Idaho Code, the change will not 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, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

The plain language of this statute allows the Department to approve a transfer upon conditions, which may include removal or modification of a condition of an existing water right provided that such removal or modification does not injure other water rights or conflict with other water rights, result in an enlargement, or cause violation of the other criteria in Idaho Code § 42-222. The Department has prepared and issued documentation describing its interpretation of Idaho Code § 42-222 consistent with this preceding sentence in its *Administrator's Memorandum, Transfer Processing No. 24*, dated December 21, 2009 (*available at* https://idwr.idaho.gov/files/water-rights/transfer-process-24-transfer-processing-policies-and-procedures.pdf) (hereinafter the "Transfer Memo"). The opening sentence of the Transfer Memo provides that "[t]he purpose of this memorandum is to provide policy guidance for processing

applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, and other applicable law." Transfer Memo at 1.

Relative to conditions contained in a water right, the Transfer Memo provides the following:

> Changes to Elements of a Water Right. An application for transfer is required if a proposed change would alter any of the four elements of the water right listed above that can be changed pursuant to Section 42-222, *Idaho Code*, as recorded with the department or by decree. Conditions or other provisions of a water right may further define or limit a recorded element of a water right; an application for transfer is required for a proposed change that could alter such a condition. For example, a proposed change of use under a water right for an industrial use, which includes a condition limiting the quantity of water that can be consumptively used, to a different industrial use that would increase the quantity of water that would be consumptively used can not be made unless enlargement is prevented.
>
> If a proposed change has the potential to injure other rights or the potential to enlarge the right, even when there would be no change in any of the recorded elements of the right, an application for transfer should be filed to provide for evaluation of injury and enlargement issues before the change is made. For example, if the point of diversion from a fully appropriated creek is proposed to be moved where additional water would be available for diversion or if the proposed point of diversion as changed would move upstream of the points of diversion for other rights, the change can not be made unless other conditions are imposed, such as mitigation, to prevent injury.

Transfer Memo at 2. The Transfer Memo additionally provides:

> Correction of Errors. An application for transfer may also be required to correct errors in licenses or decrees. For example, a transfer application may be required to correct the location of the place of use of a water right decreed by a court if the decree is later determined to be in error. However, a transfer action is not always required to correct such errors. For example, if a water right claim is determined to be in error, the claim can be amended to correct the error. Similarly, some clerical errors in a license or decree may be corrected by issuance of an amended license or decree (by the jurisdictional court) without using the transfer process. Also, a change to a description of the location of the place of use or point of diversion, as used by the department for administration of water rights, resulting from improved methodology does not require an application for transfer, as described below. In addition, conditions that are no longer applicable may be modified or removed from a license without a transfer, provided other rights are not materially affected. For decrees, conditions that are no longer applicable should be noted in comments on the department's electronic record for the right. However, a change to any element of a decreed water right requires filing an application for transfer, unless the appropriate court makes the change by amending the decree.

Transfer Memo at 3.

Most critically for purposes of Applicant's response to the first question, the Transfer Memo provides as follows:

> supply). In addition, the application must include a separate list of associated water rights or water supply proposed to be used in the same system or at a new place of use. If the associated water rights or water supply are not owned by the applicant and changes to conditions
>
> for those rights are necessary, documentation must be submitted confirming that the applicant has the legal authority to make such changes on behalf of the current owner of the other rights.
>
> Changes to conditions or remarks for associated water rights that are necessary as a result of an approved transfer and that do not affect the rights of other persons or entities can be made without a separate transfer application or process. Such changes usually result from a division in ownership and should be included in the transfer approval document.
>
> . . .
>
> (4) Conditions on Associated Rights. If an application for transfer proposes a change from or to a system where there is an associated water right that is not listed on the application as a right being transferred, a change to conditions for that right is required (other than changes to conditions resulting from an ownership split), and that right is not owned by the applicant, then the applicant must provide documentation authorizing the change on behalf of the current owner of the associated right.

Transfer Memo at 8-9, 20. As stated, "**changes to conditions or remarks for associated water rights** that are necessary as a result of an approved transfer and that do not affect the rights of other persons or entities **can be made without a separate transfer application or process**." (emphasis added).

Where the Transfer Memo is an interpretation of Idaho Code § 42-222, the above statutory interpretation is entitled to "considerable weight" because IDWR meets all of the prongs of the four-prong test applied to determine the appropriate level of deference to be given to an agency construction of a statute. *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 571, 21 P.3d 890, 893 (2001).

First, IDWR is the agency that has been entrusted with the responsibility of administering the statute at issue. *Hamilton*, 135 Idaho at 571, 21 P.3d at 893. Second, IDWR's statutory construction is reasonable because the statute allows a transfer to be approved with conditions. Third, the statutory language does not expressly treat the precise question at issue—in other words, Idaho Code § 42-222 does not specifically describe alteration or removal of conditions of an associated water right implicated in the movement or amendment of a water right.

The fourth prong looks at the rationales underlying deference, including that of repose. *Id.* This focuses on whether others have relied upon the Department's interpretation. Water users have relied upon the Department's interpretation contained in the Transfer Memo. In *State v. Hagerman Right Owners, Inc.*, the Idaho Supreme Court concluded that "[c]ase law and the record in this case show that the general public did indeed understand and depend upon the prior IDWR interpretation, policy and practice that partial forfeiture is a recognized concept in Idaho. . . The Court declines to 'unsettle the repose of all those who have detrimentally relied on . . . agency interpretations,' and will accord IDWR's interpretation deference in this case." *Hagerman*, 130 Idaho at 734, 947 P.2d at 407.

Similarly, here, for example, IDWR has previously approved an unprotested transfer of a separate water right (25-14478 under Transfer No. 83262) to the Jefferson Greens Subdivision despite the existence of Condition No. 3 in 25-14162. As stated above, the Transfer Memo provides that "[r]egardless of whether or not an application is protested, Section 42-222, Idaho Code, requires the department to evaluate [the Idaho Code § 42-222 criteria]." Transfer Memo at 1. For these reasons, the Hearing Officer should likewise not unsettle the expectations of those that have relied upon IDWR's interpretation of Idaho Code § 42-222 as described in the Transfer

Memo.

When performing this deference analysis, "If the four-prong test is met, then courts must give **considerable weight to the agency's interpretation of the statute**." *Herrmann v. State*, 162 Idaho 682, 685, 403 P.3d 318, 321 (Ct. App. 2017) (citing *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998)). The guidance outlined in the Transfer Memo is therefore entitled to "considerable weight."

While the first of the Hearing Officer's questions is broad and general, it appears that it is being asked because of the specific situation with the Transfers which propose to move ground water rights to property that has an associated domestic-only (non-irrigation) water right owned by the subdivision homeowner's association (25-14162) that contains a non-mandatory, informational condition explaining the source of the irrigation water for the subdivision (canal water from the North Rigby Irrigation Canal Company, Inc.). However, because the condition at issue in 25-14162 does not contain the word "shall," it contains no mandatory requirement that a transfer approval could violate. See *Telford Lands LLC v. Cain*, 154 Idaho 981, 989, 303 P.3d 1237, 1245 (2013) ("The district court did not err in holding that these statements were not mandatory requirements for exercising the water rights."). This is discussed in further detail below under the second question.

The Transfer Memo provides that "[r]egardless of whether or not an application is protested, Section 42-222, Idaho Code, requires the department to evaluate [the Idaho Code § 42-222 criteria]." Transfer Memo at 1. Because of this interpretation, the direct answer to the narrowly-framed question is that IDWR cannot approve a transfer that violates the conditions of an associated water right, **but** IDWR can approve the transfer as long as the review criteria of Idaho Code § 42-222 are met, which includes an analysis of injury to other water rights, and if all

criteria are met, then the allegedly contradictory condition could be revised or removed. Stated another way, if the approval of the transfer would render a condition of an associated water right unnecessary or contradictory to the change sought and approved in the transfer, the Transfer Memo provides that IDWR can remove or alter the condition without the need to file a separate transfer application: "Changes to conditions or remarks for associated water rights that are necessary as a result of an approved transfer and that do not affect the rights of other persons or entities can be made without a separate application or process." Transfer Memo at 9. In such a situation, the main question is whether "the rights of other persons or entities" would be affected by the change.

Specific to this contested case, and as further described below, the water rights of other persons or entities—including the Coalition—would not be affected by replacing canal water irrigation in a subdivision (where there was significant historical conflict with the surface water entity) with existing ground water rights where ground water irrigation will be dried up at the current place of use of use of the water right proposed to be transferred. While there could be remaining questions of fact as to whether the changes to the water rights described in the Transfers are appropriate based on such rights' historic diversions, for purposes of this legal question, the point is that approval of the Transfers will not result in increased impacts to the ESPA caused by the ground water pumping proposed in the Transfers. In fact, specific to Jefferson Greens, which is located just east of Highway 20 near Rigby, ground water pumping is beneficial to this area because of the high water table in this area. Attached at Exhibit 1 to the *Harris Declaration* is the well hydrograph for the period described on the hydrograph for a monitoring well located just a few miles west of Jefferson Greens as depicted on the map. Attached at Exhibits 2 and 3 are newspaper articles describing the subwater challenges faced by Jefferson County in constructing an annex next to its new courthouse, which is located just over one mile from the Jefferson Greens

subdivision. Accordingly, in addition to providing irrigation water, ground water pumping at Jefferson Greens aids in reducing high ground water levels to prevent the public nuisance of subwater flooding. In our view, ground water pumping at Jefferson Greens and cessation of pumping under the ground water rights described in the Transfers—which are closer to the Coalition members' service areas and Snake River reaches of concern to the Coalition—will be beneficial to the Coalition. Use of canal water for outside irrigation will cause an increase in ground water levels at the subdivision both because of reduced ground water pumping and because of incidental recharge from canal water irrigation. While not an issue contained in any of the Hearing Officer's questions, but which will be discussed at the hearing, there is a clear local public interest benefit to the residents of Jefferson Greens to reduce or eliminate the risk of subwater flooding by using ground water to control the local water table.

Based on the Department's interpretation of Idaho Code § 42-222 contained in the provisions of the Transfer Memo, the answer to the Hearing Officer's first question is "no," Idaho Code § 42-222 does not prohibit this, even if we assume that the condition addressed in the following section is determined to be a mandatory requirement for exercise of the domestic-only water right.

B. If Applications 83471, 83915 and 83918 were approved, would the approval cause Jefferson Greens Estates Subdivision to be in violation of Condition No. 3 of water right 25-14162, which states: "Irrigation water for lawns, gardens, landscaping, and common areas is provided by a separate pressurized surface water system with appurtenant canal shares of the North Rigby Irrigation Canal Company, Inc. (Stock Certificate No. 216, issues on 8/24/2000)."?

The direct answer to this question is "no," but not merely because of the Applicant's opinion. This precise question has already been decided by the Idaho Supreme Court in *Telford Lands LLC v. Cain*, 154 Idaho 981, 303 P.3d 1237 (2013). In this case, Cain argued that conditions contained in water rights at issue in that litigation "required" the right holders to divert water

through the Moore Canal. The conditions on the rights at issue provided, "[w]ater is delivered through the Moore Diversion and Timberdome Canal" and "[n]o more than 2.90 cfs or 435 acre feet per annum shall be injected into the Moore Canal." As described by IDWR employees through affidavits submitted in that proceeding:

> In response, the Ranchers presented the affidavit of Ernest Carlsen, who had been a 33–year employee of the Department. He stated that the Department uses the word " shall" when requiring the water right holder to do or not to do something and that it "will sometimes include remarks in a transfer approval that are added for explanatory purposes only, generally to provide information to the state-employed water master to aid in on the ground delivery of water diverted under the water right." He then averred that the statement regarding the use of the Moore and Timberdome Canals did not use the word "shall" and so did not require that the water be delivered through those canals, but rather "it informs the watermaster that as of the date of the transfer approval, water actually is delivered through the Moore and Timberdome Canals." The Ranchers also filed the affidavit of James Cefalo, the Water Resources Program Manager for the Department's eastern regional office, who stated that Ernest Carlson's affidavit is consistent with the Department's current policy. In its decision granting the Ranchers' motion for partial summary judgment as to their condemnation claim, the district court wrote that **"identification of a delivery system in a permit, license, transfer application or other similar document is for descriptive purposes only and has no binding effect for purposes of the pending motions."**

Telford Lands LLC v. Cain, 154 Idaho 981, 988–89, 303 P.3d 1237, 1244–45 (2013) (emphasis added). Cain furthered their arguments by arguing that "[i]t is not the province of this court to render a nullity the conditions that have been legitimately imposed by an administrative agency of the State of Idaho," and in an attempt to contradict Department employees, Cain relied upon the affidavit of Dr. Charles E. Brockway. The Idaho Supreme Court addressed this affidavit and argument as follows:

> Notably lacking from Dr. Brockway's carefully crafted affidavit was any assertion that the specific statements at issue were mandatory requirements for exercising the water rights. He did not mention or refer to those statements in his affidavit. **The district court did not err in holding that these statements were not mandatory requirements for exercising the water rights**.

Id.

Condition No. 3 of 25-14162 is just like the conditions in the *Cain* case—it is informational only. It does not limit the exercise of any of the basic water right elements of 25-14162—it only identifies a delivery system and explains that irrigation water for the subdivision homes "is provided by a separate pressurized surface water system." Just like the district court in the *Cain* case determined (which the Idaho Supreme Court upheld), "**identification of a delivery system** in a permit, license, transfer application or other similar document **is for descriptive purposes only** and has no binding effect for purposes of the pending motions." (emphasis added). Consistent with *Cain*, "these statements [in Condition No. 3 are] are not mandatory requirements for exercising the water rights."

Because Condition No. 3 is for informational purposes only, and is not mandatory, it cannot be "violated." Additional evidence that the Transfers will not "violate" Condition No. 3 is that IDWR has previously approved the unprotested transfer of a separate water right (25-14478 under Transfer No. 83262) to Jefferson Greens. As stated above, the Transfer Memo provides that "[r]egardless of whether or not an application is protested, Section 42-222, Idaho Code, requires the department to evaluate [the Idaho Code § 42-222 criteria]." Transfer Memo at 1. If the Transfers are approved, then Condition No. 3 will likely need to be updated to provide that outside irrigation occurs under 25-14478 and the ground water rights moved to the property.

The Idaho Supreme Court's interpretation of the informational condition in the *Cain* case is consistent with the water right interpretation principles articulated in the *City of Blackfoot* case, which is to interpret the water right based on contractual principles. Condition No. 3 is clear on its face, and for that reason, there is no need to resort to examination of parol evidence to properly interpret this condition. However, in the event the Hearing Officer finds ambiguity, examination

of parol evidence associated with resolution of the protests to 25-14162 does not change the interpretation of Condition No. 3 as an informational condition.

Attached at Exhibit 4 to the *Harris Declaration* is the *Stipulation to Resolve Protest* (the "Stipulation") associated with 25-14162 submitted in April of 2005. As described in this document, the original application for 25-14162 was for the diversion of 1.46 cfs for 130 homes, and it included the right to divert ground water "for a consumptive use, including for landscaping, lawns, and relevant common areas within the development." Stipulation at 1. The Stipulation continues: "Accordingly, the [Coalition] protested the application on February 7, 2005, for various reasons, including the Applicant's failure to mitigate for the depletion to the ESPA, and resulting impact to the Snake River." *Id.* at 1-2.

The parties resolved the contested case "on the basis that the Applicant no longer seeks the diversion rate and volume associated with the primary irrigation of landscaping, lawns, and common areas (0.96 cfs). Instead, the Applicant now only seeks 0.50 cfs for 'in house' domestic use only for each unit within the development." *Id.* at 2. Further, the Stipulation describes that "[t]he Applicant proposes to use the appurtenant surface water rights in a separate pressurized irrigation system to serve the Jefferson Greens Estates subdivision." *Id.* The Stipulation then sets forth the conditions to be included in the permit for 25-14162, including Condition No. 3.

The Stipulation is clear evidence that it was the new consumptive use component of what was originally proposed with 25-14162 that the Coalition objected to. The new consumptive use originally sought was then removed through reduction of the diversion rate by 0.96 cfs (as well as a reduction in the original volume sought attributable to the proposed new consumptive use). The original application sought 1.46 cfs, but the Stipulation reduced that amount to 0.50 cfs for in-house, non-consumptive uses. The inclusion of the informational Condition No. 3 merely

describes (for future administration and/or water right review) how the irrigation was occurring for the subdivision as 25-14462 was not authorized for outside irrigation uses. The Transfers do nothing more than propose to replace how the outside irrigation will occur. The water rights described in the Transfers are perfected water rights that have been exercised and resulted in consumptive use of water, and moving these rights to the subdivision will not result in new consumptive uses to the ESPA or injury to the Coalition, which was the stated concern of the Coalition described in the Stipulation.

In short, Condition No. 3 is for informational purposes only, and if the Transfers are approved, such approvals will not violate Condition No. 3 because it does not mandate anything or provide any additional limitations on the exercise of the basic water right elements of 25-14162.

C. Do the conditions of water rights 01-7017 and 35-7720 require the water right holder to use surface water right 01-7017 as a primary source o[f] water and ground water right 35-7720 as a supplemental source of water?

As described below, the answer to this question is "no." 35-7720 and 01-7017 received partial decrees in the SRBA. Exhibit IDWR8 contains the partial decree for 35-7720, a ground water right, and neither the word "supplemental" nor "primary" appears on the face of this document. The partial decree does have a combined annual diversion volume limit for it and "all other rights" under the quantity element of the water right, and a statement that "use of this right with right no. 01-7017 is limited to the irrigation of a combined total of 118 acres in a single irrigation season" under the place of use element. However, these statements do not make 35-7720 supplemental to 01-7017 or any other water right.

IDWR9 contains the partial decree for 01-7017, and it contains a statement under the place of use element that "[r]ight Nos. 1-7017 and 35-7720 are limited to the irrigation of a combined total of 118 acres in a single irrigation season." Under the other provisions necessary portion of

the partial decree, there is an informational statement that "[t]he right holder must obtain adequate supplemental water for the irrigation season that natural flow is not available." These statements likewise do not make 35-7720 supplemental to 01-7017 or any other water right.

At the outset, there is no statutory or administrative rule definition of "supplemental water right," and our understanding of the supplemental water right concept is therefore entirely obtained from IDWR's practices and policies when faced with situations it believes involve supplemental water use. Attached as Exhibits 5, 6, and 7 to the *Harris Declaration* are deposition transcripts from IDWR employees Jeff Peppersack, Carter Fritschle, and Michal Holliday taken in August of 2017 in a dispute over WR 35-2824 involving (among other things) whether or not the inclusion of the "E02" explanatory remark maintained on IDWR's database (but not included on the face of the partial decree for 35-2824) made 35-2824 supplemental to Aberdeen-Springfield Canal Company water. While this matter was ultimately settled, the depositions explain important principles relative to IDWR's interpretation of water rights and whether they are supplemental or not, and how transfers of such rights are accomplished. The entirety of these depositions is included to avoid any claim of selectively quoting from them, but in our view, the critical takeaway principles from the depositions are:

1. There is no definition of a supplemental water right or stacked water right in a statute or IDAPA rule. Peppersack Depo. at 14, 17.

2. There is a definition of "supplemental water right" in the Transfer Memo at p. 29:

> (4) Changing Supplemental Right to Primary Water Right. 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. A supplemental right can provide additional water in conjunction with a primary source, or at times when the primary source is unavailable. The use of a supplemental right is dependent on the supply available under the associated primary right and can be highly variable from year to year. 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. An exception is when the applicant can clearly demonstrate, using historic diversion records for the supplemental right as described in (5) below, or other convincing water use information, that there would be no enlargement of the water right being changed or other related water rights. Evidence of the quantity of water beneficially used under the primary right must be accompanied by some evidence of the quantity of water used under the supplemental right to qualify as "convincing water use information." The supplemental right must have been used on a regular basis (used more than 50 percent of the time). Insufficient data will be grounds to reject the application because the department will not be able to ascertain if the right will be enlarged.
>
> If an application proposes to change only a portion of a supplemental irrigation right to a use as a primary water right, the application is not approvable unless the extent of beneficial use under all associated rights prior to the transfer will be proportionately reduced or transferred to another place of use to avoid enlargement of the remaining portion of the supplemental right. The associated right(s) will not need to be reduced if the entire supplemental right will be changed through the transfer.

Id. at 14.

3. According to Jeff Peppersack, it is possible that stacked water rights are not necessarily identified in the SRBA partial decrees. *Id.* at 18.

4. Explanatory remarks are not found on the partial decree but are used as information by the Department in making administrative decisions. *Id.* at 19.

5. The Transfer Memo was developed over a series of years and was written by various Department staff based on historical application of the laws and the way the Department has interpreted the laws and applied them. *Id.* at 20-21.

6. Jeff Peppersack reviewed the partial decree for 35-2824 and stated that "[w]hether they're primary or supplemental, I guess I haven't made a determination." *Id.* at 27.

7. Jeff Peppersack described generally how a transfer in a stacked water right situation is reviewed to prevent enlargement:

Q. Okay. And how does it not occur if the transfer goes forward?
A. Well, if there were -- if it was demonstrated, for example, that it wouldn't be an enlargement because of conditions or limitations that would be imposed or -- or perhaps, you know, an explanation of the relationship of the rights, that might get at trying to decide whether they are truly stacked or primary or supplemental or, you know, used in combination some way.
So if it's demonstrated that they really weren't, even though they might reside on the same place of use, then we might decide that it's not an enlargement because they haven't been used together to, you know, provide a full water supply for the place of use.

Id. at 32.

8. IDWR allows rights it considers to be supplemental to be converted to a primary water right. *Id.* at 35-37 (Jeff Peppersack explaining a transfer example).

9. To determine whether a right is supplemental, IDWR first tries to decide whether the primary/supplemental relationship exists, and there could be circumstances where the ground water and surface water are not used together, and that the intent was not to use them as a primary/supplemental relationship. *Id.* at 39-40.

10. Relative to 35-2824, Jeff Peppersack explained that from the water right report, "there's an indication that there's surface water available on the property, or at least was. But there's nothing prohibiting the groundwater from being fully utilized based on the conditions." *Id.* at 43.

11. Other than the enlargement provision of the statute, Jeff Peppersack is not aware of any statute or rule that deals with the conversion of supplemental rights to primary rights. *Id.* at 44.

12. Without an express condition providing that surface water must be used first before ground water, there is no way of enforcing use of surface water first. Additionally, it is also possible that a surface water right could be viewed as supplemental to a ground water right:

Q. Well, for example, I think earlier you said it's a policy of the Department that you have to use your surface water right first before you turn to groundwater.
A. And that would be where we've restricted that use on conditions on a permit or water right.
Q. So if that condition doesn't exist on a permit or water right, then you're saying it doesn't apply in the Department's review?
A. I don't think we'd have a way of enforcing the use of surface water first otherwise.
Q. So then I guess the question then becomes, do you then view that surface water as then being the supplemental right?

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A. So in other words, if the groundwater was used more often than the surface water, would the surface water be viewed as supplemental?
Q. Yeah, even though the priority of the surface water was substantially earlier.
A. I guess you can call it whatever you want. But I don't know -- I don't know the value of calling it supplemental or not, unless they were trying to transfer the surface water away and we were trying to analyze it that way, then maybe we'd try to characterize it. But I think ultimately we'd want to get to the same place, and that's look at the data, look at the relationship, and see if there's enlargement in a transfer.

Id. at 54-55.

13. After being presented with a memo prepared by Mr. Peppersack in a prior matter involving Buckeye Farms, Jeff Peppersack answered questions about the memo, which included the following explanation:

Q. Okay. And then down in what would be the third full paragraph that starts with "In practice," can you read that sentence into the record.
A. The first sentence?
Q. Yes.
A. "In practice, the Department considers a supplemental right to have a different source than the associated primary right and is restricted to use when the primary right is unavailable or insufficient."
Q. Okay. So is that still the Department's practice today?
A. I think that would be a good way to look at supplemental rights.

Id. at 58.

14. There are express conditions included on water rights (generally through the permit and licensing process) that expressly make the water rights supplemental, and those conditions are enforced by the Department:

A. "Since the Department requires that use of a supplemental right is limited to times when the primary right is unavailable or insufficient,

enlargement of the primary right is usually not a concern."

Q. And again, the same questions arise out of that sentence.

Is that still the Department's understanding or policy that they implement with respect to reviewing primary and supplemental water rights?

A. I think it is, but I think I need to clarify that this would be the type where we have put on restrictive conditions that say that it's a -- it can only be used when -- when the primary surface water is not available or not sufficient.

Q. And can you point to a Department policy that states that?

A. I think I'd have to just point to the practice that where we've applied those conditions, those conditions state that the -- the supplemental groundwater use is limited in use to when the -- the surface water is not available or not sufficient.

MR. SIMPSON: That's all the questions I have. Thank you, Mr. Peppersack.

Id. at 59-60.

Q. So I want to make sure I understand that. As I understand your testimony, when we talk about supplemental water rights, you made a distinction between conditioned supplemental water rights and then nonconditioned but considered to be supplemental water rights.

Is that a fair characterization of those two categories?

A. Yes, I think so.

Q. Okay. And in both cases would those both be considered stacked water rights?

A. If we considered them supplemental, then yes, they would both be stacked water rights.

Id. at 69.

Q. Okay. Does IDWR have a number of conditions that are used to designate a water right as a supplemental water right?
A. Well, they probably don't specifically say they're supplemental. But yes, there are conditions placed on permits and licenses that would restrict the use of groundwater to times when surface water isn't available or insufficient. And that would essentially

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identify them as supplemental rights.
Q. Do you know how many different versions of those conditions there are?
A. Over time it's probably been changed and updated. But yeah, I don't know. A handful at least probably over time.

Id. at 72-73.

15. In the SRBA, except for situations where there was an express supplemental condition, IDWR did not include supplemental conditions, but simply noted that there was another water supply associated with the property under the explanatory remarks:

Q. Are you familiar with what a supplemental water right is?
A. Yes. We didn't necessarily use that term much, but I know -- I am familiar with it.
Q. In your review of adjudication claims, how would you determine whether a water right was supplemental?
A. That's why we tried not to use that term very much.
Q. What was the term that you used?
A. We just used generally a -- if a person owned two water rights, say a surface water right and a groundwater right and they're both in their name, we would just use the combined limits. We wouldn't identify which one was primary or supplemental.
Q. So that's if there was a privately held water right --
A. Yeah.
Q. -- a surface water right with a privately

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held groundwater right?
A. Yeah.
Q. With canal company shares where title to the water right is held in the name of the canal company, did you avoid that then?
A. That's why we just used this condition to say they're out there. We don't know the extent of which water right is used -- might be a primary right and which one might be a supplemental right. We're just recognizing that both rights go to the same property or water sources, if you will.
Q. If there was a prior license or a decree that included a supplemental condition, did you generally translate that over into the Director's report?
A. I'm trying to remember one in Basin 34. I think we determined that it should be included. But they were quite rare. I don't think I came across more than a handful in the years that I was down
recommending adjudication claims.

Deposition of Carter Frischle at 58-59.

16. When reviewing ground water rights within the ASCC service area, IDWR found water rights with express supplemental conditions, water rights with neither an explanatory remark or explanatory condition, and water rights with at least one explanatory condition:

Q. So can you just explain what that table represents or what you know about it. And then there's one on the next page too.
A. So this table and the maps that follow, you'll see a map representation of that table. The information that I have for Question 5, Map 1, comes directly from Wilma's table.
So of the water rights that were determined to be stacked, 3200 acres worth had -- had supplemental conditions on them. 79,000 -- 7,925 acres did not have either a supplemental or an explanatory condition. And the remainder had at least one explanatory condition.

Deposition of Michael Holliday at 31.

17. In association with the above analysis performed by Michael Holliday, at that time, there were numerous iterations of supplemental and explanatory remark provisions: "So there were 44 conditions that I was looking for. I believe it was 32 explanatory and 12 supplemental conditions." *Id.* at 34. Additionally,

Q. Well, when a transfer application is filed with the Department --
A. Yeah.
Q. -- and it's a request to transfer a groundwater right that is stacked with surface water rights, who makes the determination about what water right is primary and what water right is supplemental?
A. The water right itself should have -- if it is a supplemental right, should have the conditions on it that would make it clear that it's a supplemental right.
Q. Okay. When you say it has the conditions on it, where would those conditions appear?
A. They would appear on the water right prior to the -- you know, as it exists prior to the transfer.
Q. Okay. Are you talking about on the decree?
A. It could be a decree or it could be a license.

Id. at 68.

Based on the foregoing, there are water rights in Idaho with (1) express supplemental conditions; and (2) water rights that are stacked, and as a result of being stacked, IDWR may analyze historical water use and determine whether such historic use makes the exercise of one

right supplemental to the other in order to evaluate enlargement when such water rights are the subject of a transfer application.

The Hearing Officer's question specifically refers to the written "conditions" of 01-7017 and 35-7720, and therefore, we understand his question to be whether 35-7720 and 01-7017 have **express** conditions making 35-7720 supplemental to 01-7017. The answer to this question is easily "no," there are no express conditions that require use of 01-7017 first and/or make 35-7720 supplemental to 01-7017. As explained by Michael Holliday, there are a dozen (as of 2017) iterations of supplemental conditions historically or currently used by the Department, such as:

> The right holder shall make full beneficial use of all surface water available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right for land with an appurtenant surface water right(s) to those times when the surface water supply is not available or reasonably sufficient to irrigate the place of use authorized under this right.

This type of condition is not present on the partial decrees for 01-7017 or 35-7720. If the exercise of 35-7720 was truly supposed to be limited to times when 01-7017 was unavailable, then a condition could have been easily added when 35-7720 was licensed and/or when the partial decree was entered. If the condition was not added, then the Hearing Officer should not relitigate a question that should have been addressed in the SRBA as the Idaho Supreme Court has explained:

> Absent BCID undertaking appropriate proceedings to set aside a final judgment under Idaho Rule of Civil Procedure 60(b), we emphasize that the decrees are conclusive and final, which comports our general reluctance to allow already-decreed water rights to be relitigated. *See, e.g., City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017) ("Furthermore, it is equally clear from the plain language of the decree that recharge is not listed as an authorized use under the purpose of use element of 181C. Claiming, at this stage, that recharge is an authorized use of 181C, is nothing more than an impermissible collateral attack...."); *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016) ("Allowing IGWA to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process."); *Rangen*, 159 Idaho at 806,

> 367 P.3d at 201 ("Any interpretation of Rangen's partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself."); *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) ("Finality in water rights is essential."). Finality is for good reason, especially in water law; otherwise, the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures. *See* Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 56 (2016).

In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532, 163 Idaho at 155, 408 P.3d at 910. This point bears further emphasis. Implicitly imposing a restriction on a water right that could easily have been made express in the SRBA is contrary to the very purpose of the SRBA and would inject significant uncertainty into what rights water users were decreed. Even when a partial decree contained reference to a settlement agreement providing that Blackfoot could use surface water for ground water recharge, the Idaho Supreme Court held that this argument was "nothing more than a collateral attack" on the decree as this nature of use could have easily been included in the partial decrees. Such a restriction on the use of water rights must necessarily be express, and if it is not, to paraphrase Judge Wildman, it would constitute serious turmoil and confusion. *Memorandum Decision and Order on Challenges Final Order Disallowing Water Right Claims*, p. 5 (Twin Falls County, Fifth Jud. Dist. – *SRBA, In Re SRBA Case No. 39576, Subcase Nos. 65-23531 and 65-23532*, Oct. 7, 2016). Relitigation will ensue as water users seek to know whether their rights are subject to an implied condition—a condition that IDWR has expressly included elsewhere as appropriate, and which could easily have been included in the SRBA partial decrees.

The word "supplemental" does not appear on the face of the partial decree for 35-7720, but it does appear on 01-7017 under the "other provisions necessary" portion of the partial decree: "The right holder must obtain adequate supplemental water for the irrigation season that natural

flow is not available." Consistent with the principles of interpreting water rights described above, the plain language of this statement is that it makes it clear to the water user that other water must be obtained if natural flow is not available, which is a correct statement of the law if the right holder wants to continue irrigating. The type of supplemental water is not specified in this condition, but such supplemental water could be storage water from the upper Snake River reservoir system, other surface water rights transferred to the property, or ground water. What 01-7017 does not say is that 35-7220 is supplemental to it, and 35-7220 does not say that it is supplemental to 01-7017. Combined acreage limits such as those contained in 01-7017 and 35-7220 do not make water rights supplemental to one another or require one right to be exercised before another right may be exercised. Combined acreage limits simply define the maximum number of acres that can be irrigated under both rights, not the order that such rights must be exercised. As Jeff Peppersack described, "there's an indication that there's surface water available on the property, or at least was. **But there's nothing prohibiting the groundwater from being fully utilized based on the conditions**." Jeff Peppersack Depo. at 43.

Based on the plain language of these partial decrees, 35-7720 is not expressly supplemental to 01-7017 nor does 01-7017 require the right holder to use 01-7017 as a primary source of water and 35-7720 as the supplemental source.

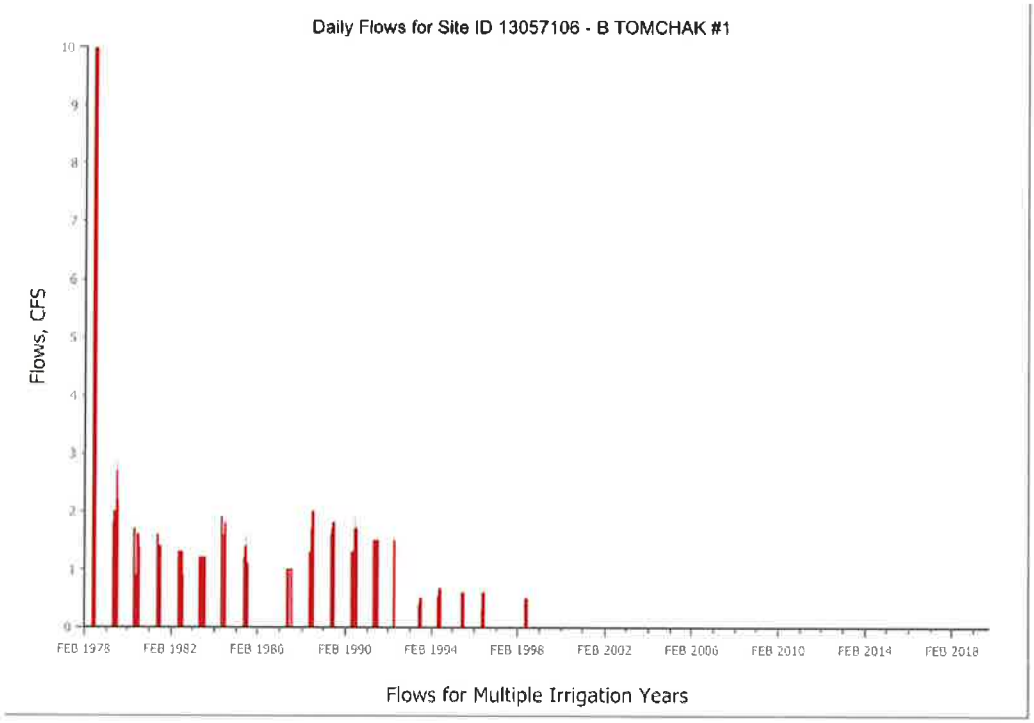
Additionally, to the extent the Hearing Officer's question seeks an answer based on actual water use and development of the right (and the development of the right is something IDWR does look at as IDWR personnel described in the depositions referenced above), 35-7720 has not been actually been used as a supplemental source to 01-7017. Precisely the opposite, 35-7720 has been used as the primary source of water on the property. In fact, as described below, the application for use of ground water under 35-7720 was submitted **before** the application for 01-7017.

The historical development of these water rights was researched using the Idaho Department of Water Resources water right database, relying on the historical documents relative to each water right. The application for 35-7720 was filed in 1977. Originally, the place of use authorized under this right was 348 acres. There were some overlapping issues that were addressed in the SRBA and during licensing, the total acres were reduced to 118 acres. The priority date was also advanced to April 22, 1979. The original well that was drilled was a poor well that did not provide sufficient water.

Due to the lack of water from the new well, in 1978, the right holder also filed for a new water right from the Snake River (01-7017) to supplement the ground water right. It was approved and a pump (the "B Tomchak #1" pump) was installed on the Snake River adjacent to the place of use. The junior priority date of the surface water right restricted the availability of the water right to be diverted. Limitations in the well and in availability of the Snake River right led the water right holder to utilize two ponds on its property from which to divert ground water under 35-7720. The ponds are more than 18' deep, as verified by IDWR employee during a site visit. Pumps were placed in the ponds to divert ground water at a satisfactory rate. The diversion rate was verified by IDWR during field examinations for licensing. 35-7720 was licensed in 1999 for diversion from ground water from both ponds.

To review the historical use of both rights, records from Water District 01, the Water Measurement Information System ("WMIS"), and the local ground water district were compiled and reviewed. Copies of relevant documents evidencing this historic use are attached as Exhibit 8 to the Harris Declaration.

Water District 1 records for the B Tomchak #1 pump show no diversion since 1998, as shown in the following graph:



Prior to 1998, 35-7720 was typically diverted during late May through June, but not consistently. The record shows variable periods of time the pump was turned on, including periods of four days up to multiple weeks continuously. A review of the priorities administered by Water District 1 shows that the water right has been available in recent years, although it has not been diverted.

Water right 35-7720 has two points of diversion. Both diversions are shared by water right 35-7744, which is a supplemental ground water right for adjacent parcels. WMIS records are available for both diversions, but they do not distinguish quantities per water right. At the north diversion, WMIS records show diversion as high as 669 acre-feet (2001), using the PCC method. At the south diversion, WMIS records show diversion as high as 1,216 acre-feet (2015). Combined, the highest diversion year is 2015 in recent years, for a total of 1,407 acre-feet (1,216 acre-feet from the south diversion and 191 acre-feet from the north diversion). 35-7720

and 35-7744 authorize a combined acreage of 425 acres (118 acres from 35-7720 and 307 acres from 35-7744). Water use in 2015 shows diversion as high as 3.3 acre-feet per acre, assuming that both rights were diverted for the entire season. Within the last five years, the record on WMIS is incomplete for both diversions, as it only includes data through 2016 or 2017. However, a summary report provided by Bonneville-Jefferson Ground Water District for the 2018 irrigation season shows that 326.7 acre-feet were pumped under water right 35-7720 at the north diversion. See Exhibit 8 of the *Harris Declaration.*

The historic water right and diversion records researched indicate that the ground water right has historically been the **primary** source of water at the place of use.[2] As described above, there are water rights with (1) express supplemental conditions; and (2) water rights that are stacked, and a result of being stacked, IDWR may analyze historical water use and determine whether such historic use makes the exercise of one right supplemental to the other when analyzing a transfer. Under the second described supplemental situation, and in response to the Hearing Officer's question, 35-7220 is not supplemental to 01-7017.

Finally, it is worth noting that even if a water right is supplemental, the Transfer Memo allows transfers of such rights if there is no enlargement. Transfer Memo at 29. This is explained in Jeff Peppersack's deposition testimony. See *Harris Declaration* at Exhibit 4. To verify that there will not be an enlargement, the Transfer Memo requires submission of five years of historical water use data for IDWR to analyze. This ensures that the ground water used at the former place

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2 While not important for purposes of this brief, there have been some recent changes to the described rights. In 2019, the water right place of use of 35-7720 and 1-7017 was split based upon change in property ownership. The split portions of these water rights now also share the points of diversion. In addition, a transfer was filed in 2019 to change the north point of diversion in Section 4 for 35-7720 to a new well location in Section 3 due to recent changes in accessibility. The place of use was also adjusted to reflect actual irrigation. Transfer 83093 was approved March 31, 2020.

of use is similar to what will be used at the new place of use. There is no specific language in Idaho Code § 42-222 concerning supplemental water rights, but enlargement is specifically described as an item that must be considered when a transfer application is filed. It is under the enlargement criteria that IDWR's position on transfer of supplemental rights (as described in the Transfer Memo) is appropriately based. Accordingly, even if 35-7720 is considered a supplemental water right, it can be changed to a primary water right under Idaho law based upon IDWR's interpretation of Idaho Code § 42-222, to which it is entitled considerable weight.

D. Do Idaho Code §§ 31-3805 or 67-6537 prohibit or constrain the approval of Applications 83471, 83915 and 83918?

The answer to the Hearing Officer's fourth and final question is "no," neither statute prohibits nor constrains the approval of the Transfers.

Idaho Code § 31-3805 has been raised by the Coalition presumably because it believes that the statute requires use of surface water in all cases when subdividing land. Idaho Code § 31-3805 was originally enacted in March 1976. In summary form, this statute now provides for the following:

1. Approval requirements.

> When there is a subdivision within the boundaries of an irrigation district (or other canal company, ditch association, or like irrigation water delivery entity), the subdivision plat must meet the following disclosure requirements before approval and acceptance and recorded of a subdivision plat or any other plat-like document:
>
> (a) The water rights have been transferred; or
>
> (b) The person filing the plat has provided underground tile (for lots less than 1 acre) or other suitable conduit (for lots more than 1 acre) that have the following approvals:
>
> i. If in the city, must be approved by city zoning authority and city council

ii. If outside the city, but in area of city impact, must be approved by city and county zoning authorities and city council and county commission.

iii. If outside the city and not in area of impact, must be approved by county zoning authority and county commission, with advice of irrigation entity.

2. Disclosure requirements.

If the event either (1)(a) or (1)(b) of this statute have not been complied with, then the assessments of the irrigation entity remain in force, and the following must be disclosed to a lot purchaser in writing:

(a) That suitable water deliveries have not been provided; and

(b) That the purchaser of the lot must remain subject to all assessments levied by the irrigation entity; and

(c) That the individual purchaser shall be responsible to pay such legal assessments; and

(d) That the assessments are a lien on the land within the irrigation entity; and

(e) That the purchaser may at a future date petition the appropriate irrigation entity for exclusion from the irrigation district.

The plain language of Idaho Code § 31-3805 reveals that this is simply a disclosure statute. It sets certain requirements that must be met for delivery of water to a subdivision before the subdivision plat or map is approved, accepted, and recorded by the applicable governmental entity. It also sets certain disclosure requirements that must be met prior to the sale of any lots in the subdivision if either (1)(a) or (1)(b) of this statute have not been complied with. This statute does not mandate use of surface water for a subdivision, and in fact, expressly gives the subdivider the option to exclude the land from the irrigation entity under section (1)(a) if proper disclosure is not made. Further, this statute does not reference water right transfers or Idaho Code § 42-222. There is nothing in the plain language of this statute that implicates what is proposed in the Transfers.

The penalty provision of this statute is further evidence that the statute does not provide what the Coalition believes it provides. Section 31-3806 provides civil penalties if the person or entity failed to comply with the provisions of § 31-3805 prior to selling lots in a subdivision. Such person or entity "shall be liable to any purchaser for the costs of the lot's exclusion plus all assessments due and owing or the actual cost of installation of an irrigation delivery system not to exceed one thousand five hundred dollars ($1,500) per lot. The purchaser shall have a right to enforce this obligation in a civil action and the purchaser shall have the right to elect exclusion or installation of the system in such action." Where this penalty provision provides that the one of the purchaser's remedies is to have the right to exclude the property from the irrigation entity, the statute cannot be interpreted to mandate use of surface water as advocated by the Coalition. Such an interpretation is contrary to the plain language of the statute and infers.

The second statute referenced in the Hearing Officer's fourth question is Idaho Code § 67-6567. The Coalition seems to suggest that this statute will prohibit approval of the Transfers as a matter of law. We disagree.

At the outset, it is critical to note that Idaho Code § 67-6537, in its current form, was not in effect when the application for 25-14162 was submitted, nor when the permit was issued on May 25, 2005. Idaho Code § 67-6537 in its current form became effective on July 1, 2005 and it does not have a provision which makes it retroactive. As a result, because the statute did not apply to Jefferson Greens then, it does not apply to Jefferson Greens now. In Idaho, legislation does not have retroactive effect in the absence of an express legislative statement of intent to that effect. Idaho Code § 73-101. "A statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute." *Guzman v. Piercy*, 155 Idaho 928, 938, 318 P.3d 918, 928 (2014) (quoting *Kent v. Idaho Pub. Utils. Comm'n*,

93 Idaho 618, 621, 469 P.2d 745, 748 (1970)). As with new legislative enactments, amendments to statutes are also not given retroactive effect unless there is an "express legislative statement to the contrary." *Id.* (citing *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987).

But even we assume this statute did apply to Jefferson Greens, the plain language of the statute does not, as a legal matter, prohibit or constrain approval of the Transfers. Idaho Code § 67-6537, in its entirety, provides (with our emphasis):

> 67-6537. USE OF SURFACE AND GROUND WATER. (1) **The intent of this section is to encourage the use of surface water for irrigation.** All applicants **proposing** to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation. Surface water shall be deemed reasonably available if:
>
> > (a) A surface water right is, or reasonably can be made, appurtenant to the land;
> > (b) The land is entitled to distribution of surface water from an irrigation district, canal company, ditch users association, or other irrigation delivery entity, and the entity's distribution system is capable of delivering the water to the land; or
> > (c) An irrigation district, canal company, or other irrigation delivery entity has sufficient available surface water rights to apportion or allocate to the land and has a distribution system capable of delivering the water to the land.
>
> (2) Consistent with sections 42-108 and 42-222, Idaho Code, any change in the nature of use of surface water provided by an irrigation delivery entity must be authorized by the entity holding the water right(s) for the available surface water. Nothing in this section shall alter the authority and discretion of irrigation delivery entities to apportion, allocate and distribute surface water, or for municipalities, counties, or water and sewer districts to pass ordinances or regulations to promote the use of surface water for irrigation.
>
> (3) **Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired thereunder.**
>
> (4) When considering amending, repealing or adopting a comprehensive plan, the local governing board shall consider the effect the proposed amendment, repeal or adoption of the comprehensive plan would have on the

source, quantity and quality of ground water in the area.

Beginning where we should with the plain language of the statute, it states that the intent of the statute is to "encourage" the use of surface water for irrigation purposes when land use changes are "proposed". Use of these two words are important.

First, the intent of the legislature to encourage—not mandate—is plainly stated in the first sentence of this statute and by what is not contained in the statute—an enforcement mechanism to compel compliance. Neither criminal penalties nor civil liabilities are included in the statute for failing to use surface water for irrigation purposes. The only other statute in the Idaho Code that references Idaho Code § 67-6537 is Idaho Code § 67-6519 and only to state that Idaho Code § 67-6519 will not affect or eliminate any other statutory requirements concerning delivery of water under Idaho Code § 67-6537.

This statute also applies to "proposed" subdivisions, not existing ones, meaning that this statute is enforced at the time of plat approval. In the event surface water is not provided at the time of plat approval, then the Local Land Use Planning Act (the "LLUPA") provides that the remedy available to any "affected person" under Idaho Code § 67-6521 is to petition for judicial review within twenty-eight (28) days of plat approval. Idaho Code § 67-6521(d). If this is not done, then such failure "to file a timely petition for judicial review is jurisdictional and causes automatic dismissal of the petition. I.R.C.P. 84(n). Idaho Code § 67-5273(2) confines the court's jurisdiction to those petitions filed within the prescribed time period." *City of Eagle v. Idaho Dep't of Water Res.*, 15- Idaho 449, 454, 247 P.3d 1037, 1042 (2011).

While the Department has recognized the public policy in favor of using surface water for subdivisions, the Director has already held that IDWR does not enforce Idaho Code § 67-6537: "Idaho Code § 67-6537 is a land use planning statute directed to the local government charged

with approving land use changes." *Final Order*, In the Matter of Application to Appropriate Water No. 27-12155 in the Name of the City of Shelley, at 5 (November 27, 2009). Accordingly, Idaho Code § 67-6537 does not constrain or prohibit approval of the Transfers.

Furthermore, the plain language of this statute found in subsection (3) is further evidence against the Coalition's position. This subsection provides that "Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired thereunder." Contained within Title 42 is the transfer statute, Idaho Code § 42-222, and it allows water rights to be amended provided the transfer does not violate certain criteria, such as enlargement. There is nothing in Idaho Code § 42-222 that expressly prohibits what the Applicant is proposing, no reference to title 67 of the Idaho Code, and no prohibition that a water right cannot be moved to property with existing water entitlements. There could absolutely be circumstances where a secondary water system does not work or make sense, and several such circumstances are present at Jefferson Greens. The high water table present at the subdivision has already been discussed. Additionally, there has been significant conflict with the surface water entity on easement and water issues, including a prior policy position that the provider could cease irrigation deliveries for grass in favor of agricultural irrigation. The surface water provider has had issues with its head gate on the Great Feeder system being physically able to divert surface water during low flow conditions, and conflict with the Great Feeder over who is supposed to maintain it. Currently, the surface water entity has not approved the diversion location for the subdivision even though the trunk lines in the subdivision are in place. Such uncertainty makes it necessary and reasonable to move ground water rights to the property.

Furthermore, a situation could certainly arise where the availability of the surface water becomes an issue because of a junior priority right. Not all surface water entities have access to senior water rights or ample storage water, and as a result, the lot owners may want to replace their irrigation water with ground water. By including subsection (3), it is clear from the plain language of this statute that the Idaho Legislature did not intend to prohibit the movement of existing ground water rights to replace a surface water irrigation system. We allow agricultural water users to replace ground water with surface water, and vice versa, and it is no different for subdivisions. Our view of Idaho Code § 67-6537 is that it was intended to encourage—through the LLUPA—the reduction of additional new consumptive uses of water sought in **new applications** for water right permit for subdivisions. It did not prohibit the movement of **existing water rights** to such subdivisions.

In sum, in response to the Hearing Officer's fourth question, neither Idaho Code §§ 31-3805 nor 67-6537 prohibit or constrain the approval of the Transfers.

Submitted this 12th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2020, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: APPLICANT'S ARGUMENT BRIEF

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