

For the reasons set forth below the Hearing Officer should dismiss the above-captioned transfer applications based on the legal issues identified in the May 14, 2020 Pre-Hearing Order as a matter of law. *See Notice of Hearing, Scheduling order and Request for Argument Briefs* (“Pre-Hearing Order”).

UNDISPUTED FACTS

Rivers Edge Development, Inc. (“Rivers Edge”), the developers of Jefferson Greens Estates, a subdivision within Jefferson County, Idaho, applied for domestic water right 25-14162 on December 13, 2004. Rivers Edge initially sought a diversion of ground water from the Eastern Snake Plain Aquifer (“ESPA”) for a consumptive use, including for irrigation of landscaping, lawns, and relevant common areas within the development. The NSCC and TFCC protested the 2004 application. The NSCC’s and TFCC’s protest, as acknowledged by Rivers Edge, sought to address Rivers Edge’s failure to mitigate for the depletion to the ESPA, and resulting impact on the Snake River. Through negotiations, the protest was resolved when the parties entered into the April 7, 2005 *Stipulation to Resolve Protest*. The *Stipulation* required the following limitations on the water right: (1) “Domestic use is for the “in-house” use at a 130 home subdivision (Jefferson Greens Estates) and does not include lawn, garden, landscape, or other types of irrigation; (2) 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 08/24/2000); (3) The applicant shall provide copies of ‘as-built’ drawings or design maps of the surface water irrigation system to the Department to maintain with the water right file; and (4) Prior to the diversion of use of water under this right, the right holder shall install and maintain an acceptable measuring device(s), including data logger(s), at the authorized point(s) of diversion and in

accordance with Department specifications.” *Stipulation to Resolve Protest*. IDWR incorporated limitations (1), (2), and (4) as conditions of approval on the water right permit.

In a Beneficial Use Field Report for Permit No. 25-14162 issued by the Idaho Department of Water Resources (IDWR) with an exam date of June 24, 2015, it is stated: “The developer (Kendall Shippen) installed a surface water irrigation system for irrigating lawns inside the subdivision”. Attached to the Beneficial Use Report is a map of a “Surface Water Irrigation System”. Based upon the apparent fulfillment of the conditions of the Permit, a Water Right License was issued on September 29, 2015 that contains the same conditions but reduced the number of homes that can be serviced by the right to 69.

On July 9, 2019, Rocky Mountain Water Exchange, LLC (“RMWE” or “Applicant”) filed a transfer application (“T83471”) to move portions of water right 27-7545, a ground water irrigation right, to Jefferson Greens Estates. The proposed place of use (“POU”) of this transfer is the same POU that is subject to the conditions set forth in water right 25-14162.

On February 24, 2020, RMWE filed transfer applications 83915 and 83918 which would move water rights 1-7017 and 35-7720 respectively to the same POU as T83471 and that is subject to the conditions of water right 25-14162. The applications acknowledge that the two water rights are linked. Condition of Approval No. 4 for water right 1-7017 states that “The right holder must obtain adequate supplemental water for the irrigation season that natural flow is not available.” (emphasis added). Condition of Approval No. 6 for the same states “Right nos. 1-7017 and 35-7720 are limited to the irrigation of a combined total of 78.7 acres in a single irrigation season.” Similarly Condition of Approval No. 1 for 35-7720 states “Rights 35-7720 and 1-7017 when combined shall not exceed a total diversion rate of 1.57 cfs, a total maximum diversion volume of 315 af at the field headgate, and the irrigation of 78.7 acres.”

In application 83915, the Applicant states that water right 1-7017, a surface water right, will be diverted through a headgate on the Great Feeder Canal to the North Rigby Irrigation and Canal Company works and the proposed POD is used by North Rigby's water rights located on the property. The application does not address the existing conditions of water right 25-14162, nor does it mention that there is not a diversion mechanism to divert the surface water onto the subdivision property. The application is implying that a diversion system exists. Further the application does not address a need for additional water at the POU even though it mentions that North Rigby shares are appurtenant to the same POU.

It is apparent that the surface water delivery system described in the Beneficial Use Field Report for Permit No. 25-14162 does not exist or at least does not divert surface water onto the subdivision property. The Applicant has also failed to indicate or provide any information regarding a proposal to divert the North Rigby water rights, or any other surface water right, onto the subdivision property. The subdivision violated the conditions of water right 25-14162 by irrigating with that right since the inception of the subdivision and is now leasing water from the State Water Bank in order to irrigate the subdivision, as appears in the records of IDWR.

After holding several status conferences and prehearings, the Department has determined, based on issues identified by both parties, that the relevant legal issues are:

(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?

(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).”?

(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 [of] water and ground water right 35-7720 as a supplemental source of water? and

(4) Do Idaho Code §§ 31-3805 or 67-6537 prohibit or constrain the approval of Applications 83471, 83915 and 83918?”

See Pre-Hearing Order at 3.

ARGUMENT

Idaho Code § 42-222 set forth the factors the Department must consider when evaluating a transfer application. It is the position of the Coalition that IDWR cannot approve a transfer application that allows the violation of an existing water right pertaining to the same POU. If RMWE’s transfer applications are approved, then Jefferson Greens Estates would be violating Condition No. 3 to water right 25-14162, and would violate the conditions of water rights 1-7017 and 35-7720 that require the use of the surface water right as a primary source of water. The Applicant should not now be allowed to ignore the duties and public policy provisions as set forth in Idaho Code §§ 31-3805 and 67-6537 by initially obtaining a ground water right that recognizes the duty to irrigate with existing surface water rights, and then 15 years later, avoid complying with those statutes (and the terms of the existing ground water right) by refusing to use the existing surface water rights and obtaining ground water rights for irrigation purposes. IDWR has a duty to enforce the terms of existing water rights. The Applicant is requesting IDWR to ignore that duty. The applications are not in the local public interest and are contrary

to the conservation of water resources. The Hearing Officer should deny the transfer applications as a matter of law.

I. Idaho law prohibits transfers which would violate the conditions of existing water rights.

The Applicant is ignoring the conditions of Water Right 25-14162 and is asking IDWR to not enforce existing conditions of licensed water rights.

In evaluating a water right application, 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 is consistent with the conservation of water resources within the state of Idaho and is in the local public interest.” I.C. § 42-222(1) (emphasis added). Under IDAPA Rule 50, “The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and . . . to the fullest extent possible including conditions to promote efficient use and conservation of energy and water.” IDAPA 37.03.08.050.01 (emphasis added). Under these sections, IDWR is vested with the authority to condition water rights to avoid injury to other water rights. *City of Pocatello v. Idaho*, 152 Idaho 830, 836, 275 P.3d 845, 851 (2012). Therefore, if a permit has conditions and if a proposed transfer were to cause a violation of an existing condition, IDWR would inevitably be causing the injury to the public and to those who relied upon the conditions when withdrawing their protest. Moreover, these conditions fall into the category of “such other matters as are necessary to define the right” of the basic elements of a water right which the Director must determine. *State v. Nelson*, 131 Idaho 12, 15, 951 P.2d 943, 946 (1998). All the basic elements are binding on IDWR, and the Director has

a “clear legal duty’ to distribute water” according to those terms and conditions. *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). Conditions become part of the water right and to allow an applicant to violate existing water right conditions and approve a proposed transfer that is contrary to existing conditions results in injury to existing water rights, the public interest, and is contrary to the conservation of water resources in Idaho.

When addressing the application for water right 25-14162, the NSCC and TFCC fought to adequately condition the water right to protect their senior water rights. Conditioning the water right preserved ground water resources and protected the NSCC and TFCC ’s interests. IDWR’s approval and incorporation of the conditions into the water right evidences the need to limit water right 25-14162 in order to comply with Idaho Law. *See* IDAPA 37.03.08.050.01. Moreover, since the licensing of water right 25-14162, the ESPA has continued to decline. Most recently, IDWR designated the ESPA as a Ground Water Management Area for purposes of restoring and sustaining the aquifer. Ignoring existing conditions on other water rights when approving a transfer is in direct contravention to IDWR’s duty to ensure no injury to other water rights under I.C. § 42-222. Approving a transfer that violates existing conditions would cause injury. IDWR must deny any transfer application that violates a condition on an existing water right, or the Department must adequately condition the transferred right so as to ensure compliance with the existing water right’s conditions.

II. The proposed transfer applications would violate Condition No. 3 of water right 25-14162 if approved.

Legal issue (2) in the Hearing Officer’s Pre-Hearing Order asks “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).’” Again, under Rule 50, IDWR may condition a permit to comply with Idaho Code Title 42, Chapter 2, other statutory duties, the public interest, or to meet the conditions of I.C. § 42-203A(5), to the fullest extent possible including conditions to promote efficient use and conservation of energy and water. IDAPA 37.03.08.050.01. No party is contesting the validity of Condition No. 3. Rather, the Applicant is asking IDWR to ignore the condition when considering the current applications. To understand the condition, it is imperative to understand its history.

As discussed above, Rivers Edge, the developers of Jefferson Greens Estates, applied for domestic water right 25-14162 on December 13, 2004. The NSCC and TFCC protested the 2004 application. Rivers Edge initially sought a diversion of ground water from the Eastern Snake Plain Aquifer (“ESPA”) for a consumptive use, including for irrigation of landscaping, lawns, and relevant common areas within the development. *See Stipulation to Resolve Protest*. The NSCC and TFCC’s protest sought to address Rivers Edge’s failure to mitigate for the depletion to the ESPA, and the resulting impact to the Snake River. Through negotiations, the protest was resolved when the parties entered into the April 7, 2005 *Stipulation to Resolve Protest*. The *Stipulation* addressed the NSCC and TFCC’s concerns by prohibiting ground water irrigation through Condition No. 3. Now, RMWE is seeking to circumvent the conditions on water right 25-14162, and irrigate the entire subdivision with ground water.

From a plain language interpretation, if Jefferson Greens Estates irrigates with any ground water, they would violate Condition No. 3. If the applications are granted, Condition No. 3 would be meaningless since irrigation would not be provided by a separate pressurized surface

water system, but with ground water. Allowing a right holder to ignore a stipulated condition and part of a water right would create greater administrative problems for the Department, uncertainty as to the state of the law, and open the floodgates to challenges from water right holders who believe their conditions are too restrictive. How does administration go forward if a right holder is not bound by the elements and conditions of the right issued?

The settlement between the NSCC, TFCC, and Rivers Edge was predicated on existing surface water rights being used to irrigate the subdivision. Condition No. 3 was intended to resolve any concerns of using ground water to irrigate the subdivision. Should IDWR allow the subdivision to irrigate with ground water, then it would be tacitly revoking Condition No. 3 and removing the sought-after protections for the ESPA and the Coalition's water rights in violation of Idaho Law. Therefore, the Hearing Officer must deny the transfer applications as a matter of law.

III. Water right 1-7017 requires water right 35-7720 to be used as a supplemental source of water.

Legal issue (3) addresses whether 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 of water and ground water right 35-7720 as a supplemental source of water. A supplemental right is "an additional appropriation of water to make up a deficiency in supply from an existing water right." *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001).

Condition of Approval No. 4 for water right 1-7017 states on its face that the water right has a deficiency in supply by requiring the water right holder to obtain an additional appropriation: "The right holder must obtain adequate supplemental water for the irrigation season that natural flow is not available." The priority date of water right 1-7017 is March 14,

1978. The priority date for Ground water right 35-7720 is a year later with a priority date of April 22, 1979. The ground water right is conditioned as follows: “Rights 35-7720 and 1-7017 when combined shall not exceed a total diversion rate of 1.57 cfs, a total maximum diversion volume of 315 af at the field headgate, and the irrigation of 78.7 acres.”

Just as in *Barron*, the surface water right was established prior to the ground water right, with the latter only being needed to make up a deficiency in supply from the existing right. *Barron*, 135 Idaho at 416, 18 P.3d at 221. Also, the two water rights here are limited to the consumptive use on the 78.7 acres, and *Barron*’s were similarly conditioned. *Id.* Therefore, water right 1-7017 is the primary right, and ground water right 35-7720 is tied to it as the supplemental right to provide additional supply after no more surface water is available.

Jefferson Greens Estates has no proposal to divert surface water to the proposed POU. Even if the transfer of 1-7017 is delivered into the North Rigby Canal Company system, it will not be applied to the proposed POU. Essentially, this transfer seeks to sever the relationship between the primary and supplemental rights and increase the use of the supplemental ground water right as there is no mechanism to divert surface water for irrigation at the subdivision. Without a surface water delivery system in place, the Applicant cannot transfer these rights without creating an enlargement of the ground water right. *See Barron, supra.*

IV. The public policy of the State of Idaho, including Idaho Code §§ 31-3805 and 67-6537 constrain approval of these transfer applications.

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

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

This policy is carried over in Idaho Code §§ 31-3805, last amended in 1997, and 67-6537, last amended in 2005, which contain specific provisions relating to the use of surface water for irrigation in a subdivision, if surface water is appurtenant to the POU. For example, the public policy of the State is explicitly set forth in Idaho § 67-6537 which states:

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.

The Coalition is not arguing it is IDWR’s role to enforce provisions of planning and zoning law. The Coalition is arguing that IDWR should take into account state policy when reviewing the factors contained in Idaho Code Section 42-222, particularly those provisions as they pertain to the local public interest and conservation of the resource. Further, IDWR should take into account that the POU involved in this matter had surface water available at the time the subdivision was approved and should have complied with the provisions of Idaho Code §§ 31-3805 and 67-6537 at the time of the subdivision approval. Because NSCC and TFCC protested the original application and the original applicant agreed to use surface water for irrigation purposes, the requirements of the code sections were met. The current Applicant should not be allowed to now avoid compliance with those sections by using ground water for irrigation after

the subdivision has been approved and the water right for the subdivision restricted irrigation to surface water rights.

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

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

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

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

Under the broad interpretation of local public interest, statutes that encourage the use of surface water for irrigation in local land use planning (I.C. § 67-6537), and impose specific local requirements for new subdivisions to have preauthorized irrigation systems from the city

planning authority or the city council prior to any subdivision plat approval (I.C. § 31-3805) must be considered when evaluating whether this proposed transfer of ground water to a subdivision is ultimately within the local public interest. If the developer was applying for subdivision approval today, the developer would have to comply with these statutes. Why should the Applicant now be allowed to circumvent these statutes, since the Applicant no longer needs to obtain subdivision approval, by applying ground water for irrigation, when that is expressly contrary to state policy and the existing water right for the subdivision? These statutes and the public policy behind them prohibit the approval of RMWE's applications in light of the existing conditions of the involved water rights.

In addition, the applications provide no explanation for why the Applicant wants to have Rigby Canal shares, two ground water rights and an additional surface water right appurtenant to the same POU. The application does not state that the Rigby Canal shares are inadequate to irrigate the POU. As set forth in Idaho Code § 42-220, "...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...". There is no showing or allegation by the Applicant that the Rigby Canal water rights that are subject to the conditions of water right 25-14162 are insufficient to irrigate the POU. The Applicant is not entitled to the use of more water than can be beneficially applied to the POU.

CONCLUSION

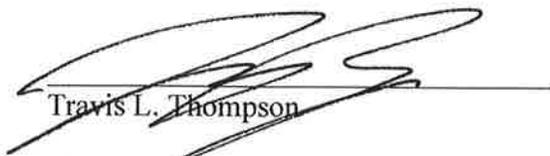
The Hearing Officer requested briefing on four identified legal issues. Based on precedent, and a plain language interpretation of the statutes, Idaho Code § 42-222 would prohibit the approval of a transfer that would result in a violation of the conditions of existing

water rights. If RMWE's Applications are approved, it would result in the ground water irrigation of the Jefferson Greens Estates Subdivision and therefore violate Condition No. 3 of water right 25-14162 which requires irrigation water for lawns, gardens, landscaping, and common areas to be provided by a separate pressurized surface water system. The condition and priority date of surface water right 1-7017 clearly establish it as a primary source and ground water right 35-7720 as the supplemental source of water. The application contains no provision for delivery of the primary surface water right. IDWR is required to make a determination as to whether the local public interest is served by a transfer application. The Hearing Officer should review the public policy concerning the use of ground water for subdivision irrigation set forth in statute, including Idaho Code §§ 31-3805 and 67-6537, when determining if the local public interest is served by these applications. Finally, the Applicant has offered no explanation of why additional water rights are needed on this place of use, and it is contrary to Idaho law and the conservation of water resources to allow the Applicant to transfer ground water rights to a place of use that has adequate surface water rights.

The Hearing Office should deny the applications as a matter of law.

DATED 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 foregoing *Surface Water Coalition's Brief on Questions of Law* on the following by the method indicated:

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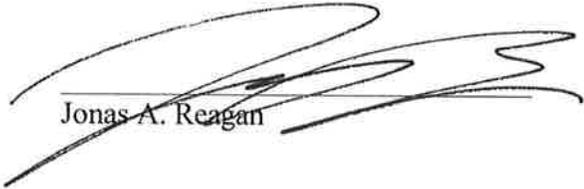
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