

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

<b>IN THE MATTER OF APPLICATIONS FOR )</b>	
<b>TRANSFER 83471, 83915 AND 83918 )</b>	<b>INTERLOCUTORY ORDER</b>
<b>IN THE NAME OF ROCKY MOUNTAIN )</b>	<b>ADDRESSING QUESTIONS</b>
<b><u>WATER EXCHANGE LLC</u> )</b>	<b>OF LAW</b>

**PROCEDURAL HISTORY**

On July 19, 2019, Rocky Mountain Water Exchange LLC (“RMWE” or “Applicant”) filed Application for Transfer 83471 with the Idaho Department of Water Resources (“Department” or “IDWR”). Application 83471 was protested by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company (“NSCC”), Twin Falls Canal Company (“TFCC”), American Falls Reservoir District #2 and Minidoka Irrigation District (collectively the “Coalition”). Application 83471 proposes to move a portion of ground water right 27-7545 to the Jefferson Greens Estates Subdivision (“JGE Subdivision”) for irrigation of residential lots within the subdivision.

On February 24, 2020, RMWE filed Application for Transfer 83915 with the Department. Application 83915 proposes to move Snake River water right 01-7017 to the JGE Subdivision. The Coalition filed a timely protest against Application 83915.

Also on February 24, 2020, RMWE filed Application for Transfer 83918 with the Department. Application 83918 proposes to move ground water right 35-7720 to the JGE Subdivision for irrigation of residential lots. The Coalition filed a timely protest against Application 83918.

On April 10, 2020, the Department issued an order consolidating contested Applications 83471, 83915 and 83918 into a single proceeding for hearing. The Department conducted a pre-hearing conference on May 4, 2020. During the conference, the parties requested that a hearing be held to decide the contested cases. An administrative hearing has been scheduled for August 27-28, 2020.

During the May 4, 2020 pre-hearing conference, the parties identified certain questions of law arising from the contested cases. The parties asked for an opportunity to file argument briefs addressing those questions of law and asked for the hearing officer to issue a decision on those questions of law prior to the scheduled administrative hearing.

Pursuant to Rule 564 of the Department’s Rules of Procedure, a hearing officer may request briefs from the parties setting forth arguments and positions on questions of law. On May 14, 2020, the hearing officer issued a *Notice of Hearing, Scheduling Order, and Request for Argument Briefs*, asking the parties to submit briefs addressing the following questions of law:

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

On June 12, 2020, RMWE filed *Applicant's Argument Brief* ("RMWE Brief"). Also on June 12, 2020, the Coalition filed *Surface Water Coalition's Brief on Questions of Law* ("Coalition Brief"). After carefully considering the arguments from the parties, the hearing officer finds, concludes and orders as follows:

### FINDINGS OF FACT

As part of their respective briefs, the parties summarized the facts they believed were relevant to the questions of law set forth above. The following facts are not in dispute and are supported by documents in the Department's water right records:

1. Rivers Edge Development, Inc. ("Rivers Edge"), the developer of the JGE Subdivision, filed Application for Permit 25-14162 with the Department on December 13, 2004, seeking a permit to divert 1.46 cfs from ground water for domestic use at a 130-home subdivision (JGE Subdivision). The proposed domestic use from ground water included irrigation of lawns, gardens, landscaping and common areas.

2. Application 25-14162 was protested by NSCC and TFCC, two of the seven entities comprising the Coalition.

3. On April 7, 2005, Rivers Edge and the protestants (NSCC and TFCC) executed a *Stipulation to Resolve Protest* ("2005 Stipulation") which included the following provisions:

The Applicant and the Canal Companies have resolved the protest 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).<sup>1</sup>

[Footnote 1: By resolution of this protest the Canal Companies do not concede or

waive any arguments with respect to the basis for their protest should they be used in future protests against new applications for permit.] Instead the Applicant now only seeks 0.50 cfs for “in-house” domestic use only for each unit within the development.<sup>2</sup> [Footnote 2: The Canal Companies acknowledge that each residence may have one or more outside spigots that are used for incidental irrigation of landscaping, gardens, or other areas. However, the primary irrigation use for each residence will be provided by the surface water rights represented by the development’s canal shares.] The Applicant currently owns 12 shares of stock in the North Rigby Irrigation Canal Company, Inc. for irrigation purposes on the development site, approximately 48 acres. Each share of stock represents 10 miner’s inches of water for a total of 120 miner’s inches (2.4 cfs). The Applicant proposes to use the appurtenant surface water rights in a separate pressurized irrigation system to serve the Jefferson Greens Estates Subdivision. The North Rigby Irrigation Canal Company consents to the Applicant’s proposed irrigation system.

The Canal Companies and the Applicant hereby agree that the following conditions shall be included on the application for permit (and license) in order to resolve the Canal Companies’ outstanding protest:

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 8/24/2000).
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.
4. Prior to the diversion and 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.

*2005 Stipulation* at 2-3 (footnotes in original).

4. On May 26, 2005, the Department issued Permit 25-14162, which contained the four conditions described in the *2005 Stipulation* and set forth above.

5. Rivers Edge filed a Statement of Completion for Submitting Proof of Beneficial Use on May 4, 2015.

6. On June 24, 2015, the Department conducted a beneficial use field exam for Permit 25-14162. The examiner observed that Rivers Edge had “installed a surface water irrigation system for irrigating lawns inside the subdivision.”

7. On September 29, 2015, the Department issued a license for water right 25-14162, which included the following condition (hereinafter “Condition 3”):

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).

8. On September 14, 2007, the Snake River Basin Adjudication (“SRBA”) Court issued a partial decree for water right 01-7017. Water right 01-7017 included the following elements and conditions:

Owner:	PT Elliott LLC
Source:	Snake River
Quantity:	2.00 cfs
Priority Date:	3/14/1978
Points of Diversion:	Lot 13 (NWNWSE), Section 3, T04N, R37E
Period of Use:	4/1 – 10/31
Purpose of Use:	Irrigation
Place of Use:	118 acres
Conditions:	Right nos. 1-7017 and 35-7720 are limited to the irrigation of a combined total of 118 acres in a single irrigation season.

The right holder must obtain adequate supplemental water for the irrigation season that natural flow is not available.

9. On January 12, 2004, the SRBA Court issued an amended partial decree for water right 35-7720. Water right 35-7720 included the following elements and conditions:

Owners:	Burleigh Tomchak Mabel Tomchak
Source:	Ground Water
Quantity:	2.36 cfs
Priority Date:	4/22/1979
Points of Diversion:	Lot 5 (SWSW), Section 3, T04N, R37E NWSE, Section 4, T04N, R37E
Period of Use:	4/1 – 10/31
Purpose of Use:	Irrigation
Place of Use:	118 acres
Conditions:	Use of this right with all other rights is limited to a total combined

annual diversion volume of 472 af at the field headgate for the lands below.

Use of this right with right nos. 35-7744 and 35-10255 is limited to a total combined diversion rate of 11.16 cfs.

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.

10. Water rights 01-7017 and 35-7720 have been split into multiple rights as a result of notices of change in water right ownership filed after the SRBA partial decrees were issued.

## ANALYSIS

### Applications for Transfer and Existing Conditions

The Department has the authority to include conditions on water right approvals. See Idaho Code §§ 42-203A(5), 42-219 and 42-222. Among other things, water right conditions are used to address injury concerns, to prevent enlargement of water rights, and to guide watermasters in the delivery of water rights. Every condition added to a water right serves a purpose. The Department should not approve a transfer that would cause a water user to violate a condition of an existing water right. Violation of water right conditions could result in injury to existing water rights, enlargement of existing water rights, or could make it difficult for a watermaster to administer the water right. The parties agree that the Department cannot approve a transfer that would violate a condition of an existing water right. *Coalition Brief* at 5 (“IDWR cannot approve a transfer application that allows the violation of an existing water right pertaining to the same [place of use]”; *RMWE Brief* at 17 (“IDWR cannot approve a transfer that violates the conditions of an associated water right . . . .”<sup>1</sup>).

### Condition 3 on Water Right 25-14162

Given the restriction on transfer approvals described above, the hearing officer must determine whether the approval of Applications 83471, 83915 and 83918 would result in a violation of Condition 3 on water right 25-14162. RMWE argues that Condition 3 is merely an identification of a delivery system, is only for descriptive purposes, and has no binding effect on the diversion and use of water right 25-14162. To support its argument, RMWE cites a recent Idaho Supreme Court case, *Telford Lands LLC v. Cain*, 154 Idaho 981, 303 P.3d 1237 (2013). Among other things, the *Telford Lands* case dealt with the interpretation of a water right condition stating: “Water is delivered through the Moore Diversion and Timberdome Canal.” *Telford Lands*, 154 Idaho at 988-89, 303 P.3d at 1244-45. The District Court held that this condition, identifying the delivery system from the river to the authorized irrigation place of use, was merely descriptive and did not impose any requirement on the water right holder to continue

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<sup>1</sup> RMWE points out, however, that a transfer application that would otherwise result in a violation of a condition listed on an associated water right could still be approved if the condition in question were revised or removed from the associated water right as part of the transfer approval.

to convey water through the Moore Diversion and the Timberdome Canal. *Id.* The Idaho Supreme Court upheld the District Court's decision noting that the District Court "did not err in holding that these statements were not mandatory requirements for exercising the water rights." *Id.* RMWE argues that Condition 3, like the condition in the *Telford Lands* case, is "for informational purposes only, and is not mandatory" and, therefore, cannot be violated. *RMWE Brief* at 21.

The hearing officer is not persuaded by RMWE's comparison of Condition 3 to the condition at issue in *Telford Lands*. The condition addressed in *Telford Lands*, described the delivery system used to convey the subject right(s) to the authorized place of use. Condition 3 is not merely a description of a delivery system. In fact, Condition 3 does not even describe the delivery system for water right 25-14162, which is a ground water right. Instead, Condition 3 is a direct result of a settlement of protest and was added to the right at the request of the parties to that contested case (Rivers Edge, NSCC and TFCC). *2005 Stipulation* at 2-3. Condition 3 describes a source of water that would be used for irrigation instead of ground water under Permit 25-14162. Application 25-14162 proposed using ground water to irrigate the JGE Subdivision, but that use was excluded from Permit 25-14162. Condition 3 provides the justification for the exclusion.

Condition 3 is not ambiguous and the interpretation of Condition 3 does not require other documents or parol evidence. It states that irrigation "is provided by a separate pressurized surface water system." Condition 3 is a simple declaratory statement and is either true or false. Either irrigation at the JGE Subdivision is provided by a separate pressurized surface water system or it is not. Condition 3 does not state, however, that the surface water system must be the exclusive source of irrigation water at the JGE Subdivision. Stated differently, Condition 3 does not require that all irrigation at the JGE Subdivision be provided by a surface water system. Nor does Condition 3 or any other condition on water right 25-14162 contain a prohibition on moving ground water irrigation rights into the subdivision. As long as at least a portion of the irrigation occurring at the JGE Subdivision is through the pressurized surface water system from the North Rigby Canal, then Condition 3 is satisfied. If, on the other hand, irrigation of the JGE Subdivision is not provided by the surface water system, at least in part, then Condition 3 is not satisfied and the right holder may be in violation of the condition.

Even though a pressurized surface water system was constructed for the JGE Subdivision (as confirmed by the IDWR field examiner), it is not clear whether the surface water system has ever been used to irrigate any part of the JGE Subdivision. If none of the irrigation is occurring through the pressurized surface water system, then the water right holder may be in violation of Condition 3. The question of whether Condition 3 has been violated in the past would be a question of fact to be addressed at the administrative hearing. For purposes of this order, the hearing officer must only determine whether the approval of Applications 83417, 83915 and 83918 would result in a violation of Condition 3 on water right 25-14162. The hearing officer concludes that the approvals will not result in a violation of Condition 3. Although at least a portion of the JGE Subdivision must be irrigated with water under the North Rigby Canal & Irrigation Company shares, the holder of water right 25-14162 is free to move in additional water

supplies—ground water rights or surface water rights—to augment the existing surface water rights available for irrigation.

### **Relationship between Water Right 01-7017 and 35-7720**

The partial decree for water right 35-7720 does not include any condition or language requiring the water right holder to exhaust the full supply of surface water available under water right 01-7017 before diverting ground water under water right 35-7720. Water right 01-7017 does include a condition requiring an additional (supplemental) supply of water be available for irrigation of the authorized acres when water right 01-7017 is curtailed. Water right 01-7017 is relatively junior on the Snake River and is only available for a short time period during the irrigation season. The condition on water right 01-7017 does not state that the right must be fully utilized or exhausted before using other water rights. In fact, water rights 01-7017 and 35-7720 do not include any conditions describing the order of use for the water rights. In the absence of a condition making water right 35-7720 secondary to water right 01-7017, the right holder is authorized to divert water under either water right in any order to accomplish the beneficial use described by the rights (the irrigation of 118 acres).

### **Effect of Idaho Code §§ 31-3805 and 67-6537**

In its brief, SWC acknowledges that the Department is not required to enforce or administer the provisions of Idaho Code §§ 31-3805 and 67-6537 when it conducts its review of a transfer application under Idaho Code § 42-222. *SWC Brief* at 11. Instead, SWC argues that these statutory provisions represent and summarize the local public interest in using surface water sources, where reasonably available, as the primary supply for irrigation use.

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.” Idaho Code § 42-202B(3). “The relevant elements [of the local public interest] and their relative weights will vary with local needs, circumstances, and interests.” *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985). “The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to [the Department’s] sound discretion.” *Id.*

The evaluation of whether a transfer application is in the local public interest involves identifying the local public interests and then weighing those interests. The Coalition has framed its arguments related to Idaho Code §§ 31-3805 and 67-6537 within the context of the local public interest element of review. Before the hearing officer can make an overall determination of whether the proposed transfer applications are in the local public interest, the parties must be given an opportunity to present evidence on the local public interest factor identified by the Coalition (related to the surface water irrigation preference) and also given an opportunity to present evidence on any other local public interest factors. It would be inappropriate to reach a determination on the local public interest element of Idaho Code § 42-222 without further development of the evidentiary record.

## CONCLUSIONS OF LAW

The Department should not approve a transfer that would cause a water user to violate a condition on a separate water right.

Approval of Applications 83471, 83915 and 83918 will not result in the violation of Condition 3 on water right 25-14162.

Water right 35-7720 is not secondary to water right 01-7017. Water right 35-7720 may be diverted exclusive of, prior to, or in combination with water right 01-7017, within the combined limits of the rights.

## ORDER

IT IS HEREBY ORDERED that the conclusions of law set forth above are adopted in the pending contested cases. Because the conclusions of law do not address all of the issues of protest, the contested cases may proceed to an administrative hearing. This is an interlocutory order issued pursuant to IDAPA 37.01.01.710.

Dated this 30<sup>th</sup> day of June 2020.



James Cefalo  
Hearing Officer



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of June 2020, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

**RE: Interlocutory Order Addressing Questions of Law**

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