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Department of Water Resources
Eastern Region

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the matter of Transfer No. 79943,) POST HEARING BRIEF
in the name of Albion12, LLC)

I am taking this opportunity to make some remarks about my experiences with the transfer process. Calling these remarks a "Post Hearing Brief" is a bit of a stretch - I'm sure that I will be breaking all sorts of rules regarding allowable subject matter and format. Nonetheless, I'd like to make some amateur observations and suggestions I believe would help to remove some of the ambiguity and misleading information I see in the Transfer Processing Memorandum No. 24, and in the Transfer Application.

If IDWR departmental policy concerning transfers of supplemental water rights is indeed consistent with the arguments made in the Order Denying Motions for Summary Judgment (dated Oct. 11, 2016, hereinafter 'Order'), then I think it would be in the interests of future applicants as well as future protestants to make the rules and determining criteria more explicit.

If I had realized that the policy regarding the issue of enlargement for supplemental rights was as elucidated in the Order, it is possible that I would have dropped my protest fairly early in the process. I probably would have seen no point in continuing if I had known that the historic, actual, physical quantities of water used at the existing site are of only peripheral interest in determining the issue of enlargement. Make no mistake, I strongly disagree with the Order on the issue of enlargement, and believe that actual use, before and after the transfer, is the essence of the question of enlargement. But if the view articulated in the Order is reflective of established departmental policy, then I believe changes should be made to the wording of the Transfer Application, and in the Administrator's Memorandum (Transfer Processing No. 24).

Therefore, I offer the following suggestions:

The transfer application, Box #8b on page 1 states: "If the transfer application proposes to change the place of use of a supplemental irrigation right, provide documentation regarding the historic use of the supplemental right(s) and the availability or reliability of the primary right(s) being supplemented, both before and after the proposed change."

The application not only specifically asks for documentation of the historic use of the existing supplemental right, but actually asks for it before asking for documentation about the comparative reliability of the two primary rights involved. A person not familiar with IDWR departmental policy might reasonably conclude from this that historic use was of at least equal importance with primary right reliability considerations. The Order, however, reveals that departmental policy values historic use only insofar as it helps to understand the reliability of the existing primary right.

To avoid misunderstanding in the future by people, such as protestants, uninitiated in the workings of IDWR departmental policy, perhaps it would be helpful in future transfer proceedings to modify the wording to read something more like:

If the transfer application proposes to change the place of use of a supplemental irrigation right, provide documentation regarding the availability of the primary rights being supplemented, both

before and after the proposed change. Include documentation regarding the extent of diversion at the existing place of use if it would be helpful in understanding the reliability of the primary right at the current location.

In Part 3C of page 6 the application states “Describe how the supplemental water rights have been used historically in conjunction with other water rights at the existing place of use. Describe the time during the irrigation season that the supplemental rights have been used. Include information about the availability or reliability of the primary right(s) being supplemented, both before and after the change.”

It may be helpful in future transfer proceedings, in view of departmental policy as discussed in the Order, to perhaps modify the wording in this part of the application to read something more like:

If it would help in understanding the reliability of the existing primary right, describe how the supplemental water rights have been used historically in conjunction with other water rights at the existing place of use. Describe the time during the irrigation season that the supplemental rights have been used. Include information about the availability or reliability of the primary right(s) being supplemented, both before and after the change.”

The Administrator's Memorandum in section 5d.(3) on page 28 states:

[T]he place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right at a different place of use without, by definition, enlarging the original right or the supplemental right proposed for transfer, so long as the primary rights at the original and proposed places of use provide comparable water supplies. In other words, use of the supplemental right at the proposed place of use cannot materially exceed use of the supplemental right at the current place of use.

The last sentence of this portion of the Memorandum is misleading to the average person . If someone asks his neighbor “How much gas did you use on your trip to Minnesota?”, the neighbor would reasonably interpret this not as “How much gas would you have used if you had maintained 40 MPH?”, nor as “How much gas would you have used if your car averaged 30 mpg?” The neighbor, as anybody else, would reasonably interpret the word “use”, without qualifying adjectives, as meaning simply “used”- actually used, “How much gas did you actually use?” Since this common, conventionally logical interpretation is inconsistent with the policy of the IDWR, as argued in the Order, the wording of the last sentence should probably be modified to read more like:

In other words, use of the supplemental right at the proposed place of use cannot materially exceed the adjudicated or legally allowed use at the current place of use.

In addition, to avoid any ambiguity, it would be prudent to add an explicit statement such as:

Since the actual use of supplemental water rights can vary substantially from year to year, issues of enlargement for a supplemental right are decided solely on the relative reliability of the two primary rights involved.

In a related issue, 42-222(1) states in part “ . . . , provided no other water rights are injured

thereby, the change does not constitute an enlargement in use of the original right, . . .” To help avoid misinterpretation of this portion of the statute by ordinary, non-legally trained people, a statement in the Memorandum clarifying the meaning of the statute as it relates to supplemental water rights would be beneficial. Perhaps something like:

The use of the phrase “enlargement in use”, per Idaho Code 42-222, when applied to supplemental water rights, has been interpreted by the IDWR to mean “enlargement in allowed or licensed use”, not “enlargement in actual, historic use.”

The Administrator’s Memorandum in section 5d.(5) on page 30 states:

For an application for transfer seeking to change the place of use under a supplemental water right for use in conjunction with a different primary right, the historic extent of beneficial use under the right must not be enlarged. For such changes, information regarding the historic availability or reliability of supply of the rights being supplemented (primary rights), both before and after the proposed change, is presumed to provide a reasonable basis to establish historic use under the supplemental right proposed for transfer.

Once again, an average person might naively interpret “the historic extent of beneficial use under the right must not be enlarged” to mean “the historic extent of beneficial use under the right must not be enlarged”, and that the wording in the next sentence “presumed to provide a reasonable basis . . .” is simply the articulation of an expedient method for determining whether such an enlargement would occur.

It may be helpful in future transfer proceedings, in view of departmental policy as revealed in the Order, to modify the wording in this part of the Memorandum to read something more like:

For an application for transfer seeking to change the place of use under a supplemental water right for use in conjunction with a different primary right, the legally allowed or adjudicated use must not be enlarged. For such changes, the availability and reliability of the primary rights being supplemented, both before and after the proposed change, if comparable, are sufficient to determine that enlargement will not occur.

A number of other instances also exist in the Memorandum which I think are inconsistent with departmental policy per the Order.

I am not an attorney, am not experienced in water rights issues, and am certainly not qualified to adjudicate a water rights dispute. I am, however, qualified to say that I was misled by the policy literature available from the department. I had no doubt that when I read statements like “the historic extent of beneficial use under the right must not be enlarged”, and “In other words, use of the supplemental right at the proposed place of use cannot materially exceed use of the supplemental right at the current place of use.”, that the policy was to determine actual, historic, existing water use and then to insure that after the transfer the amount used was not bigger than before.

I was frankly dumbfounded by the conclusions of the Order. To me it seemed almost self evident that it was the use of the right which must not be enlarged, not simply the terms of the license itself which must not be enlarged. After all, who would contemplate that a transfer could legitimize an

increase of the allowable limit from 268 AcFt/Yr to 300 AcFt/Yr, or that the right to supplement 67 acres per year could increase to 80 acres per year simply through a transfer?

Since my viewpoint is apparently not shared by the IDWR, however, I can only ask that the policy literature available more accurately reflect the actual policy of the Department. I believe that making changes similar to those that I have suggested above will help achieve greater clarity in the future.

Dated this 13th day January, 2017,

Christopher J. King, protestant

Distributed by email to the following on January 13, 2017

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