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Hydraulics

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Water Resources

RECEIVED
OCT 13 2015
Department of Water Resources
Eastern Region

October 9, 2015

James Cefalo
Idaho Department of Water Resources
900 North Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

Re: Transfer Fee

Dear Mr. Cefalo:

Paul Lanier has entered into an agreement to sell water rights 34-322 and 34-323 to Magee Family Trust. An original transfer for this purchase was submitted to IDWR in August of 2014 with a Brockway Engineering check #12155 for \$580.00.

Since that time, the transfer has been amended to include water rights 34-241, 34-533, 34-10461, 34-2324 and 34-12356. Because of the addition of the water rights and the adjustment to the overall place of use of these water rights. It is necessary to submit an additional processing fee of \$480.00 to IDWR.

Sincerely,

Greg Sullivan, M.S.

CHARLES E.
BROCKWAY,
PH.D., P.E.

CHARLES G.
BROCKWAY,
PH.D., P.E.

Cc: Fran Magee, Paul Lanier
Enc: Brockway Engineering Check # 12928 for \$480.00

2016 NORTH
WASHINGTON
STREET • SUITE 4

TWIN FALLS,
IDAHO 83301

208•736•8543

FAX: 736•8506

Receipt
E041538

Cefalo, James

From: Greg Sullivan [greg.sullivan@brockwayeng.com]
Sent: Monday, August 24, 2015 9:41 AM
To: Cefalo, James
Subject: Lanier Transfer
Attachments: Lanier Transfer.pdf

James,

I noticed an error in my legal description of the POU for the Paul Lanier transfer. The Part 1 Continued that was recently mailed to your office identifies Sections 7 and 8. The two sections to be identified are Sections 7 and 18. Please replace the attached page with the appropriate page for the transfer to be processed.

Thank you,

Greg Sullivan
Brockway Engineering
2016 North Washington Stree, Suite 4
Twin Falls, Idaho 83301
208-736-8543



BROCKWAY
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Hydraulics

Hydrology

Water Resources

RECEIVED

AUG 24 2015

Department of Water Resources
Eastern Region

August 20, 2015

James Cefalo
Idaho Department of Water Resources
900 North Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

Re: Paul Lanier Transfer 34-322 and 34-323

Dear Mr. Cefalo:

Through many meetings and discussions, a resolution relating to the transfer of water rights 34-322 and 34-323 has been agreed upon by the parties involved. The proposed place of use on the Goff property will be reduced by 32.0 acres due to the 32.0 acres being required to be stacked on top of an existing water right. No other aspect of the transfer will be changing.

I have attached an updated "Part 1 Continued" of the IDWR transfer application, a new aerial map identifying the proposed 173.0 acres of irrigation and two signed Contracts of Sale of Water Rights between Paul Lanier and Fran Magee Family Trust.

Please continue processing and advertise the transfer of water right 34-322 and 34-323.

CHARLES E.
BROCKWAY,
PH.D., P.E.

CHARLES G.
BROCKWAY,
PH.D., P.E.

2016 NORTH
WASHINGTON
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TWIN FALLS,
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208•736•8543

FAX: 736•8506

Sincerely,

Greg Sullivan, M.S., Engineer

Cc: Paul Lanier, Fran Magee

Enc: Contract of Agreement, Aerial Maps, Part 1 Continued



BROCKWAY
ENGINEERING
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Hydraulics

Hydrology

Water Resources

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AUG 06 2014

Department of Water Resources
Eastern Region

August 4, 2014

James Cefalo
Idaho Department of Water Resources
900 North Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

Re: Paul Lanier Transfer 34-322 and 34-323

Dear Mr. Cefalo:

This letter is accompanying a permanent transfer application to move the place of use and point of diversion of primary water rights 34-322 and 34-323. Several IDWR employees, attorneys and water right owners, have discussed the ownership and use of these water rights at length. This transfer is intended to simplify the current complicated issues around these water rights by moving 70.0 acres of primary irrigation water diverted from the Big Lost River to the Goff Farm owned by Magee Family Trust.

Paul Lanier and Magee Family Trust have signed a letter of intent that would facilitate the purchase of 34-322 and 34-323. The purchase of 34-322 and 34-323 will not be completed unless the transfer is approved by IDWR. When the transfer is approved, then the purchase and change of ownership can occur.

The current point of diversion of 34-322 and 34-323 is located at Township 07 North Range 24 East Section 34 SENWNW which is commonly known as the Burnett Ditch head gate. The proposed point of diversion is located at Township 07 North Range 24 East Section 33 SWNE which is commonly known as the Darlington Ditch head gate. No ESPA Modeling is required for this transfer because the points of diversion are located within adjacent ESPA Model cells.

Water right 34-2421 (also known as application G29778 and permit G29778) is a supplemental water right with a priority date of June 6, 1961, a diversion rate of 1.28 cfs, a annual volume of 224 acre feet, can irrigate 64.0 acres and is currently owned by Lynn Metcalf and Velma Metcalf. Water right 34-2421 is stacked with primary water rights 34-222 and 34-323.

The *Application for Permit* for 34-2421 identifies that there are existing water rights or permits appurtenant to the lands to be irrigate by 34-2421. Those existing water rights are "40 inches 7-21-1886, 40 inches 6-1-1889, 80 inches

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6-1-1889” and the diversion rate for the permit of 3.2 cfs “is to be supplemental to the existing water rights”.

The Proof of Application of Water to Beneficial Use and Completion of Works date May 27, 1966 for water right 34-2421 states that the nature of 34-2421 is “Supplemental water for existing rights only”.

There has been a lot of discussion and analysis performed by various entities regarding the ownership and use of 34-2421, 34-322 and 34-323 as documented by the Warranty Deed from Russell and Virginia Hanks to Lynn and Velma Metcalf (7/3/1997), the Notice of Change of Water Right (2/20,1998), the Quitclaim Deed (8/16/2012) and Notice of Change in Water Right Ownership (8/16/2012) from Russell and Virginia Hanks to Paul and Marianne Lanier and IDWR Preliminary Order Rescinding Transfer Approval of Transfer 76311 (2/11/2013).

Paul Lanier does not own the property in which primary water rights 34-322 and 34-323 is authorized but the water has been delivered by the Watermaster and utilized on property owned by Paul Lanier (see attached Water Deliveries and Account Information).

Lynn and Velma Metcalf were able to avoid a Notice of Violation in 2013 for pumping ground water (34-2421) on the property without a primary surface water by applying for and getting approved two temporary transfers. This issue was discussed via email extensively in 2013 with Nathan Olsen, Tim Luke, James Cefallo and Paul Lanier (see attached email correspondence).

It is unknown at this time if the Metcalf’s have submitted a permanent transfer to resolve their enlargement issues on the farm. If they have not, then the Department needs to examine the water use and determine if a Notice of Violation for 2014 is necessary.

It is apparent that additional primary water is available to the Metcalf’s that can be permanently stacked with the supplemental water right 34-2421. Thus, resolving the enlargement of use issue surrounding 34-2421.

The proposed transfer of primary water rights 34-322 and 34-323 would also aid in resolving the enlargement issues with 34-2421 by unstacking the primary and supplemental water rights. This action would allow a follow up transfer by the Metcalf’s to stack other primary surface water with 34-2421 and secure their irrigation practices.

Please copy our office on all correspondence regarding this transfer application.

Sincerely,



Greg Sullivan, M.S., Engineer

Cc: Paul Lanier, Fran Magee

Enc: Contract of Agreement, Aerial Maps, Warranty Deeds, Quitclaim Deeds, Application For Permit 34-2421, Proof of Application of Water to Beneficial Use and Completion of Works 34-2421, Notice of Change in Water Right Ownership, Preliminary Order, Email Correspondence, Delivery Records, Brockway Engineering Check # 12155 for \$580.00,

Cefalo, James

From: Cefalo, James
Sent: Thursday, February 26, 2015 12:12 PM
To: 'Michael C Creamer'
Subject: Application for Transfer filed by Paul and Marianne Lanier

Mike,

Just following up on the status of the Lanier Transfer. When we spoke in early January, I agreed to hold off on advertising the transfer to allow you a couple of weeks to review the water rights and consult with your clients. The transfer proposes to unstack surface water rights 34-322 and 34-323 from ground water right 34-2421 to break out new ground near Mackay, Idaho. I've already expressed my concern about enlargement to the Laniers and Greg Sullivan (representing Magee Family Trust, the potential buyer of the Lanier rights). This transfer has been on hold since August 2014, waiting for the applicants to decide whether they want to proceed. Once the transfer is advertised, the filing fee (\$580) is no longer refundable. Let me know how you would like to proceed.

James

Law Offices

RIGBY, ANDRUS & RIGBY LAW, PLLC

*Ray W. Rigby, of counsel
G. Rich Andrus
Jerry R. Rigby
Michael S. Kam (1954-2001)
Hyrum D. Erickson
Tyler J. Salvesen*

*P.O. Box 250
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Rexburg, ID 83440*

*Telephone: (208) 356-3633
Fax: (208) 356-0768
herickson@rex-law.com*

September 24, 2014

Nathan M. Olsen, Esq.
485 "E" Street
Idaho Falls, ID 83402

Via email: nolsen@pmholaw.com

Dear Nathan,

I received your email sent September 15, 2014, forwarded it to Gary Wight, and have discussed the matter with him. I have also reviewed with him the letter sent to your clients by James Cefalo of the Idaho Department of Water Resources dated August 11, 2014. Mr. Wight has asked me to respond.

Mr. Wight never intended to make the temporary change application filed in 2013, permanent. It was a temporary transfer and the water involved has already been returned to its original place of use. He does not intend to permanently transfer preexisting surface water rights onto the current place of use of 34-322 or 34-323 as suggested by your email.

Like you, I thought this matter was resolved at the meeting on February 19, 2014. I thought Mr. Cefalo was very clear in explaining that the surface water could be transferred to any place of use that had a preexisting ground water right. I understood that your client's concern was resolved once they understood the rights could be sold and transferred. My recollection is that they believed the potential buyer had ground water rights that their right could be stacked with. I thought the issue was resolved because your clients perceived that they could work around the stacking issue by transferring it to ground with a preexisting ground water right. It appears from Mr. Cefalo's letter that his recollection of the meeting is consistent with mine.

After the discussion at the meeting, I am confused as to why the Lanier's, or the Lanier's purchaser, would be trying to transfer the water right to a place of use without a current ground water right. Mr. Wight is frustrated that the Laniers have again come to him to solve their problem – despite having had the issue explained clearly to them and agreeing to a solution.

It seems to Mr. Wight and me that the appropriate solution is the one we thought your clients had agreed to at the meeting – transfer their water rights to a place of use with a preexisting ground water right.

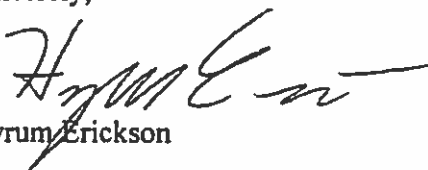
Your email mentioned correcting a "clerical error" to change the groundwater right to a supplemental right. I have reviewed the file, as we all did at the meeting, and I think I understand what Mr. Sullivan means when he says it was a clerical error. I would disagree that the backfile necessarily indicates that the omission of a supplemental condition was a clerical error. However, even if it was, the license was issued in the 1960s without the supplemental condition. Even assuming that the omission was an error by the Department, it has been my experience that the Department will not read new conditions into old licenses to the detriment of the water user. I would argue that the Department lacks the authority to go back 50 years and add a new condition to a water right license.

I guess that leaves us where we were at the meeting in February. Your client received the surface water rights pursuant to the settlement of the 2010 case. Those rights are owned by your client, they have value, and they can be sold, transferred, and used on other property, subject only to the restrictions discussed above. Your clients' challenges with selling and transferring the asset are not Mr. Wight's responsibility. That being said, if your clients are having trouble finding a buyer that has ground to which the water could be transferred, let me know and I would be happy to make some calls to see if we can find someone.

On November 26, 2012, in connection with the dismissal of the 2010 case, your client signed a release and indemnity agreement. That indemnity agreement specifically included heirs and assigns. If your clients choose to engage in further litigation regarding this issue or force Mrs. Metcalf or Mr. Wight to incur additional attorney fees, I would advise Mrs. Metcalf and Mr. Wight that they should seriously consider a claim against your clients to recoup all fees and expenses incurred since that release was signed.

Although Mr. Wight declines to take the action your client requests, he still very much desires to have this matter resolved expeditiously. If you think that discussing this matter would be helpful, please don't hesitate to give me a call.

Sincerely,



Hyrum Erickson

HE:dc

Enclosure

HE\WightG.It2.wpd



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N Skyline Dr., Ste A, Idaho Falls, Idaho 83402-1718

Phone: (208) 525-7161 FAX: (208) 525-7177 www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

August 11, 2014

Greg Sullivan
Brockway Engineering PLLC
2016 North Washington Street, Suite 4
Twin Falls, ID 83301

RE: Proposed Transfer of Water Rights 34-322 and 34-323 (Lanier)

Dear Mr. Sullivan:

IDWR recently received a transfer filed by you on behalf of Paul and Marianne Lanier, seeking to transfer water rights 34-322 and 34-323 to property owned by the Magee Family Trust. Because you are already familiar with the history of these water rights, I am not going to restate all of that information in this letter.

Water rights 34-322 and 34-323 (from the Big Lost River) are currently stacked on top of ground water right 34-2421. These three rights, in combination are limited to the irrigation of 70 acres. In my conversations with the Laniers, Nathan Olson, Gary Wight, and Metcalf, I have made it clear that unstacking these water rights would likely constitute an enlargement. The only transfer that could be approved was one moving water rights into a similar stacked position.

On February 19, 2014, IDWR hosted a settlement conference regarding the Metcalf and Lanier water rights. The parties (and their attorneys) hoped to find a resolution to the stacked water right issue to avoid future legal costs. At that conference, I restated the enlargement concerns and reminded the parties that those concerns could only be overcome if the water rights were moving from a stacked position to a stacked position. The parties agreed that the Laniers would transfer their surface water rights off of the current place of use to a place where they would be stacked with an existing ground water right.

The transfer you filed proposes to break out new ground and does not stack the Lanier surface rights on top of an existing ground water right. The proposed transfer will result in an enlargement of irrigated acres and cannot be approved in its present form.

Your letter states that the Metcalf family intends to move existing surface water rights onto the 70 acres covered by water right 34-2421. This type of an arrangement could address the enlargement concerns. However, I was not aware that the Metcalfs intended to move surface water rights and have not seen any transfer proposing to do so. Your proposed transfer cannot be approved until the Metcalf transfer has been filed. IDWR will not approve a transfer, which creates an enlargement, relying on a promise that a companion transfer will be filed

August 11, 2014

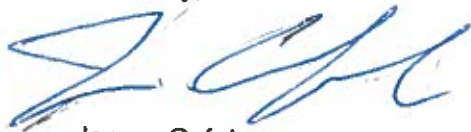
Page 2 of 2

sometime in the future. The transfer application moving surface water rights onto the Metcalf property must be filed at the same time as the Lanier application.

You have a number of options with the pending transfer application: (1) You may amend the application to propose moving the Lanier surface rights onto property covered by an existing ground water right (as was agreed to at the settlement conference). (2) You may contact the Metcalf family or Gary Wight and have them file a transfer to combine surface rights with right 34-2421. The Lanier application and Metcalf application would then be processed at the same time. (3) You could withdraw the application and continue discussions with the Metcalf family about the water rights. (4) You could pursue the transfer application as it was filed. IDWR would likely deny the application based on enlargement concerns. At that point, the Laniers would have the right to appeal the decision to the district court. I have included a copy of an Idaho case, *Barron v. IDWR* (135 Idaho 414), to show how Idaho courts have dealt with a similar set of facts in the past.

I will hold off on processing the proposed transfer application for 30 days to give you time to work with the Laniers to choose a path forward. If I don't hear from you by September 12th, I will assume that you intend to proceed with the transfer application as filed and will move forward with advertising the application.

Sincerely,



James Cefalo

Water Resources Program Manager

Cc: Gary Wight (3798 W 4050 N, Moore, ID 83255)

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18 P.3d 219 (Idaho 2001)

135 Idaho 414

In the Matter of Application for Transfer No. 5116 in the Name of Charles L. Barron.

Charles L. BARRON, Applicant-Appellant,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,
Respondent.

No. 25828.

Supreme Court of Idaho, Twin Falls.

February 6, 2001.

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[135 Idaho 415] Arkoosh Law Offices, Gooding, for appellant. C. Thomas Arkoosh argued.

Hon. Alan G. Lance, Attorney General; Phillip J. Rassier, Deputy Attorney General, Boise, for respondent. Phillip J. Rassier argued.

WALTERS, Justice.

This is an appeal from a decision by the Department of Water Resources denying Charles Barron's application to transfer a water right. We affirm the Department's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Charles Barron's transfer application concerns water right number 37-02801B, which has a 1905 priority date for six cubic feet per second (cfs) of water in Camas County. Barron proposed to split this right into two separate rights: 37-02801C and 37-02801D. The first (37-02801C) would divert 1.2 cfs of the original right at a location approximately fifteen miles upstream from the licensed place of use. The second (37-02801D) would divert the remaining 4.8 cfs at a location downstream approximately eighty miles from the licensed place of use.

Although the source for 37-02801B is listed as Camas Creek, it is apparent that the stream has also been called Malad Creek at some previous times. Additionally, Idaho Department of Water Resources (IDWR or Department) agent Jim Stanton, in a memo discussing Barron's application, stated that the source of Barron's

right is Threemile Creek. Thus, there is some confusion in the record as to the source of the right.

The origin of water right 37-02801 can be traced to the filing of an application in 1905 for the use of 12 cfs of water from Camas Creek. It appears from the record that the original point of diversion was located on Camas Creek approximately four miles upstream from the place of use. Water was then conveyed by a ditch to the licensed place of use because, according to information provided by the applicants in 1905, water did not flow below the point of diversion past the middle of July.

In 1948, an individual named E.F. Wilson applied to the Department of Reclamation [1]

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[135 Idaho 416] to change the place of diversion for 6 of the 12 cfs authorized under 37-02801. Wilson sought to change the diversion from the point four miles upstream on Camas Creek to a location near the confluence of Threemile Creek and Camas Creek. The stated reason for the change in the place of diversion was that the original point of diversion was impracticable because of the low grade at which the four-mile ditch was constructed. Wilson's application included a hand-drawn map indicating that the point of diversion was to be located on Camas Creek, just below the confluence with Threemile Creek. However, the map submitted by the IDWR in its appellate brief places the current point of diversion on Threemile Creek, above the confluence. The placement of the point of diversion on Threemile Creek is consistent with the map submitted by Barron in his application.

In 1968, an individual named Rocco Perry filed an application for a second alternative point of diversion at a point closer to the confluence with Threemile Creek. Perry stated in the application his intent to use a portable pumping system that was to be moved between the two alternate points of diversion. The Department of Reclamation approved the addition of the second alternative point. Perry's hand-drawn map also indicates that the second point of diversion is located on Threemile Creek. Thus, the confusion as to the source of 37-02801B seems to be that while the 1905 application and all subsequent applications list the source as Camas Creek, since Wilson's 1948 transfer the water has actually been diverted from Threemile Creek.

There is also some confusion in the record as to the relationship between 37-02801B and licensed groundwater right 37-07295, both of which are appurtenant to the same land. Groundwater right 37-07295 was established in 1973 by Lynn Stevenson, who currently owns the 311 acres of land to which 37-02801B is appurtenant. Surface water right

37-02801B, as the principal water supply for the authorized use, is the "primary right" for this land. Groundwater right 37-07295 is a "supplemental right"--an additional appropriation of water to make up a deficiency in supply from an existing water right, here 37-02801B.

Barron filed his application on June 16, 1997. Citing concerns over the nature of Barron's water right and the potential for injury to other users, IDWR agent Jim Stanton filed a memorandum on July 17, 1997 recommending that the transfer application be denied. The IDWR subsequently published notice of the application as required by Idaho law. No protests were received in response to the published notices. Also pursuant to Idaho law, the Department obtained the recommendation of the watermaster in the local water district. The watermaster, who expressed concern over the potential injury to downstream water users, advised against approving Barron's transfer.

Barron and the IDWR subsequently exchanged correspondence concerning the transfer application. On five separate occasions, the IDWR requested that Barron provide additional information to address the agency's concerns. Although Barron responded in writing to each of the Department's requests, the IDWR indicated in its final letter that Barron had still not presented sufficient information for the Department to approve his transfer application.

On October 28, 1998, the IDWR issued a preliminary order denying Barron's application. Before the order became final, however, Barron appealed directly to the district court. The district court affirmed the Department's action denying the transfer in a decision issued on August 6, 1999. Barron then brought this appeal from the district court's decision.

ISSUES

Barron presents three issues on appeal. First, Barron contends that the Department's decision denying Barron's application was not supported by substantial and competent evidence. Second, he questions whether the Department's decision denying his application was in violation of constitutional or statutory provisions. Finally, Barron argues that the IDWR's decision denying his application

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[135 Idaho 417] exceeds the Department's statutory authority.

DISCUSSION

A. Standard of Review

Idaho Code section 67-5240 provides that all proceedings by an agency other than the Public Utilities

Commission or the Industrial Commission that may result in the issuance of an "order" are governed by provisions of the Idaho Administrative Procedure Act (IAPA). See I.C. § 67-5201 *et seq.* Under the IAPA, the IDWR's decision may be overturned only where its findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party attacking the Department's decision, here Barron, must first illustrate that the IDWR erred in a manner specified in I.C. § 67-5279(3), and then establish that a substantial right has been prejudiced. See *Price v. Payette County Bd. of Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

In an appeal from the decision of a district court acting in its appellate capacity under the IAPA, this Court reviews the agency record independently of the district court's decision. See *Comer v. County of Twin Falls*, 130 Idaho 433, 437, 942 P.2d 557, 561 (1997); *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996). The Court will not substitute its judgment for that of the agency as to the weight of the evidence presented. See I.C. § 67-5279(1). In other words, the agency's factual determinations are binding on the Court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. See *id.*; see also I.C. § 67-5240(d). With this standard in mind, we first turn to whether the Department's decision was supported by substantial evidence in the record.

B. The Department's Decision

Water transfers in Idaho are governed by Idaho Code section 42-222. This section provides that any person who desires to change the point of diversion or the place, period, or nature of use of the water must apply to the IDWR for approval. See I.C. § 42-222(1). Upon receipt of the application, the Department's director is instructed to provide written notice to the public of the proposed change as well as advise the watermaster of the district in which such water is used. See *id.* The watermaster in turn makes a recommendation to the director concerning the application. In determining whether or not to approve the transfer, the director is instructed to "examine all the evidence and available information," including the watermaster's recommendation, and to approve the change in whole or in part if "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 [the change] is the local public interest...." *Id.*

1. Injury to Other Water Users

Barron argues that the IDWR's findings pertaining

to injury are not supported by substantial and competent evidence in the record. He asserts that the watermaster's recommendation and the Stanton memorandum, upon which the Department partially based its decision to deny Barron's transfer application, do not constitute competent evidence.

Barron first contends that the watermaster's statements should be disregarded because they are merely conclusory remarks typed onto a preprinted form provided by the Department. It is apparent from the form, however, that it does not suggest to the watermaster what his response or recommendation should be. The form is merely intended to allow the watermaster to state whether he endorses the proposed transfer and to give the reasons for his conclusion.

There is no dispute in this case, that the watermaster, based on his experience with and knowledge of the water right in question, was qualified to give such a recommendation.

Page 223

[135 Idaho 418] Stating his belief that water right 37-02801B was strictly a "flood right," the watermaster expressed his concern that without stringent regulation, the proposed transfer would damage downstream rights. Because the director is statutorily required to consider the watermaster's recommendation as evidence, *see* I.C. § 42-222, it would be incongruous to require the watermaster to submit his recommendation and then to disregard his remarks as "conclusory."

In addition, there is other information in the record supporting the watermaster's statements regarding the availability of water. Foremost, the original 1905 application states that "no water runs later than the middle of July." Although this early reference is to Camas Creek, it suggests that the water supply in the area normally dries up as the summer progresses. Moreover, there is the issuance of groundwater right 37-07295 to supplement the surface water right in 1973. This fact alone mitigates against Barron's contention that the surface water is sufficient to irrigate the licensed place of use throughout the growing season. Furthermore, the Stanton memo makes reference to evidence that Threemile Creek virtually disappears in June after the spring runoff. We therefore conclude that the watermaster's recommendation comprises competent evidence to be considered by the director.

Barron also contends that the Stanton memo and the recommendation form were issued at a time when the Department was mistaken as to the source of water right 37-02801B. However, as was discussed above, the mistake as to the source of water right 37-02801B stems from the fact that on paper the source of 37-02801B has always been listed as Camas Creek, when in reality, since 1948 the source has been Threemile Creek. Thus, Stanton's reference to Threemile Creek as the source was

actually correct. Accordingly, we also conclude that Stanton's memo constitutes competent evidence.

Barron further challenges the IDWR's finding that he failed to provide sufficient information about the lack of possible injury to downstream users. He asserts that he provided information and under oath asserted that the proposed transfer will not injure downstream water users. Consequently, he argues that there is no evidence in the record indicating that other users will be injured, particularly in light of the lack of protest after publication of notice of the proposed transfer. He asserts that the Department's statements amount to mere speculation and therefore, the record does not contain substantial and competent evidence to support the IDWR's findings. However, other than the sworn assertions of Barron and John Faulkner, the individual to whom Barron proposes to transfer the upstream water right, the record contains little if any evidence to support Barron's argument.

There is, on the other hand, in addition to the watermaster's recommendation, other evidence in the record indicating that Barron's transfer would potentially injure other water users. For example, the Stanton memorandum recites that a number of other water rights exist on Chimney Creek—the watercourse where Barron proposes to transfer his upstream point of diversion. Of these rights, Stanton reports that the largest are located downstream from the proposed point of diversion and that several contain priority dates earlier than 1905—the original priority date for 37-02801. Hence, the IDWR's concern over the potential for reduced availability, *i.e.*, injury, to those rights appears valid.

The IDWR thus appears legitimately concerned that Barron's proposed transfer will result in injury to other water users. As this Court noted in *Jenkins v. State Dept. of Water Resources*, "[t]he director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights...." 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). Barron necessarily bears the burden of providing the Department with sufficient information to show non-injury to other water rights, and this Court will not substitute its judgment for that of the Department as to the weight of the evidence Barron presented.

2. Enlargement in Use

Barron also argues that the IDWR made several findings pertaining to enlargement in use that are not supported in the record. The record demonstrates, however,

Page 224

[135 Idaho 419] that Barron did not present sufficient evidence of non-enlargement to the Department such that the director could approve Barron's transfer. Because Barron has failed to establish this criterion, we concluded that the IDWR's findings were well supported.

a. Historical Consumptive Use

Under I.C. § 42-222(1), the director may consider historical consumptive use, as defined in I.C. § 42-202B, [2] as a factor in determining whether a proposed transfer would result in an enlargement in use or injure other water rights. *See* I.C. § 42-222(1). Barron contends that he has provided relevant information on the background and historical use of the subject water right. A close reading of the record, however, demonstrates that he did not.

The Department specifically requested evidence from Barron regarding the historic use of water right 37-02801B on three separate occasions. For example, on January 9, 1998, the IDWR requested that Barron provide detailed evidence about 37-02801's historical use. Specifically, the letter requested that Barron provide a legal description and supporting documentation showing when and where water right 37-02801B had been used during the previous ten years. In addition, the letter asked that Barron present evidence of the "extent of beneficial use made of this right, in terms of the rate and period when water has been diverted...." Barron's response to these requests reveals that he was unable to present competent evidence to the IDWR. Barron, through his attorney, replied to the January 9 letter by filing a document entitled "Synopsis of Water Right No. 37-02801B and Transfer No. 5116." The Synopsis states that "[t]he affidavits with this application indicate full use of the right on the licensed place of use in 1991 and 1996." One of these affidavits, that of John Faulkner, the intended recipient of one of the transfers, makes no reference to the historical use of water right 37-02801B. The other affidavit, by Barron himself, merely states that during some years in the 1980's, the right was used to irrigate a parcel of land other than the licensed place of use, and that "[i]n 1991, and again in 1996, [Barron] used Water right No. 37-02801B to irrigate the licensed place of use." As the district court noted when reviewing the record, absent are any meaningful statements regarding the period of use, the amount of water diverted or consumed, or whether and to what extent groundwater right 37-07295 was used to supplement the surface water right.

In addition, the record contains evidence directly refuting Barron's vague assertions. The Stanton memorandum discloses that the licensed place of use for the subject water right has been leased and farmed by an individual named Shannon Wolf for the last seven years, and that Wolf has irrigated solely with groundwater during this period. Barron states in his affidavit that his use of a surface water right in 1991 and 1996 on the licensed place of use was not communicated to Wolf, and that to Barron's knowledge Wolf did not know of Barron's use of the water to irrigate. However, given Stanton's information, it would seem unlikely that in 1991 and 1996 Barron and Wolf were irrigating the same 311 acre parcel or, given that Wolf apparently holds

Barron in some disregard after Barron sued Wolf in 1993, that Barron was irrigating surrounding land without Wolf's knowledge. It therefore appears from the record that Barron failed to provide the IDWR with sufficient information to establish the historical consumptive use.

b. The Relationship between Water Rights 37-02801B and 37-7295

Another area of concern for the Department was the potential enlargement of groundwater right 37-07295 should Barron's application be granted. As mentioned above, groundwater right 37-07295 is the supplementary right to surface right 37-02801B. The problem arising with Barron's proposed transfer is that the previously combined use of the two water rights is limited to the consumptive use on the 311 acre tract of

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[135 Idaho 420] land. If water right 37-02801 is moved to another tract, (or tracts) with the result that the two rights would irrigate more than 311 acres, then there is an enlargement of the water right. Barron contends that he provided evidence to the IDWR that 37-02801B is the primary or "stand alone" right and asserts that the proposed transfer would result in the licensed place of use being farmed as dry land. Barron, however, neither owns nor exercises any control over the land upon which 37-02801 or 37-07295 is appurtenant.

Barron's proposed solution to this problem is to call upon the Department to limit the use of ground water right 37-07295, and, if necessary file a claim for injunctive relief for the illegal diversion or use of water. *See* I.C. §§ 42-351, 42-2933. The Court holds, however, that Barron's position is not well supported. Barron's proposition is in reality an attempt to shift the burden of preventing enlargement to the IDWR, yet it is Barron and not the Department who bears this burden. Additionally, Idaho Code section 42-222(1) does not contemplate curtailing junior supplemental groundwater rights so as to enable individuals to transfer the senior primary surface right to another location. Such an interpretation would undermine the very requirement of showing the absence of enlargement. Put another way, requiring the IDWR to institute injunctive litigation to accommodate Barron's transfer is not reflected in the statute. Moreover, Barron obtained water right 37-02801 as it currently exists, *i.e.*, as a water right for which there is a supplemental appropriation. Because the licensed place of use historically has been irrigated to some extent by groundwater right 37-07295, Barron took the surface right, 37-02801, subject to the groundwater right's utilization.

c. Historical Availability

Idaho law prohibits any transfer from resulting in an enlargement of the water right above its historical beneficial use. *See* I.C. 42-222(1). Enlargement includes

increasing the amount of water diverted or consumed to accomplish the beneficial use. *See id.* Thus, if Barron's transfer would result in the use of water at a time when it was historically unavailable, water right 37-02801B would be enlarged. Barron has submitted affidavits asserting that water is available at its present location throughout the irrigation season. However, as mentioned above, there is conflicting evidence that water is unavailable in the latter part of the summer. Thus, because the IDWR's findings are supported by substantial and competent, although conflicting, evidence, the Court will not disturb those findings.

C. Statutory Provisions

We next turn to whether the Department's decision violates any statutory or constitutional provision. Barron argues that the IDWR imposed a burden of proof that is inconsistent with the statutes governing the transfer of water. He challenges whether the burden imposed by the IDWR sets an inappropriate standard given the difficulty of proving no injury.

As the district court noted, however, the IDWR's director is statutorily required to examine all the available evidence and information when deciding whether to approve a proposed transfer. Although the difficulty of showing the absence of injury has prompted criticism by some courts, *see Tanner v. Humphreys*, 87 Utah 164, 172-75, 48 P.2d 484, 488-89 (1935), our statute requires Barron to present sufficient evidence to the Department so that the director can make an informed determination as to Barron's transfer application. Accordingly, the question of whether the Department's decision was in derogation of statutory provisions can alternatively be stated as whether Barron produced sufficient evidence to enable the director to approve his proposed transfer. Merely requiring Barron to present this evidence does not amount to imposing an inconsistent burden of proof. In fact, Barron's presentation of evidence of non-injury, non-enlargement, and favorable public interest is what enables the director to discharge his obligation under the statute. As noted above, Barron on several occasions failed to provide the Department with the requested information, instead relying on imprecise facts and assertions. Without a satisfactory demonstration by Barron, the director cannot.

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[135 Idaho 421] under the statutory guidelines, approve the transfer. Thus, the Department's actions in this case do not amount to the imposition of an inconsistent burden of proof, but instead demonstrate the director's compliance with his statutory responsibility under I.C. § 42-222(1).

Additionally, Barron argues that even if the burden sets the appropriate standard, the IDWR, by issuing an order denying his transfer, went beyond that standard by placing a burden on Barron that is inconsistent with the

governing statutes. Barron contends that he completed his transfer application in conformance with the statutory requirements. He asserts that his application contained sworn statements that his proposed changes would not: (1) cause any injury to another water user; (2) constitute an enlargement in use; and (3) that the information he provided was true to the best of his knowledge. Barron also contends that no person came forward to challenge the proposed transfer after notice of the proposed transfer was published in two local newspapers. The result, Barron argues, is the establishment of a *prima facie* showing of non-injury, non-enlargement, and favorable public interest.

According to Barron, this showing met his burden of production and shifted the burden to any protester, including the IDWR if it desired, to act as an adverse party. Barron argues that the IDWR did not act as a true protester because the agency never presented evidence to rebut his *prima facie* case. Instead, Barron argues, the IDWR generally alleged that his transfer would result in injury to other water users, constitute an enlargement, and be contrary to public interest--without stating specific concerns. By doing so, Barron argues, the IDWR required him to go beyond his *prima facie* showing and present evidence to rebut the Department's allegations.

What Barron ignores, however, is that the director, in deciding whether to approve the transfer, is statutorily required to examine all the available evidence and information. *See* I.C. § 42-222(1). Essentially, Barron's argument is that the Department is required to accept his evidence as a *prima facie* showing, and, if no protest is lodged, grant the transfer without further consideration. But it is based upon the examination of the information and evidence in the record--including the information applicant provides, the Department's investigation and records, and the watermaster's recommendation--that the director makes the determination of whether the proposed transfer should be endorsed. Idaho Code section 42-222(1) does not provide that absent a protest by another water user, the Department is required to approve the application. Thus, the lack of protest is irrelevant to the director's decision in this case.

In addition, Barron's argument overlooks another very significant fact--that in the eyes of the director, Barron failed to make a *prima facie* showing on the issues of injury, enlargement, and public interest. In other words, what Barron argues was a *prima facie* showing on his part was not considered as such by the director. Had Barron made a *prima facie* showing as to each of the required statutory elements, his application would have seemingly been approved. However, as discussed above, the record supports the director's determination. Because Barron must present to the Department sufficient evidence of non-injury, no enlargement, and favorable public interest, the Court holds that the IDWR's decision was not in violation of any statutory provisions.

D. Statutory Authority

Finally, we turn to whether the Department's decision denying Barron's transfer exceeded the agency's authority. Barron argues that he made a prima facie showing as to the elements required for a transfer of water under Idaho law. This showing, he contends, is all that is necessary to approve the transfer. Therefore, Barron argues, the IDWR's denial of his application was in excess of statutory authority. However, as discussed above, there is substantial and competent evidence supporting the director's determination that Barron failed to provide sufficient information to make a prima facie showing. Accordingly, the Court holds that the Department's decision did not exceed its statutory authority.

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CONCLUSION

The IDWR's decision denying Barron's transfer application is affirmed. No attorney fees have been requested; therefore costs, but not attorney fees, are awarded to respondent.

Chief Justice TROUT and Justices SCHROEDER, KIDWELL and McKEE, Senior District Judge concur.

Notes:

[1] Idaho Code section 42-1701 was amended in 1974 to provide for the creation of the IDWR. See Act of Feb. 21, 1974, ch. 20, 1974 Idaho Sess. Laws 533. Prior to that time, transfer applications were submitted to the State Reclamation Department.

[2] Idaho Code section 42-202B(1) defines consumptive use as "that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state."