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Department of Water Resources
Eastern Region

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

IN THE MATTER OF APPLICATIONS
FOR TRANSFER 86942 AND 86951 IN
THE NAME OF ROHN R. AND LORI A.
NELSON

**APPLICANTS'
RESPONSE TO PROTESTANT'S POST-
TRIAL BRIEF**

Rohn R. Nelson and Lori A. Nelson (collectively "Nelson" or "Applicants"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., pursuant to Hearing Officer James Cefalo's (the "Hearing Officer") *Request for Briefs* dated May 30, 2023, hereby submits this *Applicants' Response to Protestant's Post-Trial Brief*. The *Request for Briefs* authorized an initial brief to be submitted on or before June 30, 2023, which the Protestants served on the Department on June 30, 2023 (the *Protestant's Post-Trial Brief* ("Protestants' Brief"). Nelson also submitted an initial brief on June 30, 2023 (*Applicants' Post-Hearing Brief* on June 30, 2023 ("Applicants' Brief").

The *Request for Briefs* authorizes a response to *Protestants' Brief* to be filed on or before July 14, 2023. This brief is a response to *Protestants' Brief*.

A. Does Section 42-222(1), Idaho Code, or relevant case law require an applicant to demonstrate legal access to the proposed point(s) of diversion, conveyance system, and place of use in conjunction with an application for transfer?

In response to the Hearing Officer's first question, the Protestants fail to offer any analysis or cogent argument concerning the plain language of the application for permit statute (Idaho Code § 42-203) and the transfer statute (Idaho Code § 42-222), which the Applicant discussed and analyzed in *Applicants' Brief* at pages 2-11. Applicants maintain the position set forth therein in response to this portion of *Protestants' Brief*, which in short, is that there is no good faith/lack of delay or speculation element review criteria language found in the transfer statute (Idaho Code § 42-222) that would also capture a legal access review that is specifically provided for under a new water right permit application. Without *any* language in Idaho Code § 42-222 requiring good faith for submission of a transfer application, it would be improper for the Hearing Officer to read in such a requirement as it would violate well-established statutory interpretation principles.

B. Does a transfer applicant's legal access to the proposed point(s) of diversion, conveyance system, and place of use fall within any of the review criteria for transfer applications set forth in Section 42-222(1), Idaho Code.

In response to the Hearing Officer's second question, the Protestants assert that legal access can be evaluated under the transfer criteria of "the public interest, enlargement, conservation of resources and adverse effect analysis . . ." found in Idaho Code § 42-222. *Protestants' Brief* at 3. The Protestants argue that "[w]ith regard to the application process the Hearing Examiner has authority to consider **anything** having a contrary effect [associated with the above criteria]." *Id.*

The Protestants' argument is not supported by Idaho law addressing the limitations on IDWR hearing officers. In the context of the scope of what an IDWR hearing officer must evaluate, address, and decide upon, the hearing officer is not vested with authority to consider "anything" and be required to address every legal issue presented that may have some tie to water.

As noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), “[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested” in other agencies. *Id.* at 340, 109 Idaho at 451; *see also*, Statement of Purpose, H.B. 284 (2003) (the bill that narrowed the definition of “local public interest” under Idaho Code § 42-202B(3) because it should not require the Department to consider secondary effects of an activity simply because that activity happens to use, or relate to, water: “In recent years, some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public’s water resource. Applicants have experienced costly delays and have been required to hire experts to respond to issues **at an agency whose purpose has nothing to do with those issues.**” (emphasis added)).

As explained in *Applicants’ Brief*, had the Idaho Legislature meant for the Director to exercise the exact same type of review—specifically regarding good faith/lack of delay or speculation—on an application for transfer as he does on an application for permit, it would have been easy for it to do so. The Legislature could have simply included specific language in Idaho Code § 42-222 just as it did in Idaho Code § 42-203A(5). Alternatively, the Legislature could have cross-referenced Idaho Code § 42-203A(5) within the text of section 42-222, but did not. Lastly, it is an unnecessary exercise for the Hearing Officer to evaluate speculation for a transfer application because the remedy for such speculation is already built into the transfer approval—the water right reverts to its pre-transfer condition if the transfer is not accomplished. *Applicants’ Brief* at 2-11.

Interestingly, the Protestants do not assert that evidence related to the water delivery system can be evaluated under the injury criterion of Idaho Code that some would consider to be related

to legal access issues. Instead, the Protestants assert that legal access can be considered under several other Idaho Code § 42-222 criteria. *Protestants' Brief* at 3. As explained in *Appellants' Brief*, evidence and information related to the water delivery system, such as ditch capacity, historic water use, water right history of water rights delivered in a ditch, water right history of water rights decreed to be diverted at the headgate associated with the ditch, etc., may be considered in the evaluation of a transfer application.¹ This is because that while these issues may appear on the surface to be “legal access” issues, they are not, as they do not adjudicate easement rights or legal access rights. Rather, evidence of the above-described items applies to water right injury evaluation, the first element described in Idaho Code § 42-222(1), which provides that a transfer may be approved provided that “no other water rights are injured thereby.”

In short, as part of the Hearing Officer's water right injury evaluation, evidence concerning the delivery system, water right history, etc., should be considered even though it may appear on the surface to be related to legal access and/or a legal right to use the LWMP 5 ditch. However, adjudicating or evaluating easement or legal access rights is beyond the scope of the review criteria of Idaho Code § 42-222.

C. Section 42-222(1), Idaho Code, states that the director of the Department shall approve a transfer application “provided no other water right are injured thereby . . .” Does this protection against injury to existing rights extend to the use of high flow described in the General Provisions for Basin 74 as decreed in the Snake River Basin Adjudication?

¹ This is why the Applicants in this contested case provided evidence of the historic existence of a water right decreed in the Lemhi Adjudication with the LWMP 5 point of diversion that was appurtenant to Nelson's property that was not claimed in the SRBA (WR 74-2183). The existence of this right, coupled with evidence of the historic irrigation of the Nelson property, is evidence that replacing the water right lost in the SRBA with an existing water right will not injure the holders of water rights that currently exist in the ditch or otherwise improperly impact ditch capacity, etc. This is also why evidence of sufficient ditch capacity in the LWMP 5 ditch, as testified by the Applicants' expert Bryce Contor, is appropriate for the Hearing Officer to consider.

In response to the Hearing Officer's third question, the Protestants offer quotes from cases that apply to injury to actual decreed or licensed water rights and offer no legal authority that the diversion of "high flows" under the Basin 74 General Provisions are "water rights" under Idaho law or occupy the same status as "water rights" under Idaho law. As explained in *Applicants' Brief*, the Director of the Department has already held that under the Basin 74 General Provisions, "[h]igh flow uses are not water rights." *Order on Exceptions; Final Order*, In the Matter of Application for Permit No. 74-16187 in the Name of Kurt W. Bird or Janet E. Bird, May 21, 202, at 25; *Appellants' Brief* at 11-15. Under the plain language of Idaho Code § 42-222, the injury evaluation applies to "water rights" and the Hearing Officer is bound to follow the plain language of this statute in his evaluation. Because "high flow uses" are not "water rights," the protection against injury to existing rights in a contested transfer application proceeding does not extend to the use of high flows. The Protestants' arguments otherwise are unavailing.

D. Section 42-222(1), Idaho Code, states that the director of the Department shall approve a transfer application "provided . . . the change . . . is in the local public interest as defined in section 42-202B, Idaho Code . . ." Does this local public interest review extend to the use of high flow described in the General Provisions for Basin 74 as decreed in the Snake River Basin Adjudication?

In response to the fourth and final question from the Hearing Officer, the Protestants assert that the Hearing Officer can consider high flow use in his local public interest review. *Protestants' Brief* at 5. As previously explained by the Applicants, however, because there is an express criterion addressing whether the transfer will reduce the quantity of water under existing water rights which causes injury, the Hearing Officer cannot use the local public interest review criterion to backdoor in an issue that is fairly captured by one of the other criteria. Doing so would elevate the local public interest to a super status and render the other criteria meaningless. *Applicants' Brief* at 15-16.

In addition, however, and even more directly to the point for purposes of answering the Hearing Officer's question in this section, the plain language of the high flows general provision already provides that the use of high flows can only be undertaken provided that "**existing decreed rights** and future appropriations of water are first satisfied." (emphasis added).²

Water rights subject to a transfer are existing decreed rights, and the use of high flows remains subordinate to existing decreed rights as a matter of law. A transfer application does not change the fact that the water rights subject to the transfer are "existing decreed water rights." There is nothing in the plain language of the high flows general provision that limits the subordinated nature of high flow usage to how the decreed water rights were described at the time the high flows general provision was decreed on April 3, 2012. Neither is there any ambiguity in the high flows general provision language.

Even more to the point, water that is used for high flows is unappropriated water, and unappropriated water cannot be elevated to the status of a water right for purposes of injury evaluation and local public interest review or otherwise be used as a basis to prevent changes to existing water rights that have been decreed and are being exercised.

In the Bird matter discussed above, the Director provided binding analysis on this very issue. Specific to claims by protestants made in the Bird matter that affecting high flow use is not in the local public interest, the Director squarely addressed this issue, holding that the public

² For ease of reference, here is the entirety of the high flows general provision:

The following general provision shall govern the use of "High Flow" surface water for irrigation use within the Lemhi Basin:

The practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:

- (a) the waters so diverted are applied to beneficial use.
- (b) existing decreed rights and future appropriations of water are first satisfied.

benefits of high water use “are secondary or incidental benefits arising from the high flow irrigation use. **The Irrigators’ local public interest argument is not persuasive.** The use of high flows is only allowed if existing quantified water rights, including future appropriations of water, are satisfied.” *Id.* at 34 (emphasis added).

Director Spackman’s decision affirmed the decision of the hearing officer in that matter who held: “To summarize, high flow use, **as a matter of law**, cannot restrict the appropriation of water in the Lemhi River Basin, **under an injury analysis or under a local public interest analysis.**” *Preliminary Order Approving Application*, In the Matter of Application for Permit No. 74-16187 in the Name of Kurt W. Bird or Janet E. Bird, January 9, 2020, at 28 (Hearing Officer James Cefalo) (emphasis added).

The Protestants’ position fails to address the nature of high flow usage as a secondary and incidental benefit that cannot be elevated to a status that would prevent existing decreed and licensed water rights from being amended through the transfer application process. These principles concerning the nature of high flows are applicable in any context, including a transfer application proceeding, even though the Bird precedent came out of a water right permit application contested case.³ There is nothing unclear or ambiguous in the high flow general provision. Use of high flows is subject to (subordinate) existing decreed water rights, such as those subject to the Nelson transfers (WRs 74-16256, 74-210A, and 74-734A). This is the case even if they are amended through the transfer process. The secondary or incidental benefits arising from high flow irrigation use asserted on local public interest grounds as a basis to deny a water

³ As previously asserted, from a public policy and logical standpoint, it makes no sense that the transfer of an existing water right (with already existing consumptive use) could be prevented because of high flow use, and yet, a **new** appropriation of water (with new consumptive use and new impacts) could not be prevented.

right permit was previously rejected as a matter of law by the Director. The Hearing Officer in this matter is bound by this precedent and these same legal principles. The Protestants have not provided any authority supporting their position or suggesting otherwise.

DATED this 14th day of July, 2023.



Robert L. Harris
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2023, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: APPLICANTS' RESPONSE TO PROTESTANT'S POST-TRIAL BRIEF

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