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BEFORE THE DEPARTMENT OF WATER RESOURCES

Department of Water Resources
Eastern Region

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS
FOR TRANSFER 86492 AND 86951
IN THE NAME OF ROHN R. NELSON
AND LORI A. NELSON

Post-Trial Brief

PROTESTANT'S POST-TRIAL BRIEF

JAMES CEFALO, HEARING EXAMINER, PRESIDING

1. 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?

Idaho Code § 42-222(1) and supporting case law in Idaho is silent regarding whether an applicant must demonstrate legal access to the proposed point(s) of diversion, conveyance system and place of use in conjunction with a transfer application. As the Department is likely aware however Idaho Code § 42-11 *et al.* generally provides that all water users in the state of Idaho shall have a right of way for irrigation purposes including inspection, cleaning maintenance etc. of ditches and diversions. This chapter provides a right of way for a successful applicant to the proposed point(s) of diversion, conveyance system, and place of use. While Idaho law is silent on any requirement for an applicant to demonstrate legal access to the proposed point of diversion, such access is likely granted to a successful applicant pursuant to statute.

2. 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.

Idaho Code Section 42-222(1) provides in relevant part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change 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 is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates. Idaho Code § 42-222(1).

The term "local public interest" is defined in Idaho Code § 42-202B 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 *See also North Snake Ground Water Dist. v. Idaho Dep't of Water Res.* (In re Permit No. 36-16979), 160 Idaho 518, 524, 376 P.3d 722, 728, 2016. With regard to the application process the Hearing Examiner has authority to consider anything having a contrary effect on the local public interest, does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho. The hearing examiner shall also only grant application if it "will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates." Thus, transfer of a proposed point of diversion and the applicant's legal access (as provided by Idaho Code § 42-11) is subject to the public interest, enlargement, conservation of resources and adverse effect analysis set forth above.

3. 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?

The Idaho Supreme Court has significantly analyzed injury for purposes of Section 42-222(1) and ruled that in a transfer proceeding injury to other water users should be considered. "It must be shown that the change of such point of diversion resulted in an injury to the respondent, that is to say that he was deprived of the use of water to which he was entitled." *Montpelier M. Co. v. City of Montpelier*, 19 Idaho 212, 113 Pac. 741. "An appropriator of water may change the point of diversion and place of use of his appropriation only when the rights of others are not thereby

injured.” *Bennet v. Nourse*, 22 Idaho 249, 125. “An appropriator of water may change the point of diversion and place of use of his appropriation only when the rights of others are not thereby injured.” *Id.* at 125. “Junior appropriators have a vested right to the continuance of conditions that existed on the stream at and subsequent to the time they made their appropriations. These conditions may not be changed to their injury by transfer of another water right.” *Washington State Sugar Co. v. Goodrich*, 27 Ida. 26, 147 P. 1073. “A general benefit to the water users of an area is not sufficient to warrant change if injury results to the right of an individual.” *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 6, 154 P.2d 507, 508, 1944.

In *First Security Bank v. State*, 49 Idaho 740, 291 P. 1064 (1930), the Court indicated that in a transfer proceeding injury to other appropriators should be considered. The Court stated therein: In an action involving a change in the place of diversion, the reasons why the change will or will not injure other appropriators may be considered, as indicated by the latter portion of the case cited.” *Jenkins v. Department of Water Resources*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). Thus, it is well settled that protection against injury is highly guarded under this statute and Idaho jurisprudence. With the evidence admitted at hearing showing injury to existing high flow users if the application is granted, and the authority provided above, the protection against injury does extend to the use of high flow described in the General Provisions for Basin 74 as decreed in the Snake River Basin Adjudication.

- 4. 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?**

The local public interest review does extend to the use of high flow described in the General Provisions for Basin 74 as decreed in the Snake River Basin Adjudication. Regarding public interest the Idaho Supreme Court has ruled “The statute authorizes only evaluation of the effects of [the proposed] use on the public water resource” *Id* at. 524. This clear guidance by the Idaho Supreme Court, and a plain reading of the statute extends the local public interest review to the use of high flow described in General Provisions for Basin 74 as decreed in the Snake River Basin Adjudication. There was testimony and evidence set forth at hearing that if granted, this transfer would adversely affect other water users’ use of the public resource during high flows. The protestants and a number of witnesses testified to injury. Thus, the Director of the Department should properly consider the public interest analysis and review related to the effect on high flow irrigation by other users of the public water resource.

Certificate of Service

I certify that on June 30, 2023, I caused a true and correct copy of the foregoing post-trial brief to hearing examiner James Cefalo via email at james.cefalo@idwr.idaho.gov.

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