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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'
POST-HEARING 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 *Applicants' Post-Hearing Brief*. The *Request for Briefs* requests an initial brief to be submitted on or before June 30, 2023, with responses (if any) due on July 14, 2023, addressing the following four questions:

- 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?**
- 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.**

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?

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?

As an initial matter, the term “legal access” contained in the first two questions is not defined by the Hearing Officer. Without a clear definition, we interpret this phrase to mean a right recognized by the law that provides an individual with the legal right and ability to utilize a water diversion facility or facilities for the individual’s benefit in the form of property ownership, easement ownership, or permission from the property owner. To the extent this phrase is later determined to be defined in a materially different way, the Applicants reserve the right to supplement this post-hearing brief. Based on this understanding of the term “legal access,” each of the Hearing Officer’s questions is addressed in turn below.

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 order to appropriately address this question, it is important to understand the different Idaho statutes and rules applicable to (1) new applications for water right permit; and (2) transfer (or element change) applications to amend existing water rights.

Applications to appropriate new water rights in Idaho are governed by both statutes and adopted administrative rules found in Chapter 2 of Title 42 of the Idaho Code and IDAPA 37.03.08 (the “Water Appropriation Rules”), respectively. The review criteria for an application for permit

is found at Idaho Code § 42-203A(5), which provides:

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

(Underlining added). As the plain language of this statute provides, there is a good faith/lack of delay or speculation element to evaluation of an application to appropriate a new water right. Further IDWR evaluative detail of this element is provided in certain provisions of the Water Appropriation Rules, including evaluation of “legal access”:

e. Information relative to good faith, delay, or speculative purposes of the applicant. Section 42-203A(5)(c), Idaho Code, shall be submitted as follows: (3-18-22)

i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code. (3-18-22)

ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials. (3-18-22)

...

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if: (3-18-22)

i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and (3-18-22)

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and (3-18-22)

iii. There are no obvious impediments that prevent the successful completion of the project. (3-18-22)

IDAPA 37.03.08.040.05.e and IDAPA 37.03.08.045.01.c. As the plain language of these rules provides, in the context of a new application for water right permit, questions concerning legal access are appropriate for an IDWR hearing officer and/or reviewing court to address. This precise question was addressed in *North Snake Ground Water Dist. v. Idaho Dep't of Water Res. (In re Permit No. 36-16979)*, 160 Idaho 518, 376 P.3d 722 (2016). In this case, the Idaho Supreme Court affirmed Judge Wildman's reversal of IDWR Director Spackman's denial of an application for water right permit filed by the North Snake Ground Water District, and in so doing, specifically interpreted the above-cited Water Appropriation Rules. After quoting and citing to IDAPA 37.03.08.045.01.c.i., the Idaho Supreme Court explained:

Rangen's addition of a bracketed "and" in its quotation of the rule misstates the law and is nonsensical. Nothing about this rule indicates that it applies only to water districts or other public entities; all applications to appropriate water are subject to the good faith analysis in Rule 045.01.c. If an applicant were required to show both legal access and eminent domain authority before the Director would be required to find good faith, the Rule would apply only to governmental entities. This is an absurd result. Nor is it a natural reading of the rule. There are three primary clauses separated by commas, with the word "or" appearing at the beginning of the last primary clause. The more natural, and correct, way of reading the Rule is that an applicant may prove good faith by showing legal access or eminent domain authority. In light of this, Rangen's subsequent focus on actual legal access is misplaced and irrelevant.

Id. at 528, 376 P.3d at 732. Ultimately the Idaho Supreme Court held that “[b]ecause there is no dispute that the Districts intended to apply the water to the beneficial use of mitigation, and because the Districts have statutory authority to condemn Rangen’s real property to obtain legal access for mitigation purposes, we affirm the district court’s determination that the Districts’ application is not speculative.” *Id.* at 529, 376 P.3d at 733.

Turning now to water right transfer applications (applications to amend certain elements of existing water rights), transfer applications are not applications to appropriate new water rights, but instead, are applications to amend certain elements of existing water rights. Transfer applications are governed by Idaho Code § 42-222, but unlike new applications for permit, there are no specific promulgated administrative rules for transfer applications.¹ The review criteria for an application for transfer is found at Idaho Code § 42-222, which provides:

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, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where

¹ While there are no promulgated rules for transfer applications, IDWR has prepared and generally insisted upon compliance with a processing memorandum for transfers commonly referred to as the “*Transfer Memo*.” *Administrator’s Memorandum*, Transfer Processing No. 24, December 21, 2009, available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/guidance/Transfer-Processing-Memo-24.pdf>. The Hearing Officer is not bound by a guidance memo. See, *Amended Preliminary Order Denying Transfer*, In the Matter of Application for Transfer No. 83160 in the Name of Jeffrey and Chana Duffin, August 12, 2023, at 9. Even if the Hearing Officer was bound by the *Transfer Memo*, it does not address or discuss the issue of legal access in a transfer application.

such change would significantly affect the agricultural base of the local area.

(Underlining added).

While there is similar language and terms in the review criteria for a new water right permit application found at Idaho Code § 42-203A(5) and the review criteria for a transfer application found at Idaho Code § 42-222, critically, 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:

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

State v. Dunlap, 155 Idaho 345, 361-62, 313 P.3d 1, 17-18 (2013). Even when it is argued that statutes may be related such that provisions in one statute may be informed and interpreted by the other, it is improper to read into one statute terms that are simply not contained in the plain language of the statute. *See, Arel v. T & L Enters.*, 146 Idaho 29, 34, 189 P.3d 1149, 1154 (2008) (“Nonetheless, the plain language of I.C. §§ 72-701, -704 requires that an employee give notice of the accident within sixty days after its happening, or that the employer had knowledge of the injury within sixty days after the accident, or that the employer has not been prejudiced by the want of notice. Here, Arel cannot show he met any of these requirements. Instead, he argues this Court

should read both statutes to require notice need not be given until the employee is aware that the unexpected mishap or untoward event caused violence to the physical structure of his body. However, this reading is contrary to the plain language of the statutes. Thus, we affirm the Commission's dismissal of Arel's claim.") (footnote omitted). Even if the language of a statute's clear language is absurd, a court or administrative hearing officer is not authorized to construe the statute to mean something other than what the plain language of the statute provides. See, *State v. Montgomery*, No. 43795, 2017 Ida. App. LEXIS 22, at *11 (Ct. App. Feb. 21, 2017) ("In overruling the holding in *State, Dept of Law Enf't v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979), the Supreme Court explained if a statute's clear language was absurd, a court still could not construe the statute to mean something other than what it says, since the Idaho Constitution provides that only the legislature has the power to revise statutes. The Court stated: 'Thus, we have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so.'") (internal citations omitted).

We further note that in the context of legal access, easement rights, etc., even a Board of County Commissioners has no right to adjudicate easement rights. See, *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 234, 254 P.3d 1224, 1230 (2011) ("The Board did not, and indeed could not, grant the Meyers permission to enter Hawkins' land to use the spur road or otherwise define the scope of the Meyers' easement rights. The Board has no authority to adjudicate easements."). The law surrounding access rights, easement rights, scope of easement limitations, adjudication of prescriptive easements, increase of intensity of use of an easement, etc., is its own specialized area of the law that concerns both water and non-water situations. It would be improper and unreasonable to expect that an IDWR hearing officer would be equipped

to address these issues when already burdened with the requirements to address the Idaho Code § 42-222 elements associated directly with water. In the context of the scope of what an IDWR hearing officer must evaluate, address, and decide upon, the hearing officer should not have 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)).

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. For example, in Utah, Utah Code § 73-3-3 governs changes to a water right and change applications (similar to an application for transfer in Idaho and Idaho Code § 42-222). Utah Code § 73-3-3(3)(a)(iii) states that “A person entitled to the use of water may make a change to an existing right to use water...if: the state engineer approves the

change application, consistent with Section 73-3-8." (Underlining added). The section of Utah Code referenced, specifically Utah Code § 73-3-8(1)(a) (which is similar to Idaho Code § 42-203A(5)) provides the following:

It shall be the duty of the state engineer to approve an application if there is reason to believe that:

- (i) for an application to appropriate, there is unappropriated water in the proposed source;
- (ii) the proposed use will not impair existing rights or interfere with the more beneficial use of the water;
- (iii) the proposed plan:
 - (A) is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation; and
 - (B) would not prove detrimental to the public welfare;
- (iv) the applicant has the financial ability to complete the proposed works;
- (v) the application was filed in good faith and not for purposes of speculation or monopoly; and
- (vi) if applicable, the application complies with a groundwater management plan adopted under Section 73-5-15.

(Underlining added). The Utah Legislature made it clear that in a change application their state engineer was to consider not only the physical and economic feasibility of a proposed plan/change, but also whether the proposed change was "filed in good faith and not for purposes of speculation...". Idaho Code § 42-222 does not contain similar language. Consequently, the Idaho Legislature has not provided the Hearing Officer and the Director with legal authority to consider good faith/lack of delay or speculation, including legal access, as part of the evaluation of an application for transfer.

It is further worth noting that just because a transfer application is approved, that does not mean the water right subject to the transfer is considered immutably amended upon issuance of the final order approving the transfer. In the transfer approval of the water right subject to the transfer, IDWR includes the following condition: "The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval." This means that the if the

proposed change is not accomplished, the water right will revert to its pre-transfer condition. In a sense, then, all transfer applications contain some element of speculation because it is unknown whether the proposed change will actually be implemented. It is therefore 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.

Because the plain language of Idaho Code § 42-222 does not contain a good faith/lack of delay or speculation element of review, the Hearing Officer has no legal authority to consider legal access as part of his evaluation of the transfer applications at issue in this matter. The lack of any Idaho case law addressing whether a transfer application was submitted in good faith or challenged because of a legal access issue further supports this conclusion. Accordingly, in response to the Hearing Officer's first question—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?—the answer is “no,” neither the plain language of Idaho Code § 42-222 nor any Idaho cases require an applicant to demonstrate legal access in an IDWR contested case concerning a transfer application.

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.

For the same reasons that the answer to the first question discussed above is “no,” the answer to this second question is also “no”—the plain language of Idaho Code § 42-222 does not contain a good faith/lack of delay or speculation element of review, and as a result, the Hearing Officer has no legal authority to consider legal access as part of his evaluation of the transfer applications.

To be clear, however, despite the above conclusion, this does not mean that the Hearing

Officer cannot consider 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., in the evaluation of a transfer application. 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.”

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 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?

There are two significant nuances that exist for water right administration in the Lemhi River Basin that generally do not exist in other water basins in Idaho. Water right administration in the Lemhi River basin is subject to two general provisions which were decreed in the Snake River Basin Adjudication (“SRBA”) on April 3, 2012. These general provisions are generally referred to in a shorthand manner as (1) the “separate streams general provision;” and (2) the “high flows general provision.” The Hearing Officer’s question is directed at the second of these general provisions, the high flows general provision, which in its entirety provides the following:

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.

Exhibit 18 at 60.

The Director has already held that under this general provision, “[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, 2012, at 25. In this contested case involving the Bird application for water right permit, the Director discussed arguments that the application would impact high flow uses. The Director concluded as follows:

Idaho Code § 42-203A(5)(a) and Rule 45.01.a of the Department’s Water Appropriation Rules mandate that IDWR consider injury to water rights. High flow uses are not water rights. *See In Re SRBA, Subcase Nos. 74-15051 et al.* (January 3, 2012). Questions of when water users may divert high flows are questions of administration and are not appropriate for this proceeding.

Id. The Director affirmed the underlying hearing officer’s same conclusion:

There are water users on Big Timber Creek, including Bird, and water users on the Lemhi River who divert high flows (above and beyond existing, recorded water rights) during the snowmelt runoff period. The Basin 74 General Provisions clearly state that high flows can only be diverted after “existing decreed rights and future appropriations of water are first satisfied.” Ex. 11. Stated differently, water users diverting high flows cannot make a delivery call against future water rights, issued after the date of the Basin 74 General Provisions decree (April 3, 2012). For purposes of water right administration, high flow uses are subject to future appropriations. Therefore, the proposed permit cannot injure high flow uses on Big Timber Creek or the Lemhi River.

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 15 (Hearing Officer James Cefalo).

The Bird contested case addressed an application for permit and not a transfer application. However, in any context, the law concerning use of high flows is the same: “High flow uses are not water rights.” Accordingly, in response to the Hearing Officer’s question, protection against injury to existing water rights does not extend to the use of high flows because use of high flows are not water rights. This should be sufficient to answer this question because the term “water rights” is found in both Idaho Code § 42-203A(5) and § 42-222 and mean the same thing. But in the event there is any question that law developed from a permit application contested case should or should not apply to a transfer application contested case, existing Idaho law provides further guidance on answering this question.

Unlike the good faith/lack of delay or speculation language that is present in Idaho Code § 42-203A(5), but is not present in any form in Idaho Code § 42-222, both of these statutes contain similar language mandating that IDWR evaluate whether the application will injure other water rights. *See* Idaho Code § 42-203A(5) (“that it will reduce the quantity of water under existing water rights . . .”) and Idaho Code § 42-222 (“provided no other water rights are injured thereby . . .”). Reduction of quantity of water under existing water rights is a form of injury, and given these similarities, the law in both contexts is the same.

The Idaho Supreme Court has described a process to engage in to determine if related statutes or legal authorities exist that inform the proper interpretation of certain statutory terms. In *3G Ag, LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022), the owner of a ground water right that overlapped with a surface water entitlement (evidenced by shares in the Aberdeen-Springfield Canal Company) filed a transfer application under Idaho Code § 42-222 that sought to unstack the ground water right and change its authorized point of diversion and place of use to a new location. *Id.* at 254-55, 509 P.3d at 1183-84. After stipulating to facts, the parties briefed the question of whether, as a legal matter, the transfer application would result in an “enlargement” under the transfer statute. The hearing officer in that case ultimately determined that the transfer application would result in an enlargement, which was affirmed by the district court, and ultimately the Idaho Supreme Court. In its decision to affirm, the Idaho Supreme Court provided an analysis of where to look for persuasive authority to interpret an undefined term.

As to the definition of “enlargement,” the Idaho Supreme Court noted, “[t]o begin, the meaning of ‘enlargement’ under Idaho Code section 42-222(1) is not defined by statute or rule.” *Id.* at 258, 509 P.3d at 1187; *see also* IDWR Administrative Rules *available at* <https://adminrules.idaho.gov/rules/current/37/> (last visited June 2, 2022) showing there are no administrative rules specific to transfer applications). Similarly, here, the meaning of “injury” under Idaho Code § 42-222 is not defined by statute or rule.

In *3G*, the Court turned to the statute that addressed enlargement principles in a different context—decree of enlargement water rights in an adjudication under Idaho Code § 42-1425(2)—and a prior Idaho Supreme Court opinion (*Fremont-Madison District & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996)) addressing this

adjudication statute. The basis for turning to these authorities to interpret “enlargement” in a different context—under Idaho Code § 42-222—was described by the Court:

Although *Fremont-Madison* dealt with “enlargement” in the context of transferring water rights under section 42-1425(2) and not section 42-222(1), there is no language in either statute that suggests the Idaho Legislature intended “enlargement” to mean something different as between these two transfer statutes.

Id. at 259, 509 P.3d at 1188.

Similarly, here, the Hearing Officer should turn to existing authority, such as the decisions in *Bird*, to inform the issues present with the Nelson transfers. This is because both the application for permit statute and transfer statute requires analysis of injury to existing water rights and “there is no language in either statute that suggests the Idaho Legislature intended [“injury”] to mean something different as between these two . . . statutes.” For these additional reasons, in response to the Hearing Officer’s question addressed in this section, the answer is “no,” the protection against injury to existing rights in a contested transfer application proceeding does not extend to the use of high flows.

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 contested water right permit application and transfer application hearings, based on counsel’s experience, the primary criterion asserted by the protestants is whether the proposed appropriation or transfer is in not in the local public interest. Because the local public interest encompasses many things to different people, in a contested case before the Department, it is typical that there will be competing local public interest issues that a hearing officer must weigh and consider.

Idaho Code § 42-202B currently defines the local public interest 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.” In a transfer application, it is one of the several issues mandated for review by Idaho Code § 42-222, as summarized by the Department in this Department document:

ISSUES

Applications for transfer are filed for the purpose of changing a point of diversion, purpose of use, period of use or nature of use of all or part of a licensed, decreed or statutory water right. Section 42-222, Idaho Code, identifies the following potential issues that the department can consider in connection with an application for transfer:

1. Will the proposed transfer reduce the quantity of water under existing Water Rights?
2. Will the proposed transfer constitute an enlargement in use of the original right?
3. Will the proposed transfer be contrary to the conservation of water resources within the State of Idaho?
4. Will the proposed transfer conflict with the local public interest, where local public interest is defined as interests that the people in the area directly affected by a proposed water use and its potential effects on the public water source?
5. Will the proposed transfer adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates?
6. If the proposed transfer is for a municipal use, is it necessary to provide reasonably anticipated future needs for a municipal service area and is the planning horizon consistent with Sections 42-222 and 42-202B, Idaho Code?
7. Will the proposed transfer change the nature of use from an agricultural use, and would such a change significantly affect the agricultural base of the local area?

BURDEN OF PROOF

The applicant has the initial burden of proof for issues 1, 2, 3, 5, 6, 7, 8, and 9 above and must provide evidence for the department to evaluate these criteria.

The initial burden of proof on issue 4, if applicable, lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for these issues.

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.

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. Accordingly, the high flows general provision should be interpreted in accordance with Idaho law:

When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. *Id.*, 153 Idaho at 523, 284 P.3d at 248. If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. *Cf. Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) ("If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own words."). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf. Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 850, 367 P.3d 228, 245 (2016) ("Where terms of a contract are 'reasonably subject to differing interpretations, the language is ambiguous....' " (quoting *Clark v. Prudential Prop. and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003))). Whether ambiguity exists in a decree "is a question of law, over which this Court exercises free review." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798,

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.

807, 367 P.3d 193, 202 (2016) (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)).

City of Blackfoot v. Spackman, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017).

More to the point, water that is used for high flows is unappropriated water, and unappropriated water cannot be elevated to a status to that 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 the following binding analysis on this very issue:

Pursuant to the Basin 74 General Provisions, high flow uses are allowed provided existing quantified water rights, including future appropriations of water, are first satisfied. Therefore, high flow use cannot be protected against diminishment (reduction in flow) caused by future water rights. This limit on high flow uses has been reinforced by the SRBA Court. Water users in the Lemhi River Basin filed claims in the SRBA in an attempt to obtain recorded water rights for their high flow uses. As part of the review of those high flow claims, the SRBA District Court addressed a proposal to make high flow uses subject to only those future water rights located within the Lemhi River Basin. In other words, the proposal would have protected high flow uses from being subject to future, downstream (out-of-basin) water rights. The court rejected the proposal:

This court has already determined that the high flow general provision in the *Lemhi Decree*, based on its express language, was not intended to create a water right. . . . Therefore, both factually and as a matter of law, the high flow general provision in this case did not create a water right. The direct consequence of limiting the application of the subordination provision to water rights within the

Lemhi Basin *de facto* elevates the status of the high flow use to that of a water right as between in-basin and out-of-basin water users. Since the use of high flow water does not create a water right high flows are therefore unappropriated water.

Ex. 189 at 25 (*In Re SRBA, Subcase Nos. 74-15051 et al.* (January 3, 2012) (citations omitted)).

The SRBA Court concluded the use of high flow water is subordinate to all future and existing water rights, both in-basin or out-of-basin, because the high flows are unappropriated water. The reasoning and conclusion of the SRBA Court is binding. Pursuant to the Basin 74 General Provisions and the related decision from the SRBA Court, high flow uses cannot restrict future appropriations based on the argument that the future appropriations will reduce the quantity of water available for high flow uses, because doing so would elevate the status of the high flow use to that of a water right.¹³

The Irrigators argue that high flow uses in the Lemhi River Basin provide important public benefits that should be protected through the local public interest review. These public benefits (aquifer recharge, temporary storage of snowmelt runoff, streamflow augmentation in the late summer) 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. High flow use is subordinate to new water rights established through administrative appropriation. Therefore, the protection of high flows is not an issue in this administrative hearing.

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, 2022, at 33-34.

As clearly explained by Director Spackman:

[1] “Pursuant to the Basin 74 General Provisions, high flows are allowed provided existing quantified water rights, including future appropriations of water, are first satisfied.”

[2] “. . . high flows are unappropriated water,” and

[3] “High flow use is subordinate to new water rights established through administrative appropriation.”

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 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). These principles concerning the nature of high flows are applicable in any context, including a transfer application proceeding, even though this precedent came out of a water right permit application contested case. Use of high flows is a “secondary or incidental benefit” and cannot be elevated to a status that would prevent existing water right

holders from making changes to existing water rights.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 right permit was previously rejected as a matter of law by the Director. The Hearing Officer in this matter is bound by these same legal principles.

Based on the foregoing, in response to the Hearing Officer's question—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 answer is “no.”

DATED this 30th day of June, 2023.



Robert L. Harris
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³ 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.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 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' POST-HEARING BRIEF

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