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Meeting Idaho's Water Needs Through the Water Right Transfer Process: A Call for Legislative Reform

by

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MEETING IDAHO'S WATER NEEDS THROUGH THE WATER RIGHT TRANSFER PROCESS: A CALL FOR LEGISLATIVE REFORM

COMMENT

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I. INTRODUCTION

Competition for Idaho's water continues to intensify. Indian water right claims, salmon protection, municipal growth, energy short-

ages, recreation, and environmental concerns are placing increasing demands on supplies once committed to irrigated agriculture. The political and practical realty is that new water resource development remains foreclosed and water users must look to existing supplies to satisfy their needs. To this end, much focus has been placed on reforming the water right transfer process.[1]

Like most private property interests, the appropriative water right is alienable and transferable.[2] But, there are two important aspects of water rights that work against their ready transferability. First, a water right is not well defined. The interrelationship between upstream and downstream users and the complex hydrology of surface streams and ground water aquifers make it difficult to precisely quantify the effect of a water right on stream flow.[3] Because of the way in which it is defined, the water right does not take into account external impacts on other water users[4] and "these effects must be determined and mitigated on a case by case basis."[5] Thus, the law of water right transfers is the law of identifying possible third party effects and mitigating them through conditions and restrictions on transferability.

The second aspect of water that works against ready transferability stems from the importance of water as a public good. The scarcity of water, especially in the arid West, and the collective manner in which water has been traditionally provided, leads to greater government oversight than is present in traditional property conveyances.[6]

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1. *See, e.g.*, James N. Corbridge, Jr., *Historical Water Use and the Protection of Vested Rights: A Challenge for Colorado Water Law*, 69 U. COLO. L. REV. 503, 508 (1998); George A. Gould, *Water Rights Transfers and Third Party Effects*, 23 LAND & WATER L. REV. 1, 13 (1988); CHARLES J. MEYERS & RICHARD A. POSNER, MARKET TRANSFERS OF WATER RIGHTS: TOWARD AN IMPROVED MARKET IN WATER RESOURCES (Nat'l Water Comm'n Legal Study No. 4, 1971).

2. *See* IDAHO CODE § 42-222 (Michie Supp. 2000); Hard v. Boise City Irrigation & Land Co., 9 Idaho 589, 76 P. 331 (Idaho 1904).

3. Gould, *supra* note 1, at 13. Professor Gould describes the appropriative water right as a piece in a jigsaw puzzle with the shape and size of the piece signifying different components of the right. *Id.* at 12. The size of the piece represents the diversionary entitlement and the shape represents those variables affecting stream flow: place of use, point of diversion, and nature of use. *Id.*

4. Nor does the definition of the water right take into consideration impacts on riparian habitat, preservation of the local agricultural base, or other real and aesthetic values of growing importance. However, modern transfer law reflects increased attention to such values.

5. Gould, *supra* note 1, at 5.

6. Treatment of water as a public good can be traced to Roman times. Charles F. Wilkinson, *Headwaters of the Public Trust*, 19 ENVTL. L. 425, 429 (1989). The traditions of collective management in water and of protection of water supplies from "wholesale private acquisition" were brought to the American West by early Spanish settlers. *Id.*; *see also* ROBERT G. DUNBAR, FORGING WESTERN WATER RIGHTS (1983). *See generally*

As early as the mid-1800s, territorial and local governments were involved in the regulation of water.[7] Over the last one hundred and fifty years, the state paternalism has persisted and been strengthened through the administrative and judicial regulatory regimes.[8] More recently, environmental concerns have been a source of important new water policy and legislation.[9] Increasingly, transfer law operates at the intersection of numerous competing public values. The incorporation and prioritization of these values by administrative and political bodies adds further layers of uncertainty to the water right transfer process.

In Idaho, the water right transfer process is codified at title 42, sections 108 and 222 of the Idaho Code[10] and administered by the Idaho Department of Water Resources (IDWR). The term transfer, as it is commonly used, does not necessarily entail a conveyance, but in-

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MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1987) (providing a critique of federal influence on western water policy). *See also* Barton H. Thompson, Jr., *Institutional Perspectives on Water Policy and Markets*, 81 CAL. L. REV. 3 (1993) (discussing how institutions and institutional values can be harnessed in conjunction with legislation to better meet growing water demands). For a critique of the treatment of water as a public good, see Dwight R. Lee, *Political Provision of Water: An Economic / Public Choice Perspective*, *in* SPECIAL WATER DISTRICTS: CHALLENGE FOR THE FUTURE (James N. Corbridge, Jr., ed., 1983).

7. *See* DUNBAR, *supra* note 6, at 15-17.

8. An example of such policies is the public interest criterion existing in the majority of western states requiring transfers to be approved in light of the local public interest or welfare. OWEN L. ANDERSON ET AL., 2 WATER AND WATER RIGHTS § 14.04(d)(1) (Robert E. Beck ed., 2000); *see* IDAHO CODE § 42-222 (Michie Supp. 2000).

9. *See generally* Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319 (1996) (discussing implementation of federal Endangered Species Act). The environmental community has for years viewed Western water policy as myopic. For example, the "doctrine of beneficial use" and the "first in time, first in right" order of priority have been criticized for tending toward a system that protects established uses. The limitation on beneficial uses, traditionally restricted to domestic, agricultural and industrial uses, has been used to deny the appropriation of waters to many non-consumptive uses associated with the environment and recreation. *See* Deborah Moore & Zach Willey, *Water in the American West: Institutional Evolution and Environmental Restoration in the 21st Century*, 62 U. COLO. L. REV. 775 (1991). The "doctrine of beneficial use" has also operated to undercut conservation and improved water efficiency by validating beneficial uses as long as they are "reasonable" and "economical." *Id.* at 788-89. For application of this principle in Idaho, see Wash. State Sugar Co., v. Goodrich, 27 Idaho 26, 43, 147 P. 1073, 1079 (Idaho 1915) ("A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used."). Beneficial use is discussed in depth *infra* Part II.A.

10. IDAHO CODE § 42-108 (Michie 2000), *id.* § 42-222 (Michie Supp. 2000). *See also* A. Lynn Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 IDAHO L. REV. 249, 249-50 (1990-91) (providing a thorough and general overview of the Idaho transfer process).

stead refers to any change in the exercise of a water right affecting one or more of its defining elements.[11] This includes a change in place of use, point of diversion, nature of use, or period of use.[12]

Under Idaho law, an appropriator may transfer a water right without a loss in priority subject to certain statutory conditions.[13] To do so, the appropriator must first apply for and receive the approval of IDWR.[14] The application for transfer must adequately describe "the right licensed, claimed or decreed which is to be changed and the changes which are proposed."[15] Once application is made, IDWR is required to examine all evidence and available information and to approve the transfer in whole, in part, or upon condition, provided four criteria are met: (1) that no other water rights are injured; (2) the change does not constitute an enlargement in use of the original right; (3) the change is in the local public interest and consistent with the conservation of water resources within Idaho; and (4) the change complies with the policy of beneficial use.[16] As the Idaho Supreme Court has stated, the right to transfer "depends upon and must be controlled by the facts of each particular case."[17]

Some have argued that simplifying the transfer process and moving water to an open market could facilitate more efficient use of scarce water resources.[18] Whatever the merits of the argument, for the

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11. Gould, *supra* note 1, at 13 (A transfer involves "an alteration of the water right itself."); *cf.* ANDERSON ET AL., *supra* note 8, § 14.04(a) (drawing a distinction between a "change" of a water right and a "transfer" with the latter consisting of any "physical or ownership change in all or part of a water right").

12. § 42-222. A transfer does not contemplate an increase in the diversionary entitlement of a water right (or a change in its priority). WELLS A. HUTCHINS, 1 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 1, 9 (1971). Under the prior appropriation system, any increase in the rate of diversion would constitute a second appropriation and would as a practical matter have a later priority date.

13. *See* § 42-108; *Wash. State Sugar Co.*, 27 Idaho at 42-43, 147 P. at 1078-79 (referring to both the no-injury rule and other statutory requirements for effectuating a change).

14. § 42-108.

15. § 42-222(1). Once the Director of the Department of Water Resources has received an application for transfer, it is his duty to publish written notice as provided under section 42-203A, and to notify the Water master in the district where such water is used. *Id.* Any person desiring to protest the proposed change may do so by filing a protest with the Department within ten days of the last date of publication. *Id.* The filing of any protest triggers an investigation and hearing to be conducted by the Department of Water Resources. *Id.* But, regardless of whether the proposed change is protested or not, the director may condition or deny the transfer consistent with its duty to evaluate for compliance with the statutory scheme. *See id.* § 42-203A(5).

16. *See* § 42-222(1).

17. Crockett v. Jones, 47 Idaho 497, 504, 277 P. 550, 552 (Idaho 1929).

18. *See generally* H. Stuart Burness & James P. Quirk, *Water Law, Water Transfers, and Economic Efficiency: The Colorado River*, 23 J.L. & ECON. 111 (1980); Steven E. Clyde, *Legal and Institutional Barriers to Transfers and Reallocation of Water Re-*

reasons discussed above, water marketing and water banking have enjoyed only limited, localized success.[19] Nevertheless, an effective and fairly structured water right transfer process remains desirable. This comment examines the transfer process in Idaho, focusing in particular on the statutory criteria under title 42, section 222 of the Idaho Code and recent judicial and administrative decisions affecting the right to transfer. The analysis reveals a trend in Idaho towards increasing scrutiny of the transfer process—the natural result of shifting values and rising system demands. In this environment, closer legislative attention to the water right transfer process is needed in order to streamline the process for meeting future water needs.

II. LEGAL RESTRICTIONS ON TRANSFERS

A. The Doctrine of Beneficial Use

1. Overview

The doctrine of beneficial use is a foundational concept in Western water law.[20] Its centrality is revealed in the once familiar statement that "[b]eneficial use shall be the basis, the measure, and the limit of the right to the use of water."[21] In principle, the doctrine has two components that affect the right to transfer. First, it limits the types of uses to which the water may be applied.[22] That is, the nature of the use must be one that is considered beneficial. Second, the doctrine limits the quantity of water that may be transferred to the amount of water actually put to beneficial use under the pre-existing permit or decree.[23] These twin aspects of the doctrine tend to be associated with three policy goals: ensuring the highest socially acceptable

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sources, 29 S.D. L. REV. 232 (1984); Gould, *supra* note 1; Lee, *supra* note 6; MEYERS & POSNER, *supra* note 1; Thompson, *supra* note 6; Timothy D. Tregarthen, *The Market For Property Rights in Water*, *in* WATER NEEDS FOR THE FUTURE: POLITICAL, ECONOMIC, LEGAL, AND TECHNOLOGICAL ISSUES IN A NATIONAL AND INTERNATIONAL FRAMEWORK 139-51 (Ved P. Nanda ed., 1977).

19. Water markets continue to be viewed as a solution to water scarcity. *See* Wade Graham, *California Floats its Future on a Market for Water*, HARPER'S MAG., June 1998, at 51; Lawrence J. MacDonnell, *Water Banks: Untangling the Gordian Knot of Western Water*, 41 ROCKY MTN. MIN. L. INST. 22-1 (1995).

20. HUTCHINS, *supra* note 12, at 9.

21. *Id.* (quoting from the New Mexico Constitution).

22. ANDERSON ET AL., *supra* note 8, § 14.04(b).

23. *Id.*

use of water;[24] avoiding unreasonable or unnecessary waste;[25] and preventing speculation and monopoly.[26]

Although the policy of beneficial use seems to connote a restrictive measure of water use, in practice it has afforded great flexibility to water users.[27] In the diversion and application of water, appropriators have not been held to a measure of absolute efficiency or to the minimum amount of water necessary to irrigate a specific crop.[28] Instead, appropriators have been held to a standard of reasonableness as it has been defined in reference to the prevailing local community standards and practices.[29]

However, the accommodation of new values, together with better science, improving technology and growing demands, have led to changing perceptions as to what constitutes acceptable water use.[30] As system demands increase, pressure seems to be mounting on courts and administrators to adopt stricter standards of reasonableness. The effects of this pressure will undoubtedly be felt on water rights as they are scrutinized in the transfer process.

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24. ROBERT E. BECK ET AL., 2 WATER AND WATER RIGHTS § 12.02(c)(2) (Robert E. Beck ed., 2000).

25. HUTCHINS, *supra* note 12, at 11, 497.

26. *Id.* at 495. Courts sometimes state the anti-speculation policy as the inability of the appropriator to play the "dog in the manger," and hold water to the exclusion of others without actually putting it to beneficial use. *Id.* (quoting from Bailey v. Tintinger, 122 P. 575 (Mont. 1912)). *See also* Janet C. Neuman, *Beneficial Use, Waste and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919 (1998) (identifying three original purposes of the doctrine: avoiding speculation and monopoly; maximizing use of a scarce resource for all; and providing flexibility to water users). Professor Neuman concludes, however, that while the doctrine has provided flexibility and accommodated new uses to some extent, it has proved inadequate at preventing waste and encouraging efficiency. *Id.* at 947-48. Instead, the doctrine has tended to freeze old customs and inefficient practices. *Id.*

27. *See* Neuman, *supra* note 26, at 922. In some instances, the definition of beneficial use has been statutorily defined, but most often what is and is not a beneficial use of water has been left for the courts to decide. *Id.* at 925. *See also* Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557 (Wyo. 1978) (noting the historic discrepancy between the paper right and the actual practices of water users in Wyoming; discussing the continued significance of the beneficial use concept in a reallocation proceeding).

28. HUTCHINS, *supra* note 12, at 644. In Idaho, see for example, Twin Falls Land & Water Co. v. Twin Falls Canal Co., 7 F. Supp. 238, 252 (D. Idaho 1933) ("[A] reasonable method of farming must prevail and a farmer is not required to use methods which are costly in labor and money simply because some waste can be saved thereby.").

29. HUTHCHINS, *supra* note 12, at 644.

30. *See generally* Neuman, *supra* note 26 (critiquing the doctrine of beneficial use West). *See also* Moore & Willey, *supra* note 9 (discussing emerging values for water).

2. Beneficial Use in Idaho

a. Purpose of Use

The significance of the beneficial use concept, particularly with regard to the nature of use aspect of the doctrine, has been largely displaced by the statutory scheme. Recognized beneficial uses—once limited to a narrowly defined category of traditional domestic and economic purposes[31]—now include scenic beauty, recreation, in-stream flow, wildlife habitat, and other uses consistent with the values of the people of the state.[32] Consequently, in a transfer proceeding, although an applicant must continue to provide evidence that the intended nature of use under the transfer is for a recognized beneficial purpose, this element of the doctrine has decreasing importance as a limit on the right to transfer.[33]

b. The Quantity Element: Reasonable and Economic Use of Water

In addition to constraining the uses to which water may be transferred, the doctrine of beneficial use may function to limit the quantity of water transferred in Idaho. In theory, this may occur in one of two ways: because of non-use or because of waste.[34] Non-use occurs

31. IDAHO CONST. art. XV, § 3 (recognizing agriculture, domestic, mining, milling, power, and manufacturing as beneficial uses).

32. State Dep't of Parks v. Idaho Dep't of Water Admin., 96 Idaho 440, 443, 530 P.2d 924, 927 (Idaho 1974) (interpreting list of beneficial uses under the Idaho Constitution to be non-exclusive). Other statutorily defined beneficial uses include: in-stream and other water use for livestock, IDAHO CODE § 42-113 (Michie Supp. 2000); stored water for irrigation, *id.* § 42-222; appropriation of geothermal water for heat purposes, *id.* § 42-233; minimum stream flow for "the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality," *id.* § 42-1501 (but note, only the Idaho Water Resource Board can appropriate water for in-stream purposes under this chapter); and, the appropriation of surface water for the recharge of ground water basins, *id.* § 42-4201A(2). In contrast, the use of water to overflow lands in order to create an ice cap for later use was held not to be a beneficial use of water. Blaine County Inv. Co. v. Mays, 49 Idaho 766, 773, 291 P. 1055, 1060 (Idaho 1930).

33. § 42-222 (new use must be beneficial). Similarly, section 104 merely states that "[t]he appropriation of water must be for some useful and beneficial purpose," but does not elaborate further. *Id.* § 42-104.

34. The Wyoming Supreme Court has said: "The key to understanding the application of beneficial-use concepts to a change-of-use proceeding is a recognition that the issues of nonuse and misuse are inextricably interwoven with the issues of change of use and . . . place of use." Basin Elec. Power Coop. v. Bd. of Control, 578 P.2d 557, 564 (Wyo. 1978). In Idaho, however, technically a water right may only be wholly or partially lost through a forfeiture, abandonment, or similar formal proceeding. *See* IDAHO CODE § 42-222(2) (Michie Supp. 2000); State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 947 P.2d 409 (Idaho 1997). *See* forfeiture discussion *infra* Part A.3.

when it is determined that all or part of the diversionary entitlement under the permit was not previously being put (diverted) to a beneficial use.[35] Waste occurs when, regardless of whether the entire diversionary entitlement was actually diverted to a beneficial use, the quantity of water that the applicant seeks to transfer is determined to be excessive when considered in light of the circumstances of its historic use.[36] In either case, the water right to be transferred may be diminished to the amount of actual, historic beneficial use.

As a measure of the right that may be transferred, the beneficial use concept is closely related to the concept of the "duty of water," often employed in the irrigation context.[37] In Idaho, the duty of water is

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35. For example, suppose an existing right entitles the holder to divert 20 cubic feet per second (cfs). The applicant seeks to transfer the entire amount, but the evidence shows that only 15 cfs has been diverted in the past. The applicant would be limited to 15 cfs under the transfer.

However, there are at least two exceptions to the rule that an appropriator may not hold more water than can be presently put to beneficial use. In what some jurisdictions have called the "Great and Growing Cities Doctrine," municipal providers are one such exception. Title 42, section 219 of the Idaho Code, allows municipal water users to hold water sufficient to serve "reasonably anticipated future needs" so long as the service area and planning horizon are designated. *See* IDAHO CODE § 42-219, *id.* § 42-222(1), and *id.* § 42-202B. However, a municipal provider may not transfer "that portion of the right held for reasonably anticipated future needs . . . to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use." § 42-222(1).

A second possible exception to the rule is embodied in what is known as IDWR's "*sprinkler-flood policy.*" *See* Memorandum Decision and Order on Challenge, *In re* SRBA Case No. 39576, (Gisler Subcase 36-00077D) (Twin Falls District Court, Idaho 2000). The policy allows an irrigator whose paper claim is based on a rate of diversion for a gravity flow system, but is presently using sprinkler irrigation (presumed under the policy to be less consumptive), to claim the higher diversion rate of the former. In *Gisler*, the policy was challenged on the grounds that it violated a statutory duty to approve a water right claim for the present beneficial use. *Id.* at 23. SRBA Presiding Judge, B. Wood, upheld the application of the policy, but decided the case on procedural and evidentiary grounds. *Id.* Although Judge Wood specifically stated he was not deciding the issue, his discussion indicates that he felt the sprinkler-flood policy is consistent with state law. *Id.* at 23-28. *Gisler* is currently on appeal to the Idaho Supreme Court, with oral arguments scheduled for November 2, 2001.

36. Such circumstances include: The purpose of use, the method of application, and in the case of irrigation, the condition of the lands to which the water is appurtenant. Wash. State Sugar Co. v. Goodrich, 27 Idaho 26, 43, 147 P. 1073, 1079 (Idaho 1915). *See generally* Wells A. Hutchins, *Idaho Law of Water Rights*, 5 IDAHO L. REV. 1, 38-40 (1968).

It is important to recognize the distinction here between an original appropriation and a transfer when it comes to assessing the beneficial use. With an original appropriation, the measure of use is assessed against the land, or use, to which the water *will* be put. In contrast, with a transfer, the measuring use is the land, or use, to which the water *has* been put.

37. Like beneficial use, a precise definition of the duty of water is hard to pin down. The Colorado Supreme Court has stated the definition this way:

statutorily defined to limit the amount of water for irrigation purposes to one cubic foot per second for each fifty acres of land, unless IDWR or the court, deems more water is necessary.[38] Essentially, the statutory limit functions as a rebuttable presumption of reasonable use for irrigation. Nevertheless, the Idaho Supreme Court has said the ultimate determination of the duty of water is a question of fact with the primary considerations being beneficial and economical use.[39] That is, the duty of water is the amount that is reasonably necessary for the purpose intended when economically used.[40] Reasonableness is defined by the standards of the community with reference to the characteristics of the land or use to which it is applied.[41] In the con-

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> It is that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily grown thereon. It is not a hard and fast unit of measurement, but is variable according to conditions.

Farmers Highline Canal & Reservoir, Co. v. City of Golden, 272 P.2d 629, 634 (Colo. 1954).

38. IDAHO CODE § 42-220 (Michie 2000).

39. Uhrig v. Coffin, 72 Idaho 271, 274, 240 P.2d 480, 481 (Idaho 1952). *See also Wash. State Sugar Co.*, 27 Idaho at 43, 147 P. at 1079: "The duty of water depends upon the character and condition of the soil, and in determining the duty of water, reference should always be had to the lands that have been prepared and reduced to a reasonably good condition."

40. *Wash. State Sugar Co.*, 27 Idaho at 43, 147 P. at 1079. The Idaho Supreme Court articulated the policy of beneficial use in 1915:

> It is held that the test of an appropriator's right to water for irrigation is the amount of water actually used for a beneficial purpose.
>
> . . . .
>
> It is the settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of the irrigation of the lands in question and the condition of the land to be irrigated, should be taken into consideration. A prior appropriator is only entitled to the water to the extent that he has use for it when it is economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty of the waters of the state in the interest of agriculture and for useful and beneficial purposes.

Id. (citations omitted). *See also* Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9 (9th Cir. 1917).

41. *Wash. State Sugar Co.*, 27 Idaho at 43, 147 P. at 1079; Beasley v. Engstrom, 31 Idaho 14, 18, 168 P. 1145, 1146 (Idaho 1917) (stating that reasonable use is determined by circumstances including size of stream, type of crops, character of soil, and method of irrigation commonly used in the vicinity); IDAHO CODE § 42-916 (Michie 2000)

text of accomplishing a transfer, it is this measure that the law attaches to a water right.

Despite statutory and judicial pronouncements that prior appropriators may not hold or waste water,[42] the case law in Idaho suggests that until recently, this policy has rarely been used to reduce a water right in a transfer proceeding. To understand why this is so and how it is changing, it is necessary to look at the law of forfeiture in Idaho.

3. Loss of a Water Right from Non-Application to Beneficial Use: Forfeiture and Partial Forfeiture

a. Forfeiture in Idaho

Closely related to the beneficial use limit on the right to transfer is the concept of statutory forfeiture. Statutory forfeiture is the loss of a water right from non-application to a beneficial use for a continuous five-year period.[43] Up until 1997, the relationship between the beneficial use limit and forfeiture was not entirely clear. What was clear was that forfeiture of water rights rarely occurred in a transfer proceeding and thus the beneficial use limit was never strictly enforced. There appear to be at least three reasons for this.

First, the Idaho Supreme Court has taken the position that questions of forfeiture should *not* be considered in a transfer proceeding unless it is probative to a determination of injury to protesting appro-

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("No person entitled to the use of water . . . must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates.").

42. For a more recent statement see Kunz v. Utah Power & Light Co., 117 Idaho 901, 904, 792 P.2d 926, 929 (Idaho 1990): "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."

43. Section 222(2) provides: "All rights to the use of water acquired under this chapter or otherwise shall be lost or forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated," except in certain circumstances specified under section 223. IDAHO CODE § 42-222 (Michie Supp. 2000). *See also* Gilbert v. Smith, 97 Idaho 735, 738, 522 P.2d 1220, 1223 (Idaho 1976).

In Idaho, statutory forfeiture is a distinct legal concept from abandonment. "Abandonment is a common law concept involving a concurrence of an intention to abandon and the actual relinquishment or surrender of the water right." Gilbert v. Smith, 97 Idaho 735, 738, 522 P.2d 1220, 1223 (Idaho 1976). Under the law of abandonment, the intent to abandon must be shown by clear and decisive acts, and mere non-use of a water right can not result in abandonment. 97 Idaho at 739, 522 P. at 1224. The consequences of abandonment and forfeiture, however, are the same: the water reverts back to the state. § 42-222(2),(3) and (4); Sears v. Berryman, 101 Idaho 843, 848, 623 P.2d 455, 460 (Idaho 1981). Early Idaho case law failed to distinguish between abandonment and forfeiture; however, since 1944 the case law has been much improved in this regard. *See Sears*, 101 Idaho at 847, 623 P.2d at 459; Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (Idaho 1944).

priators.[44] Given all the lip-service to the beneficial use rule, this is particularly puzzling when, as a practical matter, it is only when a water right is in dispute or in a transfer proceeding that it is likely to be scrutinized for waste or non-use.[45] The result has been that enforcement of the beneficial use limit on an appropriator's right has been solely at the initiative of other private appropriators.[46]

Second, the judicial attitude toward forfeiture has been that it is not favored in Idaho and it must be shown by clear and convincing evidence.[47] This attitude and legal standard seems to have been

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44. Jenkins v. State Dep't of Water Res., 130 Idaho 384, 387, 647 P.2d. 1256, 1259 (Idaho 1982) ("[O]rdinarily abandonment and forfeiture are to be determined in a separate proceeding. . . ."). *See also In re* Boyer, 73 Idaho 152, 158, 248 P.2d 540, 543 (Idaho 1952) ("The question of abandonment is not pertinent in a proceeding of this kind."); Twin Falls Canal Co. v. Shippen, 46 Idaho 787, 788, 271 P. 578, 579 (Idaho 1928) ("In a proceeding to change a point of diversion of water, the question of abandonment of priority is not normally before the court . . . .").

45. A third way, of course, is when water rights are decreed under a general adjudication, for example, the Snake River Basin Adjudication (SRBA).

46. This was not the position taken by IDWR in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (Idaho 1997). There, IDWR stated that the "concept of beneficial use allows for constant re-evaluation of whether water is being used beneficially." *Id.* at 738, 947 P.2d at 411.

47. *E.g.*, McCray v. Rosenkrance, 135 Idaho 509, 20 P.3d 693 (Idaho 2001) (stating that because of disfavor of forfeiture, Idaho law requires heightened evidentiary standards); *see also* Aberdeen-Springfield Canal Co. v. Peiper, 132 Idaho 82, 87, 982 P.2d 917, 922 (Idaho 1999) (stating forfeiture of water rights is not favored); Jenkins v. State Dep't of Water Res., 130 Idaho 384, 389, 647 P.2d. 1256, 1261 (Idaho 1982) (stating forfeitures are not favored); *In re* Boyer, 73 Idaho 152, 161, 248 P.2d 540, 545 (Idaho 1952) ("Forfeitures are abhorrent and all intendments are to be indulged against a forfeiture.").

In transfer proceedings, challenges to transfers based on resulting expansions in beneficial use have often yielded two results. On the one hand, where the courts have found that other appropriators would not be injured by a change, they have allowed the transfer despite an increase in historic beneficial use. *See Boyer*, 73 Idaho at 161, 248 P.2d at 545; Colthorp v. Mountain Home Irrigation Dist., 66 Idaho 173, 179-81, 157 P.2d 1005, 1007-08 (Idaho 1945). Both cases involved transfers where the historic use of the water had been under conditions of substantial transmission and seepage losses affecting, in one case, nearly seventy-five percent of the diversion. Finding that the requirements of forfeiture and abandonment had not been met, both courts approved the transfers, despite the fact of an increase in beneficial use.

On the other hand, in cases where evaluations of historic use have shown substantial waste and inefficiency, either because of the location of use or the preparation of the lands, and where the transfer could not be approved without substantial injury, rather than reduce the water rights to the actual historic beneficial use the courts have simply denied the transfer. *See, e.g.*, Wash. State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (Idaho 1915) (denying a change on the grounds that it would have expanded the beneficial use of the water right and defeated the rights of junior appropriators); Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9 (9th Cir. 1917) (finding that the change would expand the beneficial use of the water right, the court prevented the change in order to protect the rights of juniors). *But cf. Jenkins*, 130 Idaho at 386, 647

transplanted from the law of abandonment, which requires a clear showing of intent to abandon coupled with actual surrender of a water right.[48] The courts have used the terms forfeiture and abandonment interchangeably on occasion and this seems to be the source of the mixing of standards.[49]

Finally, numerous exceptions and defenses to forfeiture have been recognized both by the courts and the legislature tending to further decrease the chances that a water right will actually be reduced or lost for non-application to beneficial use.[50]

It is difficult to reconcile judicial and legislative pronouncements of a policy of beneficial use, without waste, as the limit on an appropriator's right to use water, with a legal regime that: (1) leaves enforcement of the policy to the initiative of private water users, (2) provides for numerous exceptions, (3) indulges all intendments in the law against forfeiture, and (4) presumes that one of the few forums avail-

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P.2d. at 1258 (holding that where evidence showed non-use of a water right for 18 years and where other appropriators would be injured by transfer, forfeiture was justified).

48. *See supra* note 43.

49. An example of such confusion is apparent in the following quote used in an attempt to explain forfeiture under section 222(2): "Loss by *abandonment* cannot arise until after a failure to apply water to a beneficial use for a period of five years and this *intent* must be made to appear by clear and convincing evidence." State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 746, 947 P.2d 409, 419 (Idaho 1997) (quoting Albrethsen v. Wood River Land Co., 40 Idaho 49, 60, 231 P. 418, 422 (Idaho 1924)) (emphasis added).

50. At least ten such defenses and exceptions have been recognized, including: (1) resumption of use after five years but before third parties make a claim on the water, see *Dovel v. Dobson*, 122 Idaho 59, 62, 831 P.2d 527, 530 (Idaho 1992); *Jenkins*, 130 Idaho at 389, 647 P.2d at 1261; *Boyer*, 73 Idaho at 160, 248 P.2d at 544; *Carrington v. Crandall*, 65 Idaho 525, 532, 147 P.2d 1009, 1011 (Idaho 1944); (2) wrongful interference with a water right, *Jenkins*, 130 Idaho at 389, 647 P.2d at 161; (3) circumstances beyond the control of the right holder, see *Jenkins*, 130 Idaho at 389, 647 P.2d at 161; *Aberdeen-Springfield Canal Co., v. Peiper*, 132 Idaho 82, 87, 982 P.2d 917, 922 (Idaho 1999) (finding neighbor's unwillingness to allow reconstruction of ditch and head-gate were circumstances over which appropriator had no control); (4) holders of Carry Act water where another entity besides the right holder was the original appropriator, *Aberdeen-Springfield*, 132 Idaho at 87, 982 P.2d at 922; (5) application for additional five year extension when good cause is shown before the end of the five-year grace period for non-use, IDAHO CODE § 42-222(3) and (4) (Michie Supp. 2000); (6) water rights appurtenant to land contracted in a federal cropland set-aside programs toll the five year non-use period, *Id.* § 42-223(1) (in addition, section 223 specifically provides that its enactment does not "preclude judicial or administrative recognition of other exceptions or defenses to forfeiture"); (7) non-use by a municipal provider of water needed to meet reasonably anticipate future needs, § 42-223(2); (8) excess "water [that is] not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes including, but not limited to, discharge from dairy lagoons," § 42-223(3); (9) water not used for reasons of compliance with an approved ground water management plan, § 42-223(4); and, (10) placement of a water right in the states water bank pursuant to sections 1761-1766, IDAHO CODE §§ 42-1761-1766 (Michie 2000).

able for administrative and judicial scrutiny of a water right — the transfer proceeding — is inappropriate for questioning historic beneficial use. Support for an attitude of administrative and judicial leniency is perhaps even more troublesome when considering that since 1979 an appropriator has been able to avoid forfeiture simply by voluntary placement of the right in the state's water bank pursuant to Idaho Code sections 42-1761 through 1766.[51]

In 1992, Justice McDevitt expressed his frustration with the court's unwillingness to apply the forfeiture provision. *Dovel v. Dobson*[52] involved an application for permit and a transfer that was protested by Dovel, who objected on several grounds, including injury and forfeiture. The court affirmed the decision of the director approving both the transfer (with conditions) and the permit, even though the duty of water approved under the transfer exceeded the duty originally established under the right, and there was an acknowledged finding by the court of forfeiture of water appurtenant to six of the ninety-six acres at the originally authorized place of use.[53] In a lone dissent, Justice McDevitt stated that he felt the record could not support the director's finding that *all* of the rights had not been forfeited, adding: "Our very existence depends on water, claims to our water should require greater scrutiny than the director afforded this transfer."[54]

b. Partial Forfeiture

Despite continued disfavor for forfeiture of a water right in Idaho, there are signs that water rights will undergo increasing scrutiny in the future. In 1997, two important issues were resolved concerning the operation of the forfeiture provision, spun-out by the ongoing Snake River Basin Adjudication (SRBA).[55] The first issue was whether the forfeiture provision displaced the doctrine of beneficial use limit—at least with respect to the time frame in which to measure non-use or waste. In *State v. Hagerman Water Right Owners, Inc.*,

51. IDAHO CODE §§ 42-1761 to 42-1766 (Michie 2000).

52. Dovel v. Dobson, 122 Idaho 59, 62, 831 P.2d 527, 530 (Idaho 1992) (McDevitt, J. dissenting).

53. *Id.* at 65, 831 P.2d at 533. In effect, IDWR found only that the consumptive use of the water appurtenant to one of the three fields under the right had been forfeited for non-use. Concluding that the transfer would not change the amount of use authorized by the water right, IDWR approved the historic diversion rate. *Id.* at 61, 831 P.2d at 529.

54. *Id.* at 65, 831 P.2d at 533 (McDevitt, J. dissenting).

55. *See* State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400 (Idaho 1997) [hereinafter *Hagerman I*]; *see also* companion opinion, State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 947 P.2d 409 (Idaho 1997) [hereinafter *Hagerman II*].

IDWR contended that the SRBA court could not decree water rights "in excess of the amount actually used for beneficial purposes for which such right was claimed."[56] Accordingly, "the concept of beneficial use allows for constant re-evaluation of whether water is being used beneficially."[57] The Idaho Supreme Court disagreed. The court explained:

> Although the doctrine of beneficial use is a concept that is constitutionally recognized and that permeates Idaho's water code, the Idaho Constitution does not mandate that non-application to a beneficial use, for any period of time no matter how small, results in the loss or reduction of water rights. On the contrary, the legislature has enacted a specific statute which provides for the loss of water rights for failure to apply the water to a beneficial use . . . Section 42-222(2).[58]

So according to the Idaho Supreme Court, the only way a vested water right may be lost or reduced from non-application to a beneficial use, is when such non-use or waste continues for the five-year statutory period. Although this holding actually limits the applicability of the beneficial use concept, it does provide some much needed clarity. Additionally, the fact that IDWR litigated the issue is some indication of the mounting pressure to scrutinize water rights.

The second issue dealt with in *Hagerman* is a more substantial indication of the trend toward closer scrutiny. The issue was whether a water right may be partially forfeited under section 222.[59] The claimants contended the statute contemplated only total forfeiture and therefore IDWR could not reduce a previously decreed or licensed water right as long as part of the right was put to beneficial use during the statutory five-year period.[60] The claimants also contended that a prior decree was conclusive as to the nature and extent of current water use.[61] The SRBA district court agreed on both counts, "holding, as a matter of law, that water rights in Idaho are not subject to partial forfeiture for non-use."[62]

Accepting an interlocutory appeal, the Idaho Supreme Court reversed.[63] The court acknowledged that the issue of whether a water right may be partially forfeited pursuant to section 222(2) had never

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56. *Hagerman II*, 130 Idaho at 744, 947 P.2d at 416. Although IDWR is not a party to the SRBA, the court relies on IDWR for its expertise.

57. *Id.* at 738, 947 P.2d at 411.

58. *Id.* at 744, 947 P.2d at 416.

59. *Id.*

60. *Hagerman I*, 130 Idaho 727, 947 P.2d 400.

61. *Hagerman II*, 130 Idaho at 740-41, 947 P.2d at 413-14.

62. *Hagerman I*, 130 Idaho at 729, 947 P.2d at 402.

63. *Id.* at 735, 947 P.2d at 408; *Hagerman II*, 130 Idaho at 741, 947 P.2d at 414.

squarely presented itself, but noted that the "principle has been assumed on occasions by both the court and the litigants."[64] In this case, IDWR took the position that section 222(2) does contemplate partial forfeiture.[65] Turning to the statute, the court concluded that it was ambiguous.[66] However, the court found that IDWR's interpretation of the statute was consistent with the "longstanding decisions in Idaho that decreed water rights . . . are not insulated from reexamination by the court and may be lost *or reduced*."[67] In addition, the court concluded the principle of partial forfeiture is consistent with "the policy and law of the state . . . to secure the maximum benefit, and least wasteful use, of its water resources."[68] Therefore, in Idaho, a forfeiture has taken place when, for the statutory duration, either the full amount of the water right is not diverted, or in order to divert the full amount the water user must waste water.[69]

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64. *Hagerman I*, 130 Idaho at 732, 947 P.2d at 405 (discussing Dovel v. Dobson, 122 Idaho 59, 831 P.2d 527 (Idaho 1992) and several other cases that assumed partial forfeiture to be lawful).

65. *Hagerman I*, 130 Idaho at 729, 947 P.2d at 402.

66. *Id.* at 732, 947 P.2d at 404.

67. *Hagerman II*, 130 Idaho at 741, 947 P.2d at 414 (emphasis added).

68. *Hagerman I*, 130 Idaho at 735, 947 P.2d at 408 (quoting from Kunz v. Utah Power & Light Co., 117 Idaho 901, 904, 792 P.2d 926, 929 (Idaho 1990)).

69. *Id.* However, in a startling decision handed down by Judge B. Wood in December of 1999, the SRBA district court held that for purposes of establishing forfeiture, "once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are tolled . . . so long as the claimant continues to prosecute the claim to partial decree." Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue (*In re* SRBA Case No. 39576) (Subcase Nos. 36-02708, et al.), at 27 (Twin Falls District Court, Idaho 1999). Under this ruling, if a claimant filed a claim in the SRBA in 1992 and continues to prosecute it, when the claim is finally adjudicated, only evidence of forfeiture in the five years preceding 1992 will be allowed to enter the determination of forfeiture. Judge Wood reached this decision by analogizing the SRBA to a quiet title proceeding, and noting that "[i]t is a settled legal principle that the filing of a quiet title action tolls the running of the statute of limitations for establishing title by adverse possession or prescription to the property that is the subject of the action." *Id.* "Since forfeiture is a species of adverse possession and prescription" it follows that the forfeiture provision should also be tolled once a water right claim is filed. *Id.* This view seems to ignore the policy behind the beneficial use limit embodied in section 222(2).

Note: In an internal memorandum dated March 24, 2000, IDWR announced that it has interpreted this decision as applying only for purposes of establishing a decree within the SRBA, and thus not for the re-evaluation of water rights in other administrative settings. Memorandum from Norm Young, Idaho Dep't of Water Resources, to Water Management Division Staff (Mar. 24, 2000) (on file with author). The memorandum states:

> Filing a claim and participating in the SRBA does not prevent a water user from making use of his/her water right. Therefore, in the context of transfer or other applicable administrative proceedings, IDWR will continue to con-

B. The No-Injury Rule

1. Overview

The rule that an appropriator may not change a water right if it will injure other vested rights is the essential restriction on the right to transfer.[70] The clear purpose of the rule is to protect the rights of junior appropriators, who because of the order of priority, are vulnerable when senior rights are changed. The policies supporting a strict operation of the rule are overall fairness to appropriators and the protection of investment-backed expectations.

The necessity of the no-injury rule stems from the way in which the prior appropriation right is defined: in reference to a diversionary entitlement.[71] Because this definition by itself does not take into consideration the consumptive use of the right involved,[72] transfer proceedings typically focus on the impacts to stream conditions below the originally decreed point of diversion.

In general, an actionable injury occurs when a proposed change would materially alter stream conditions to the detriment of junior rights.[73] This principle is frequently stated as the right of the junior to the maintenance of stream conditions existing at the time of their ap-

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sider nonuse of water after the filing of an SRBA claim as relevant to whether forfeiture has occurred.

Id.

70. Although judicially created, the rule has been statutorily adopted in all prior appropriation doctrine states. ANDERSON ET AL., *supra* note 8, § 14.04(c); HUTCHINS, *supra* note 12, at 623, 631. The prohibition against injury as a condition precedent to a transfer is so much a part of the general rule that the Colorado courts have stated it this way: "[T]he right to [transfer] . . . does not exist at all . . . unless it can be exercised without injury to other vested rights." Farmers' Highline Canal & Reservoir Co. v. Wolff, 131 P. 291 (Colo. 1913).

71. *E.g.*, Gould, *supra* note 1, at 5. Professor Gould notes that several authors have suggested that the appropriative water right should be redefined in reference to a "consumptive entitlement" instead of a diversionary entitlement. *Id.* at 25.

72. Consumptive use may be defined as "diversions less returns," the difference between the amount physically removed from the stream and the amount returning after application to a beneficial use. ANDERSON ET AL., *supra* note 8, § 14.04(c)(1). *See* discussion *infra* Part II.C.

73. Senior rights are protected through the priority system and the ability of the senior to "call" out junior rights.

In the context of a transfer, an injury to other rights may occur because of an increase in the water diverted or consumed, a change in the timing of the diversion, a change in the point(s) of return, a change in the place of storage, a change in the means of diversion, a decline in water quality after diversion and use, or because of a combination of these changes. *See* ANDERSON ET AL., *supra* note 8, § 14.04(c).

propriation[74] and has been applied in numerous Idaho cases.[75] In *Crocket v. Jones*,[76] the Idaho Supreme Court announced the rule:

> [T]o be that junior appropriators have a vested right to a continuance of the conditions existing on the stream at and subsequent to the time they made their appropriations, and that no proposed change in place of use or diversion will be permitted when it will injuriously affect such established rights.[77]

Although the no-injury rule may be viewed as necessary to adequately protect the rights of juniors in a priority system, the rule has not gone uncriticized. One such basis for criticism is that because the burden of proof is typically placed on the proponents of a transfer,[78] they are charged with proving a "sweeping negative."[79] The consequence is that the reallocation process can become expensive and time consuming.[80] This is the reason why many economists have complained of the high "transaction costs" associated with reallocation proceedings and the overall impediments the no-injury rule places on the development of efficient water markets.[81]

Over the years, courts have responded to the supposed rigidity of the no-injury rule in several ways that have tended to increase, rather than decrease, the possibilities for transfers. First, several jurisdictions have manipulated the proof requirements. For example, the Colorado Supreme Court held that "[o]nce an applicant has established a *prima facie* case of no injury [from a proposed change in water rights] the burden shifts to any objector to establish that injury to an extant water right might result."[82] The Utah Supreme Court announced a similar approach in 1934 when it held that an applicant need only make a general showing of no injury and then rebut specific claims of injury.[83] Second, courts have applied traditional standing

74. *See* HUTCHINS, *supra* note 12, at 570-71.

75. *See, e.g.*, Crockett v. Jones, 47 Idaho 497, 277 P. 550 (Idaho 1929); Wash. State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (Idaho 1915); Bennett v. Nourse, 22 Idaho 249, 125 P. 1038 (Idaho 1912).

76. *Crockett*, 47 Idaho at 497, 277 P. at 550.

77. *Id.* at 504, 277 P. at 552.

78. Gould, *supra* note 1, at 35.

79. MEYERS AND POSNER, *supra* note 1, at 34-35. In most western states, the burden of proof is on the proponent of the transfer to show no injury. ANDERSON ET AL., *supra* note 8, § 14.04(c).

80. *See* Gould, *supra* note 1, at 20.

81. For a discussion of this view see Gould, *supra* note 1, at 23. *See also* J. SAX, WATER LAW CASES AND COMMENTARY 207 (1965).

82. City of Aurora v. Div. Eng'r for Water Div. No. 5, 799 P.2d 33, 37 (Colo. 1990) (emphasis added).

83. *See* Tanner v. Humphreys, 48 P.2d 484 (Utah 1935).

principles by holding, for example, that only other appropriators are protected against injury.[84] Finally, instead of outright denial of a transfer, statutes typically authorize courts and agencies to place conditions on transfers so that they can be approved in ways that mitigate injury. The following discussion focuses on the issues of standing, proof and conditions on transfers in Idaho.

2. Standing to Contest a Transfer: When Is There Injury to Other Rights and Who May Complain?

Section 222 states that a transfer will not be approved "if . . . other water rights are injured thereby."[85] This provision may be enforced in two ways. First, the statute creates an affirmative duty on the part of IDWR to see that injury to other water rights does not occur.[86] Second, it allows any party with standing to require an investigation and hearing by the agency before the transfer is approved.[87] To have standing, a party must allege a sufficient imminent injury,[88] the injury must be to a water right,[89] and the injury must be traceable to the proposed transfer. Two Idaho Supreme Court decisions illuminate these aspects of the no-injury rule in Idaho.

In *In re Johnson*,[90] the applicant sold his water right to a third party and sought authorization for a change in place of use and point of diversion.[91] The protestant, an irrigation company, shared a canal as tenant in common with the applicant, and both parties took water from the same point of diversion.[92] The complaint alleged three sources of injury: (1) because the applicant would no longer be sharing the canal, the protestant would absorb all transmission losses associ-

84. Gould, *supra* note 1, at 19.

85. IDAHO CODE § 42-222 (Michie Supp. 2000).

86. *See* IDAHO CODE § 42-203A (Michie 2000); Barron v. Idaho Dep't of Water Res., 135 Idaho 414, 421, 18 P.3d 219, 226 (Idaho 2001) (stating the fact that no protest was filed does not relieve IDWR from performing its statutory duty); Jenkins v. State Dep't of Water Res., 130 Idaho 384, 387, 647 P.2d 1256, 1259 (Idaho 1982) ("The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right."); *see also* Lockwood v. Freeman, 15 Idaho 395, 398, 98 P. 295, 296 (Idaho 1908) (holding that the director cannot issue a permit or license that in any manner interferes with the rights of other prior appropriators).

87. § 42-222.

88. *See In re* Boyer, 73 Idaho 152, 161, 248 P.2d 540, 545 (Idaho 1952).

89. Colthorp v. Mountain Home Irrigation Dist., 66 Idaho 173, 180-81, 157 P.2d 1005, 1008 (Idaho 1945); *In re* Johnson, 50 Idaho 573, 580, 300 P. 492, 494 (Idaho 1931).

90. 50 Idaho 573, 300 P. 492. (Idaho 1931).

91. *Id.* at 580, 300 P. at 494.

92. *Id.* at 577, 300 P. at 493.

ated with its operation and thereby suffer a "direct loss of water;"[93] (2) allowing the transfer would deprive the protestant "from revenues in succeeding years in assisting in the up-keep of [the] canal," and; (3) it would deprive the stockholders of the canal company of "the use, waste, runoff, etc.," of the waters when not in use by the applicant.[94]

On review, the Idaho Supreme Court stated that "[t]he term 'injured,' as used in the sections of the statute . . . applies to injury to the water right of another."[95] The court found that the injury was not caused by the transfer but by "the failure of [the applicant] to longer use the . . . canal in common with [protestant]."[96] The transfer would not impair the protestant's right to divert under his priority. Consequently, the injury complained of was not cognizable in a transfer proceeding.[97]

Even if a complaining party alleges injury to a water right, the supreme court has ruled that for a protestant to defeat the right to transfer he must demonstrate *substantial* injury, that is, "not merely a fanciful injury but a real and actual injury."[98] This rule was applied in *In re Boyer* [99] to prevent a speculative claim of injury.[100] The court held the fact that other rights might be injured if similar changes in other water rights were also granted, is an insufficient ground on which to defeat the right to transfer.[101]

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93. *Id.* at 576, 300 P. at 493. This type of injury is especially common in this era of high urban growth in the West, where lands under major canal service areas are sold off for development and the water is transferred to municipal uses. Title 42, section 108 of the Idaho Code, now requires the consent of the irrigation company before a right may be transferred, if that right is represented by a share of stock in a mutual corporation. IDAHO CODE § 42-108 (Michie 2000) (amended 1947). *See also Boyer*, 73 Idaho at 157, 248 P.2d at 542.

94. *Johnson*, 50 Idaho at 574, 300 P. at 494.

95. *Id.* (internal citations omitted). *See also* Colthorp v. Mountain Home Irrigation Dist., 66 Idaho 173, 180-81, 157 P.2d 1005, 1012-13 (Idaho 1945) (holding that where the complainant did not allege injury to a water right, he did not state a cause of action). *But see*, Hardy v. Higginson, 123 Idaho 485, 490, 849 P.2d 946, 951 (Idaho 1993) (holding that protestants, although owning no water rights, did have standing to challenge an appropriation on local public interest grounds). *Hardy* is discussed *infra* Part II.D.

96. *Johnson*, 50 Idaho at 474, 300 P. at 494.

97. *Id.*

98. Beecher v. Cassia Creek Irrigation Co., 66 Idaho 1, 7, 154 P.2d 507, 509 (Idaho 1944) (emphasis added).

99. 73 Idaho 152, 248 P.2d 540 (Idaho 1952).

100. *Id.* at 161, 248 P.2d at 545.

101. *Id.* (holding the evidence did not show rights would be immediately injured).

a. Specific v. General Injury

Idaho courts have not settled a significant issue that could have substantial implications on the transferability of water rights in Idaho; that is, whether a transfer may be denied on the grounds that it would cause a "general injury" to the stream, rather than on a finding of any specific injury to a right or rights. The notion of "general injury" comes from the common sense recognition that on a fully appropriated stream an increase or change in patterns of use is bound to affect some appropriator.[102] This reasoning persuaded the Colorado Supreme Court in the well-known case *Farmers Highline Canal & Reservoir Co. v. City of Golden.*[103] Reversing the decision of the trial court allowing the transfer, the court said: "Where general injury would result to the stream by the transfer, the change could not be authorized without injury to junior appropriators because it is their rights, proportionate with senior rights, that consume the whole stream."[104]

On its face, section 222 seems not to exclude the possibility that a claim of general injury could defeat a transfer.[105] Although no case is specifically on point, there are two Idaho decisions shedding some light on the issue. The most recent of the two cases provides some indication that a claim of general injury could eventually be viable to defeat a transfer in Idaho.

In the earlier case, *In re Boyer*, the protestant sought review of the state engineer's decision to approve a change in point of diversion and place of use.[106] The trial court affirmed the decision, finding that there would be "no substantial interdicting injury."[107] On appeal, the Idaho Supreme Court acknowledged witness testimony that the transfer would result in loss of return flows above the protestant's points of diversion.[108] However, the court found that,

> [The witnesses] had made no definite study or determination of a definitive amount of water that would get back into the river from use of water on [applicant's] lands . . . , or to the ex-

102. Gould, *supra* note 1, at 22 n.88. Enlargement in use is defined as any increase in the burden on the stream resulting from a transfer. *See* discussion *infra* Part II.C.

103. 272 P.2d 629 (Colo. 1954).

104. *Id.* at 633. This argument seems especially persuasive in circumstances such as where a jurisdiction is subject to a state issued moratorium on permits for new consumptive uses.

105. As is discussed, *supra*, however, the statute has been interpreted to require injury to a water right.

106. 73 Idaho at 152, 248 P.2d at 540.

107. *Id.* at 163, 248 P.2d at 546.

108. *Id.* at 161, 248 P.2d at 545.

> tent the flow of the river would be augmented thereby and directly available to other users, certainly not as to any specific user or ditch.[109]

Thus, the court refused to reverse the trial court and instead upheld the transfer.

The law in Idaho after *In re Boyer* seems to be that a protestant must demonstrate injury with some amount of specificity, at least when the source of that injury is alleged to be seepage and percolation losses from use on a particular tract of land.[110] However, *In re Boyer* did not address the degree of injury specificity that is required to defeat a transfer in a situation where there is no protestant. This was the situation presented in *Barron v. Idaho Dep't of Water Resources*.[111]

In *Barron*, the applicant challenged, *inter alia*, the sufficiency of evidence used by IDWR to deny a proposed change in place of use and point of diversion of six cubic feet per second (cfs).[112] Although the proposed transfer did not receive protest after publication of notice, IDWR determined that Barron had failed to produce sufficient evidence that other water users would not be injured by the change.[113] Barron contended that he "provided information and under oath asserted that the proposed transfer [would] not injure downstream water users."[114] Furthermore, argued Barron, IDWR failed to present any evidence to the contrary.[115] On appeal, the Idaho Supreme Court upheld IDWR's decision to deny the transfer. According to the court, the

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109. *Id.*

110. However, this language is somewhat anomalous when viewed in the context of other aspects of the case. First, the parties stipulated that the transmission losses the protestant complained of would be accounted for in the event of transfer. *Boyer*, 73 Idaho at 162, 248 P.2d at 546. Thus, this portion of the alleged injury was disposed of prior to reaching the court. *See id.* Second, the evidence showed and the court concluded that the return flows from the current place of use that the protestant allegedly relied on were the result of excessive waste water from application to unproductive, highly porous land. *See id.* at 156-57, 162, 248 P.2d at 542-43, 546. The new place of use under the transfer was shown to be highly productive in comparison, and the court employed the rule that "no appropriator can compel any other appropriator to continue the waste of water whereby the former may benefit." *Id.* at 162, 248 P.2d at 546. These factual circumstances would seem to make the case easily distinguishable from a case in which a claim of general injury was alleged.

111. 135 Idaho 414, 18 P.3d 219 (Idaho 2001). *Barron* is important for a number of reasons and is discussed further *infra* Parts II.B.3 and II.C.3.

112. *Id.*

113. *Id.* at 416, 18 P.3d at 221.

114. *Id.* at 418, 18 P.3d at 223.

115. *See id.*

record contained evidence to justify a legitimate concern "that Barron's proposed transfer will result in injury to other water users."[116]

The evidence to which the court referred, related to statements in the record by the water master concerning the existence of both junior and senior water users down-stream from the proposed new point of diversion.[117] The court made special note that several of the largest rights have priority dates earlier than the 1905 priority of Barron's right.[118] However, the holders of the rights were not identified, and the nature and extent of the potential injuries were not discussed. Relying on the testimony of the water master that these downstream rights could be potentially injured, the court concluded that IDWR had a legitimate basis to deny the transfer.[119]

One way to explain this part of the *Barron* opinion is in terms of agency deference, the outcome being merely the result of the court refraining from substituting its judgement for the judgement of the agency. But, it also seems fair to interpret the rationale of the *Barron* decision as approaching the general injury situation described by the Colorado Supreme Court. Essentially, the *Barron* court held that the existence of other water rights below a new point of diversion, combined with testimony by the water master that these rights could be injured, is sufficient evidence of injury to defeat a transfer in Idaho. At the very least, the degree of required injury specificity is a departure from the court's decision in *In re Boyer* and represents further evidence of the trend in increasing water right scrutiny.

3. Burden of Proof

IDWR places the burden of proving no injury on the applicant in a water right transfer proceeding.[120] Until the Idaho Supreme Court decision in *Barron*, no decision had carefully addressed this issue and it was unclear how this burden was to be specifically allocated.[121] The

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 418, 18 P.3d at 223.

120. *In re* Application for Transfer No. 3922 in the Name of John and/or Kristy Molyneux, (Idaho Dep't Water Res. 1998) (second amended final order): "The applicant carries the burden of coming forward with evidence that his proposed transfer will not result in an enlargement in use, will not injure other water rights, and is consistent with the conservation of water resources." *Id.* at 15, Conclusions of Law ¶ 2.

121. *See Barron*, 135 Idaho 414, 18 P.3d 219 (Idaho 2001). However, the court has taken note of this placement on two previous occasions. *See* Fed. Land Bank of Spokane v. Union Cent. Life Ins. Co., 54 Idaho 161, 166, 29 P.2d 1009, 1010 (Idaho 1934) (remarking in passing that the trial court had placed the burden on the proponent); Wash. State Sugar Co. v. Goodrich, 27 Idaho 26, 41, 147 P. 1073, 1078 (Idaho 1915) (citing with approval from an early Colorado case placing the burden of proof on the proponent of the

Barron decision, though providing much-needed clarification, reveals that the standard is perhaps stricter than might previously have been thought the case in Idaho.[122]

On appeal to the Idaho Supreme Court, Barron challenged the burden of proof standard applied by IDWR in denying the transfer.[123] Essentially, Barron argued that when no protests are filed, IDWR's duty to discharge section 222 becomes ministerial, and it must approve the transfer as long as the application is prima facie valid.[124] According to Barron, because of the difficulty in proving no injury, the burden of proof under the statute should be allocated as follows. Once a completed application is submitted to IDWR along with sworn statements that the transfer is in compliance with the statutory scheme, the applicant has established "a prima facie showing of non-injury, non-enlargement and favorable public interest."[125] At that point, the burden of proof switches to any protestants, "including the IDWR," to rebut the prima facie case.[126] Barron asserted that, because IDWR did not present any evidence to "rebut his prima facie case," it improperly denied the transfer.[127] The Idaho Supreme Court disagreed.[128]

According to the court, Barron's argument was flawed for several reasons. First, the court stated that "lack of protest is irrelevant to [IDWR's] decision" of whether to approve a transfer.[129] This is because there is an affirmative duty on the part of IDWR to ensure that there is no resulting injury.[130] Second, IDWR is not required to gather every piece of evidence or to offer rebuttal evidence against an applicant's prima facie case. Instead, each applicant is required to produce "sufficient evidence to enable the director to approve [a] proposed transfer."[131] This, the court said, is what enables IDWR to discharge its

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change). This rule is, of course, consistent with the general rule in Idaho that in most civil cases the burden rests with the party seeking affirmative relief. *See* Basin Land Irrigation Co. v. Hat Butte Canal Co., 114 Idaho 121, 124, 754 P.2d 434, 437 (Idaho 1988).

122. *Barron* is further discussed for its significance to the issue of "enlargement" *infra* Part II.C.3.

123. For the facts of *Barron* see *supra* notes 112-116 and accompanying text. *See also* text *infra* Part II.C.3.

124. *Barron*, 135 Idaho at 421, 18 P.3d at 226.

125. *Id.*

126. *Id.*

127. *Id.* Arguably, the minimal evidence offered by Barron was insufficient to meet this asserted prima facie standard.

128. *Id.*

129. *Id.*

130. *Id.* at 420, 18 P.3d at 225.

131. *Id.*

duty under the statute.[132] Accordingly, it is the applicant who "necessarily bears the burden of . . . [showing] non-injury to other water rights."[133]

The allocation of the burden of proof advanced by the applicant in *Barron* is similar to the approach taken by courts in both Montana and Colorado. In Montana, the applicant must prove by a preponderance of the evidence the substantive criteria in a change proceeding *only if a valid objection* is filed.[134] In Colorado, the applicant is required to make a *prima facie showing of no-injury* before the burden switches to the protestant of the transfer.[135] By contrast, the approach taken by the *Barron* court seems closer to the Wyoming standard. In Wyoming, the applicant must establish each element of the statute by clear and convincing evidence, regardless of the proof offered by any protestant.[136] This approach is more burdensome on the applicant than either the approach taken by Montana or Colorado. Consequently, the *Barron* decision should be of some concern to current water users and those looking to satisfy new water needs. It will likely increase the cost, time, and uncertainty of a transfer proceeding in Idaho. Closer attention by the legislature to the allocation of the burden of proof in a water right transfer proceeding appears necessary if the ready transferability of water rights is to be achieved.

4. Conditions on Transfers: Preventing Injury

Section 222 authorizes IDWR to either impose conditions or to partially approve a transfer if injury cannot otherwise be avoided.[137] This is sometimes called the "accommodation rule"[138] and it is another example of how states in general have attempted to promote transfers by working around the no-injury rule.[139] Common conditions imposed on transfers include: a reduction in the quantity or diversionary enti-

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132. *Id.*

133. *Id.* at 418, 18 P.3d at 223.

134. MONT. CODE ANN. § 85-2-402(3) (1999) (emphasis added). A valid objection is one that contains "substantial credible information" that one or more criterion may not be met. *Id.*

135. City of Aurora v. Div. Eng'r for Water Div. No. 5, 799 P.2d 33, 37 (Colo. 1990).

136. Gould, *supra* note 1, at 35 (discussing the decision in Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557 (Wyo. 1978)).

137. *See* IDAHO CODE § 42-222(1) (Michie Supp. 2000) ("director . . . shall approve in whole, or in part, or upon condition"); Beecher v. Cassia Creek Irrigation Co., 66 Idaho 1, 8, 154 P.2d 507, 509 (Idaho 1944) (stating that the court in a transfer proceeding has jurisdiction to impose reasonable limitations and conditions to avoid injury).

138. *See* ANDERSON ET AL., *supra* note 8, § 14.04(c)(2).

139. Anderson notes that, historically, under the accommodation rule, the outright denial of a transfer has been rare. *See id.*

tlement of the reallocated right; seasonal or time limits on the period of use; a substitution of water or an exchange; restrictions on the location of use; adjustments in the points of diversion; installment of measuring devices; and stricter enforcement.[140] In theory, conditioning transfers to prevent injury protects the rights of juniors while at the same time allowing more transfers to be approved. It appears that conditions are being placed on transfers more frequently than previously was the case in Idaho.[141] This is consistent with the trend toward closer scrutiny of transfers.

There are, however, different ways in which the accommodation rule can operate to further facilitate transfers. For example, one approach is to simply allow the state agency or the court to determine what conditions should be imposed to protect other rights. This top-down approach requires a state agency to have significant information available concerning the proposed transfer and generally operates to give the agency discretion as to whether to attempt to condition or outright deny a transfer. Another approach is more bottom-up. For example, a procedure can be put into place that allows either the protestant or the applicant to propose alternatives or to volunteer to institute mitigating conditions.

Colorado takes an approach similar to the bottom-up concept.[142] Under Colorado's statutory scheme, once a statement of opposition to change has been filed, the applicant must provide the referee or water judge a proposal to cure any adverse effects.[143] If after hearing the evidence the proposal remains inadequate, the referee or water judge must then "afford *the applicant or any person opposed to the application* an opportunity to propose terms or conditions which would prevent such injurious effect."[144] Under Colorado's approach, the court is required to consider whether any conditions could be imposed to prevent injury before denying the transfer.[145] Thus, the rule in Colorado is such that the right to transfer cannot be denied if the applicant can show *either* no injury *or* that the change can be conditioned to prevent injury.[146]

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140. *See id.* For a list that has been codified, see COLO. REV. STAT. ANN. § 37-92-305(4) (West 2000).

141. *See, e.g.*, Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (Idaho 1993) (imposing conditions to protect local public interest); Dovel v. Dobson, 122 Idaho 59, 831 P.2d 527 (Idaho 1992) (imposing numerous conditions to protect local public interest and prevent injury).

142. *See* § 37-92-305(3); *see also* Corbridge, *supra* note 1, at 508.

143. § 37-92-305(3).

144. *Id.* (emphasis added).

145. *Id.*

146. Colorado v. Yust, 249 P.2d 151, 154 (Colo. 1952).

The Idaho statute could be interpreted to achieve a similar result. Section 222 provides in pertinent part that "[t]he director . . . *shall* approve the change in whole, or in part, or upon conditions. . . ."[147] Given the use of the word "shall," a reasonable construction of the statute yields a rule akin to the one followed by Colorado—that the transfer *must* be approved if conditions can be imposed to mitigate injury. Such a construction would require IDWR to formally consider possible mitigating conditions before denying a transfer.

The Idaho Supreme Court has not had the opportunity to rule on this issue and the legislature has provided little guidance. It does not appear that IDWR has any similar procedures in place for conditioning transfers. A recent final order issued by IDWR acknowledges that in reviewing transfer applications, "the Department is authorized to approve a proposed change in whole or in part under certain circumstances."[148] However, in this case IDWR declined to "partially approve" the application because "the applicant did not propose a partial project."[149] A review of the record shows that the application might have been conditioned to prevent injury by limiting the diversionary entitlement under the transfer to the historic consumptive use.[150] As discussed below, this is a common limitation traditionally imposed on transfers in other jurisdictions.[151] As it stands now, that applicant has sought judicial review.[152] Suffice it to say, had a procedure or policy been in place which clearly informed the party of his or her right to condition the initial proposal, further litigation might have been avoided and scarce department resources conserved.

As discussed, a possible drawback of the current top-down approach followed in Idaho is that it may at times prove cumbersome to administer, because it is IDWR that must analyze and determine what possible conditions are capable of curing any injury. More likely it is the applicant or the protestant who is in possession of the relevant information of what might be an acceptable cure from his or her own standpoint. A second possible drawback of the top-down approach is that it might also work to polarize relations between the water community and IDWR, as well as between the applicant and any protestants. The better approach would seem to be that, once IDWR has determined the proposed change is injurious, to allow either the

147. IDAHO CODE § 42-222 (Michie Supp. 2000) (emphasis added).

148. *In re* Application for Transfer No. 5244 in the Name of James and/or Paula Whittiker, 5 (Idaho Dep't Water Res. 1999) (final order).

149. *Id.* at 5.

150. *See id.*

151. *See* discussion *infra* Part II.C.

152. *See* Whittaker v. Idaho Dep't of Water Res., (currently on appeal to the Seventh Judicial District, Lemhi Co. Case No. CV00-009).

applicant or the protestant to submit for consideration any proposed limitations or conditions under which the right might be exercised to avoid injury. This would reduce the administrative burdens on IDWR and could ultimately help maintain positive relationships among Idaho water users and the State. It could also carry significant implications for efficiency by lowering the transaction costs associated with transfer proceedings.

C. Enlargement in Use

1. Overview

Section 222 also prohibits a change in the exercise of a water right that results in an enlargement in use of the original right.[153] In Idaho, "[t]he term enlargement has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means."[154] An enlargement may include such events as an increase in the total number of acres irrigated[155] as well as an increase in the rate of diversion,[156] the amount consumed,[157] or duration of diversion.[158]

Though not in the context of a transfer proceeding, an enlargement in irrigated acreage was essentially at issue before the Idaho Supreme Court in *Hall v. Blackman*.[159] The plaintiff sought to enjoin the defendant from spreading water, that was decreed and historically applied to a particular parcel of land, to approximately ten acres of new land recently acquired by the defendant.[160] Finding that the application of water by the defendant to the new lands deprived the plaintiff of the benefit of seepage, percolation, and waste water when

153. IDAHO CODE § 42-222(1) (Michie Supp. 2000).

154. Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators Group, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (Idaho 1996) (citing to IDAHO CODE § 42-1426(1)(a) (Michie Supp. 2001)). This is the definition provided under the SRBA so-called "amnesty" provisions for evaluating accomplished transfers. § 42-1426(1)(a).

155. Barron v. Idaho Dep't of Water Res., 135 Idaho 414, 420, 18 P.3d 219, 225 (Idaho 2001); *see also* Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9 (9th Cir. 1917) (holding that an appropriator could not subsequently apply decreed water to additional lands not diligently prepared for beneficial use, despite a showing that the water was appurtenant to such lands under the original decree); Hall v. Blackman, 22 Idaho 556, 126 P. 1047 (Idaho 1912) (discussed *infra* this Part).

156. *Barron*, 135 Idaho at 420, 18 P.3d at 225.

157. *Id.*

158. *Fremont-Madison*, 129 Idaho at 458, 929 P.2d at 1305.

159. 22 Idaho 556, 126 P. 1047 (Idaho 1912).

160. *Id.*

used upon lands under the original decree, the supreme court upheld the decision of the trial court, perpetually enjoining the defendant from irrigating the recently acquired tract.[161]

Enlargement in use is sometimes difficult to separate conceptually from both the beneficial use limit and the no-injury rule. In the case of the former, this is because an enlargement analysis will typically focus on the historic use of the water right. In the case of the latter, an enlargement in use is a usual source of an injury complaint as the *Hall v. Blackman* case illustrates.[162] However, it is important to treat each restriction on the right to transfer separately.

One reason why the criteria should be treated separately is that the analysis may differ depending on which claim is being asserted. For example, while an enlargement in use analysis focuses on the historic use of the right, much as a beneficial use analysis does, the purpose is not for determining past waste or non-use per se. Instead, the purpose is for discerning the place of authorized use, the number of acres irrigated under the right, the historic diversion rate, and the return flow regimes created from its particular place and purpose of use. These factors can then be compared to the proposed use under the transfer. Even where the analysis yields no evidence of non-use or waste (that is, where there is no evidence of possible forfeiture for failure to put the water to beneficial use), an enlargement in use under a transfer could still potentially result in injury, or increase the burden on the stream, sufficient to prevent a change.

Similarly, the no-injury and no enlargement rules should be treated separately because, although an enlargement in use will often be coextensive with injury, enlargement in use is a distinct criterion under the Idaho Code and could potentially prevent a transfer even though no injury is shown.[163] The Idaho Supreme Court has twice recognized as much. First, in *Jenkins*, the applicant asserted that because the transfer would not enlarge the original use of the water

161. *Id.* at 557, 126 P. at 1048.

162. Indeed, the term enlargement has been defined in reference to injury. *See* Beecher v. Cassia Creek Irrigation Co., 66 Idaho 1, 8, 154 P.2d 507, 509 (Idaho 1944) (stating that a change is prohibited where enlarged use "increases the burden on the stream, or decreases the volume of water in the stream to the injury of other appropriators on the stream").

163. *See* Barron v. Idaho Dep't of Water Res., 135 Idaho 414, 18 P.3d 219 (Idaho 2001) (treating the no-injury rule and the no enlargement rule separately and indicating that failure of the applicant to establish no enlargement in use was sufficient to deny the transfer); *see also* Jenkins v. State Dep't of Water Res., 130 Idaho 384, 647 P.2d 1256 (Idaho 1982). Note, however, that section 222 provides an exception to this rule. "The transfer of the right to the use of water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other rights are injured thereby." IDAHO CODE § 42-222(1) (Michie Supp. 2000).

right, the protestant could not be heard to complain.[164] The Idaho Supreme Court conceded arguendo that Jenkins may not have been seeking to enlarge the original use under his decreed right, but stated:

> [Section 222] provides that the director 'shall approve' the transfer 'provided' two conditions are met, *i.e.*, that no other water rights are injured, *and* that the original use is not enlarged. Hence if either of the two conditions are not met, there is no authorization to approve the proposed transfer.[165]

More recently, in *Barron*, the court pointed to a real distinction between the two criteria.[166] Although there is no case in Idaho where a change has been prevented because of an enlargement where there was not also injury, the fact that the supreme court has again acknowledged the possibility is another example of the trend toward closer scrutiny of the transfer process.

2. Consumptive Use

One of the more common focuses in a transfer proceeding in other jurisdictions is on the prevention of an increase in the historic consumptive use of the water right.[167] "In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use."[168] Consumptive use changes are often associated with changes in nature of use,[169] changes in place of use, or in the case of agriculture, changes in methods of diversion and/or application.[170] In order to

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164. *Jenkins*, 130 Idaho at 388, 647 P.2d at 1260.

165. *Id.*

166. *Barron*, 135 Idaho at 417-19, 18 P.3d at 222-24.

167. ANDERSON ET AL., *supra* note 8, § 14.04(c)(1); Gould, *supra* note 1, at 20. *E.g.*, WYO. STAT. § 41-3-104 (Michie 2000) (A transfer may not "increase the historic amount consumptively used under the existing use;" nor, "decrease the historic amount of return flow.").

168. ANDERSON ET AL., *supra* note 8, § 14.04(c)(1).

169. For example, a change in nature of use may involve a change from a less consumptive agricultural use to a more consumptive industrial use.

170. For example, an irrigation use is almost always less than 100% consumptive. Flood irrigation normally consumes 40-60% of the amount diverted while sprinkler and drip irrigation systems consume 80-95% of the amount diverted. ANDERSON ET AL., *supra* note 8, § 14.04(c)(1) n.240 (citing to LEONARD RICE & MICHAEL D. WHITE, ENGINEERING ASPECTS OF WATER LAW 127-28 (Krieger Publ'g Co. 1991)). This means that the portion of the right not calculated under consumption returns to the source of supply, usually by means of run-off and ground water return flows from transmission and seepage losses, and can be used by other appropriators. The exception is when the location of use results in water being transported out of basin, thereby preventing the return flows

make certain that consumptive use is not increased, the historical consumptive use is typically employed as the measure of the right that may be transferred.[171] This is sometimes called the "historic use" rule.[172] A Colorado case explains:

> [O]nce an appropriator exercises his or her privilege to change a water right . . . the appropriator runs a real risk of requantification of the water right based on the actual historical consumptive use. In such a change proceeding a junior water right . . . which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historical use of the right.[173]

Most often the consumptive use limitation will only be imposed when the proposed new use will increase the historic consumptive use to the detriment of other water users.[174] However, this was not the approach taken by the Wyoming Supreme Court in the well known opinion *Basin Electric Power Cooperative v. State Board of Control*.[175] In this case, the Wyoming Board of Control limited a transfer to the amount that had actually been consumed by the growing crops, despite a showing that no injury would have accrued to other appropriators had the diversionary quantity been transferred in full.[176]

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from returning to the basin of origin. *See* ANDERSON ET AL., *supra* note 8, § 14.04(c)(1). In this case, the use would be considered 100% consumptive.

171. ANDERSON ET AL., *supra* note 8, § 14.04(c)(1). Determinations of consumptive use and water use efficiency are being made by increasingly sophisticated computer modeling techniques with data collected by agronomists, agricultural engineers and other experts. *See* Gould, *supra* note 1, at 20; *see also* ANDERSON ET AL., *supra* note 8, § 14.04(c)(1) n.240. Some of the variables considered include cropping patterns, soil type, local precipitation, transmission and seepage losses, and evaporation. The modeling technique known as the "Hubble Analysis" has been employed by IDWR. *See* Special Masters Findings of Fact (*In re* SRBA, No. 39576) (Subcase nos. 34-00060 et al.) (Twin Falls County Court, Idaho 1997).

172. *See* Gould, *supra* note 1, at 21.

173. Pueblo W. Metro. Dist. v. S.E. Colorado Water Conservancy Dist., 717 P.2d 955, 959 (Colo. 1986).

174. ANDERSON ET AL., *supra* note 8, § 14.04(c)(1). This is the approach taken by Colorado. *See, e.g.*, Williams v. Midway Ranches Prop. Owner's Ass'n, 938 P.2d 515, 522 (Colo. 1997).

175. 578 P.2d 557 (Wyo. 1978).

176. *Id.* at 567-68. This case is unique in several respects, the more so because it tends to further blur any distinction between the beneficial use limit and consumptive use. The Wyoming statute prohibits a transfer that results in an increase in the "historic amount consumptively used." WYO. STAT. ANN. § 41-3-104(A) (Michie 2000). In *Basin Electric*, a portion of the water rights in question was historically used on lands outside the basin of origin, and thus, technically, was 100% consumptive. *See* 578 P.2d at 560-61. Since its use could not be increased, there was no one to be injured by a transfer. However, the court determined that the Wyoming code and the beneficial use limitation "go

In 2000, the Idaho Legislature added to the no enlargement criterion the consideration of an increase in consumptive use. The statute now provides that "[t]he director may consider *consumptive use* . . . as a factor in determining whether a proposed change would constitute an enlargement in use of an original water right."[177] The Idaho Supreme Court decision in *Barron v. Idaho Department of Water Resources* sheds some light on how the new consumptive use provision will be applied in Idaho.[178]

3. *Barron v. Idaho Department of Water Resources*

The issue of enlargement in use of a water right arose in the context of a section 222 transfer proceeding in *Barron v. Idaho Department of Water Resources*.[179] As the reader may recall, Barron applied with IDWR to transfer a water right of six cfs with a 1905 priority date.[180] The application proposed to split the right diverting 1.2 cfs approximately fifteen miles upstream from the licensed place of use and diverting the remaining 4.2 cfs downstream at a location approximately eighty miles from the licensed place of use.[181] Although no protests were filed, the application and supporting affidavits raised questions as to the actual historic use of the right and the water master from the local water district, expressing "concern over the potential injury to downstream water users," recommended against approval.[182] Ultimately, IDWR denied the transfer on the grounds that Barron failed to provide sufficient evidence that the transfer would not cause injury to other water rights and would not enlarge the use under the original right.[183] Barron appealed, the district court agreed with IDWR, and the Idaho Supreme Court affirmed.

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beyond the purpose of avoiding injury." *Id.* at 566. The Wyoming Supreme Court concluded that that portion of the water, which was not used in the growing of the crops but was lost to the closed basin through percolation and evaporation, had not been used beneficially. *Id.* at 567-69.

177. IDAHO CODE § 42-222(1) (Michie Supp. 2000). Section 202B 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." *Id.* § 42-202B. It does not include "any water that falls as precipitation . . . unless it is captured, controlled and used under an appurtenant water right." *Id.*

178. 135 Idaho 414, 420, 18 P.3d 219, 225 (Idaho 2001). Surprisingly, this case did not originate out of the SRBA.

179. *Id.*

180. *Id.* at 415, 18 P.3d at 220. *Barron* is also discussed *supra* Parts II.B.2.a. and II.B.3.

181. *Id.*

182. *Id.* at 416, 18 P.3d at 221.

183. *Id.* at 417-18, 18 P.3d at 222-23.

The opinion of the court discloses two sources of enlargement the applicant failed to rebut: an enlargement in irrigated acreage and an enlargement in duration of use.[184] With regard to an increase in irrigated acreage, the evidence showed that the right Barron was seeking to transfer was the primary surface right appurtenant to lands currently being irrigated by what originally was a supplemental ground water right to the same lands.[185] Those lands were owned by a third party who planned to continue to irrigate solely with the groundwater right.[186] IDWR determined, and the court agreed, that to allow Barron to use the surface right on other lands would enlarge the total irrigated acreage under the rights in violation of the statute.[187]

With regard to the enlargement in duration issue, there was conflicting evidence as to whether the water was available throughout the irrigation season at its current location.[188] IDWR concluded that there was not and to allow the change would result in an enlargement. The court stated it this way: "Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use. Thus, if Barron's transfer would result in the use of water at a time when it was historically unavailable, [the water right] would be enlarged."[189] Because there was substantial competent evidence to support the finding, the court would not disturb the ruling.[190]

In addressing the issues presented, the court interpreted section 222 as authorizing IDWR to consider "historical consumptive use" as a factor in determining whether a proposed transfer would cause an enlargement in use or injury to other water rights.[191] In order to make this determination, IDWR required that Barron provide "a legal description and supporting documentation showing when and where [the water right] had been used during the previous ten years."[192] However, the information provided by Barron concerning the historic use was refuted by the fact that "the licensed place of use for the subject water right [had] been leased and farmed by [another individual] for the last seven years."[193] Consequently, "Barron failed to provide

184. *See id.* at 419-20, 18 P.3d at 224-25.
185. *Id.* at 416, 18 P.3d at 221.
186. *See id.* at 419, 18 P.3d at 224.
187. *Id.*
188. *Id.* at 420, 18 P.3d at 225.
189. *Id.* (citation omitted).
190. *Id.*
191. *Id.* at 419, 18 P.3d at 224.
192. *Id.*
193. *Id.*

the IDWR with sufficient information to establish the historical consumptive use." [194]

Barron is significant in that it provides the first supreme court interpretation of the consumptive use provision as it relates to enlargement in use under section 222. Although the court's analysis is rather sparse, three things are worth noting. First, it appears that the court is inclined to consider the historical consumptive use as a factor in determining both injury and enlargement in use. Second, historical consumptive use is primarily to be used as a comparative measure in evaluating the new use. Finally, because historical consumptive use may be used to evaluate enlargement, and because enlargement in use is treated as a criterion separate from injury, it appears that in Idaho a result similar to the one achieved in *Basin Electric* is tenable: that is, that an increase in consumptive use could prevent a change in the absence of proof of injury.[195]

What is not clear, is whether the consideration of historic consumptive use will take on the meaning of the "historic use rule" as it is applied in other jurisdictions. That is to say, whether in a transfer proceeding the paper right will likely be re-quantified to reflect the historic consumptive use of the right. Unless other changes in the law occur, in order for Idaho to adopt the "historic use rule," in light of *State v. Hagerman*, the re-quantification would have to be part of a forfeiture determination with the "historic" part of the rule determined by the five-year statutory period for non-beneficial use. Given the trend towards increasing scrutiny, such a result seems likely.

D. Public Interest Review

1. Overview

Most Western states, including Idaho, now require some form of public interest evaluation in a transfer proceeding.[196] What this means is that not only are water right transfers being scrutinized for possible injury to other appropriators, they are now being scrutinized for adverse impacts on the community in which the water has been

194. *Id.* The court was really saying that there was no evidence to conclude that the right had been used at all. Arguably, Barron's claim should have been analyzed for forfeiture because of non-use.

195. *See* Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557 (Wyo. 1978). *See* discussion *supra* Part II.C.2.

196. ANDERSON ET AL., *supra* note 8, § 14.04(d)(1). Traditionally, this function was accomplished in a limited fashion through the doctrine of beneficial use, which focused on promoting the most productive and socially acceptable uses of water.

and will be used. In most instances there is little statutory guidance as to what factors are legitimate to a public interest evaluation and the weight any factor is to be given in the overall decision to approve a transfer.[197] The decisions as to relevancy and weight are thus left to administrators and to the judiciary. While this outcome may have the advantage of affording flexibility in the evaluation of adverse impacts, it produces uncertainty from the standpoint of water users and adds further complication to the transfer process.

2. The Local Public Interest in Idaho

In 1981, the Idaho Legislature added to section 222 the requirement that any proposed transfer be "in the local public interest."[198] The statute defines the local public interest as "the affairs of the people in the area directly affected by the proposed use."[199] Although the statute itself does not elaborate as to its application, the scope and significance of the criterion was partially fleshed out by the Idaho Supreme Court in the permit context.

Shokal v. Dunn[200] involved a permit to appropriate 100 cfs for fish propagation and hydropower generation. The application for permit was protested on grounds that its potential impact on water quality conflicted with the local public interest.[201] On review, the Idaho Supreme Court determined several important procedural and substantive aspects of a public interest evaluation.

First, the court concluded that the local public interest is a general term that must include "any locally important factor impacted by proposed appropriations."[202] Among the factors that may be considered are: loss of alternative uses, the benefit of the appropriation to the applicant, fish and wildlife habitat, recreation, aesthetic beauty, water quality, access and navigation, minimum stream flows, etc.[203]

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197. *See* Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L.J. 681 (1987).

198. IDAHO CODE § 42-222(1) (Michie Supp. 2000). Section 222 includes two other public interest oriented criteria. First, the statute requires that a proposed transfer be consistent with the "conservation of water resources" in the state of Idaho. *Id.* Second, the statute states that the "director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area." *Id.* These provisions do not appear to have been interpreted by the Idaho Supreme Court.

199. IDAHO CODE § 42-203A(5) (Michie 2000).

200. 109 Idaho 330, 707 P.2d 441 (Idaho 1985).

201. *Id.* at 332-33, 707 P.2d at 443-44.

202. *Id.* at 339, 707 P.2d at 450.

203. *Id.* at 338, 707 P.2d at 449. The court stated that the legislature must have intended to include the factors listed in title 42, section 1501 of the Idaho Code.

The importance of each factor depends upon the character of the locality involved. The court explained:

> The relevant elements and their relative weights will vary with local needs, circumstances, and interests. For example, in an area heavily dependent on recreation and tourism or specifically devoted to preservation in its natural state, [IDWR] may give great consideration to the aesthetic and environmental ramifications of granting a permit which calls for substantial modification of the landscape or the stream.[204]

In addition, the court stated that a determination of what factors of the public interest are affected by a proposal is committed to the "sound discretion" of IDWR.[205] In the present case, because IDWR found that the initial proposal would have violated the water quality standards set by the Department of Health and Welfare, it properly conditioned the issuance of the permit on a showing that the mandatory standards were met.[206]

Another important aspect of the public interest evaluation established in *Shokal* is that, like the other criteria under section 222, the burden of proof is on the applicant to show that a proposed transfer is in the public interest.[207] However, it is worth noting that, unlike the elements of injury and enlargement, a public interest evaluation allows the applicant somewhat more flexibility. In the event that the applicant is unable to prove that the transfer will be in the local public interest, the transfer could still be approved if the applicant can show "that there are other factors that outweigh the local public interest in favor of the project."[208]

After *Shokal*, the extent to which public interest review can potentially complicate a transfer proceeding is immediately apparent. In approving or denying a transfer, IDWR has an affirmative duty to determine whether it is in the local public interest.[209] IDWR may consider virtually any factor it deems relevant to this inquiry. Consequently, in putting together a transfer proposal an applicant faces a rather daunting task. First, the applicant must make the necessary technical determinations of impacts on stream flow so as to avoid injury or enlargement to other appropriators. Second, the applicant must identify the significant interests of the community: whether

204. *Id.* at 339, 707 P.2d at 450.
205. *Id.*
206. *Id.* at 441, 707 P.2d at 452.
207. *Id.* at 339, 707 P.2d at 450.
208. *Id.*
209. *Id.* at 337, 707 P.2d at 448.

they are economic, social or environmental. Once those interests are identified, the applicant must consider each one and attempt to mitigate any adverse impacts. To the degree any impacts can not be mitigated, the applicant must persuade IDWR that the potential benefits of the transfer outweigh the other considerations.

The process is complicated further by the possibility (and growing likelihood) that, after it is submitted for consideration, the application is protested. This event triggers an evidentiary hearing, giving each side the opportunity to present evidence and cross-examine witnesses.[210] But, unlike the case when a protest is based on injury or enlargement, when the protest is based on public interest grounds the Idaho Supreme Court has determined that the source of the protest is not limited entirely to other appropriators.[211] In other words, a public interest conflict may give standing to third parties to contest a transfer even though they do not hold water rights or own property in the local area.[212]

In *Hardy v. Higginson*[213] the applicant sought to amend two existing water rights to include an additional point of diversion near Box Canyon.[214] Twelve protestants challenged the amendments asserting injury to several endangered species.[215] The area affected by the transfer was designated by the Bureau of Land Management (BLM) as an "Area of Critical Environmental Concern (ACEC)," in order to protect the species and the "scenic and unique natural qualities of the area."[216] On appeal, the applicants argued that the protestants were not proper parties to an amendment proceeding.

Taking guidance from *Shokal*, the court concluded that because of the ACEC designation, habitat protection was a locally important factor affecting the public interest.[217] The court held that the protestants, "although having no water rights within Box Canyon, sought to protect these locally important factors, and thus their interests were properly considered by the Director."[218] Regardless of one's feelings about the merits of the case, the ability of third parties who do not themselves own water rights to assert standing to contest a transfer, creates further uncertainty in the transfer process and greatly in-

210. *Id.* at 334, 707 P.2d at 445.
211. *See* Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (Idaho 1993).
212. *See id.*
213. *Id.*
214. *See id.* The application for amendment was filed in accordance with title 42, section 211 of the Idaho Code. The amendment process is subject to the same basic procedural and substantive requirements as are transfers.
215. *Id.* at 487, 849 P.2d at 948.
216. *Id.* at 490, 849 P.2d at 951.
217. *Id.*
218. *Id.*

creases the chances that every transfer will result in an evidentiary hearing and investigation.

The addition of the public interest criterion, in itself, is evidence that the transfer process is becoming more rigorous in Idaho. Since its addition to section 222, public interest review has played a role in numerous administrative and judicial decisions.[219] This is a trend that will likely continue as demand on Idaho's water grows.

III. CONCLUSION

Water resources in Idaho will have to be stretched as new uses are accommodated and public priorities change. Consequently, water users can expect closer administrative and judicial oversight of the transfer process. This scrutiny is manifesting itself in several ways. First, although the no-injury rule remains the primary limitation on the right to transfer, the enlargement and public interest criteria are more likely than ever to function as real independent restrictions on the right to transfer. Second, whereas unprotested transfers may have been glossed over in the past, the Idaho Department of Water Resources is taking a more active role in protecting third party interests. Finally, traditional standing barriers to protest a change are coming down as the public interest plays a more prominent role in the evaluation of transfers. These trends are generating greater uncertainty in the transfer process and placing increasing burdens on water users. New legislation can and should be fashioned for greater clarity and to help streamline the transfer process in this era of increasing water demand.

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219. *See, e.g., In re* Application for Transfer No. 5435 (Wybenga Dairy), (Idaho Dep't Water Res. 2000) (preliminary order, now final) (transfer denied because proposed point of diversion was within area of ground water moratorium and thus against the public interest); *In re* Application for Transfer No. 5691 in the Name of Jerome Cheese Co., (Idaho Dep't Water Res. 2000) (final order) (holding that economic benefits to community under transfer outweighed other factors detrimental to the local public interest); Dovel v. Dobson, 122 Idaho 59, 62, 831 P.2d 527, 530 (Idaho 1992) (IDWR conditioned transfer to protect local public interest); Collins v. Dunn, 114 Idaho 600, 759 P.2d 891 (Idaho 1988) (IDWR conditioned transfer to protect local public interest).

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