

You Can't Embiggen a Water Right: The Concept of Enlargement

Idaho Water Users Association

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Dylan Lawrence

Roadmap

- Idaho statutes and rules that invoke the concept of enlargement
- Policies behind prohibition
- Rules of law related to enlargement
- Definitions and examples of enlargement



Definition of *embiggen*

transitive verb

informal + humorous

: to make bigger or more expansive : ENLARGE, EXPAND

// This incredible chart was the final product. (Click to *embiggen*.)

— Erik Malinowski

// There are many painters who rely on computers as a tool or arbitrary gimmick, but the recent striated abstract paintings of Linda Day translate digital structures into painting language in a seamless way that *embiggens* both.

— Doug Harvey

First Known Use of *embiggen*

1996, in the meaning defined above

History and Etymology for *embiggen*

EM- + BIG entry 1 + -EN entry 2

“embiggen.” 2020. Merriam-Webster.com. Retrieved July 24, 2020, from <https://www.merriam-webster.com/dictionary/embiggen>



“Enlargement” in Idaho Code

- Idaho Code § 42-105 (use of natural water ways)
- Idaho Code § 42-222 (water right transfers)
- Idaho Code § 42-222A (temporary changes during droughts)
- Idaho Code § 42-240 (water right exchanges)
- Idaho Code §§ 42-1425, 42-1426 (adjudications)

“Enlargement” in Idaho Rules

- IDAPA 37.03.11.043 (CM Rules) (mitigation plans)
- IDAPA 37.02.03.030 (WSB Rules) (sale or rental applications)
- IDAPA 37.02.03.025 (WSB Rules) (acquisition of water rights)

Why prohibit enlargement?

- When a water right is enlarged, “[i]n effect, a separate water right is being created.” *Rangen v. IDWR*, Mem. Dec. at p. 9, Case No. CV-2015-1130 (5th Dist. Oct. 8, 2015).
- Causes injury to junior appropriators. *Id.*; see also *FMID v. IGWA*, 129 Idaho 454, 461 (1996).
- Juniors have a vested right to existing stream conditions. *Crockett v. Jones*, 42 Idaho 652 (1926).
- According same priority date to enlarged use violates prior appropriation doctrine. *Rangen v. IDWR*, *supra*.



Rules of law related to enlargement

- Formally codified in 1969. See S.L. 1969, ch. 303, § 2, p. 905.
- Transfer applicant bears the burden of proof on enlargement. *Barron v. IDWR*, 135 Idaho 414, 420-21 (2001).
- Exchange applicant bears the burden of proof. *In the Matter of Application for Exchange of Water Right Nos. 34-12050C and 34-10400 Filed in the Name of Shane Rosenkrance*, Preliminary Order at p. 7 (IDWR, May 24, 2001).
- Enlargement analysis only applies to the subject water right, not other water rights. *Rangen v. IDWR*, Mem. Dec., Case No. CV-2015-1130 (5th Dist. Oct. 8, 2015).

Caveats

- Presumptions
- Denial vs. conditions
- Hierarchy of rules of law (constitution > statute > rule > guidance memos)
- Dicta
- Not exhaustive
- Categories



Diversion Rate

- Increasing the authorized instantaneous diversion rate (cfs). I.C. 42-222(1); IDWR Transfer Processing Memo, p. 28.
- Increasing the authorized annual diversion volume (AFY). I.C. 42-222(1); IDWR Transfer Processing Memo, p. 28.
- Increasing the amount of water actually diverted. *Barron, supra*, 135 Idaho at 420; *FMID v. IGWA, supra*, 129 Idaho at 458.

Nature/Season of Use

- Increasing the amount of water consumed. *Barron, supra*, 135 Idaho at 419; see also Idaho Code §§ 42-202B, 42-222(1).
- Adding a new beneficial use, even if non-consumptive. *In the Matter of App. for Transfer No. 79037 in the Name of P4 Production*, Preliminary Order at p. 9 (IDWR, Aug. 4, 2015).
- Increased period of use for surface water. *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 8 (1944).



Point of Diversion

- Use of water at a time it was historically unavailable. *Barron, supra*, 135 Idaho at 420.
- Moving point of diversion to location where available water is greater or more reliable. IDWR Transfer Processing Memo, p. 31.
- Adding point of diversion if it will allow diversion of more water. *City of Pocatello v. State of Idaho*, 152 Idaho 830 (2012).

Place of Use

- Increasing number of acres irrigated. *FMID v. IGWA*, supra, 129 Idaho at 458.
- Unstacking “stacked” irrigation rights. IDWR Transfer Processing Memo, p. 28.
- Converting supplemental irrigation right to primary or “stand alone” irrigation right. *Barron*, supra, 135 Idaho at 420.

Not enlargement...

- Change in use to irrigation storage, even if more acres irrigated, as long as no injury to other water rights. I.C. 42-222(1), ¶ 4.
- Increased season of use of groundwater right, as long as diversion rate, diversion volume, and consumptive use do not increase. IDWR Transfer Processing Memo, p. 30.

Questions?

dylanlawrence@varinwardwell.com

(208) 345-6021

LinkedIn:



VARIN **WARDWELL**
ATTORNEYS AT LAW