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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFREY AND CHANA DUFFIN, husband and wife,

Petitioners-Appellants,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent,

v.

A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL CMPANY AND TWIN FALLS CANAL COMPANY,

Intervenors.

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 83160 IN THE NAME OF JEFFREY AND CHANA DUFFIN

Supreme Court Docket No. 48769-2021

Bingham County District Court Case No. CV06-20-1467

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham; Honorable Eric J. Wildman, District Judge, Presiding;
Concerning Judicial Review of the *Amended Preliminary Order Denying Transfer* (dated August 12, 2020) entered by Hearing Officer James Cefalo of the Idaho Department of Water Resources

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Appellants Jeffrey Duffin and Chana Duffin (collectively "Duffin"), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Appellants' Brief.*

I. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal which seeks review of a denied application to transfer, or amend, certain elements of a ground water right pursuant to Idaho Code § 42-222 before the Idaho Department of Water Resources ("IDWR" or "Department"). The contested transfer at issue, Transfer No. 83160 ("83160"), was filed by Duffin in an effort to amend the place of use and point of diversion of water right 35-7667 ("35-7667"). A.R. 286-340.[1] Duffin seeks judicial review of the *Amended Preliminary Order Denying Transfer* issued on August 12, 2020, that became final (the "*Final Order*") fourteen days later. A.R. 656-669.

Duffin's position is that this matter should be decided by statutory and water right interpretation principles based on stipulated facts. The underlying hearing officer, Department employee James Cefalo (the "Hearing Officer") did not decide the matter based on these interpretation principles, but instead determined that approval of 83160 would result in an enlargement because it would violate the newly described "single, combined beneficial use" element of a water right. A.R. 594, 662. On appeal to the District Court, the Department defended the Hearing Officer's decision, but in so doing, and unlike the Hearing Officer, touched on the statutory interpretation issue and argued for the first time that approval of 83160 would violate

[1] The record on appeal in this matter contains two primary set of documents provided on two separate CDs, which are (1) the Clerk's Record on Appeal; and (2) Exhibit 1 to the Record on Appeal, which is the Bates-labeled Agency Record before the District Court. Reference to the Clerk's Record on Appeal will be made with "C.R." and references ot the Administrative Record will be made with "A.R.".

Idaho's "duty of water" both as a general matter and as contained in the *only* condition listed on the license for 35-7667, which is the standard IDWR condition that embodies the "duty of water."[2]

The District Court adopted IDWR's duty of water argument, and it serves as the primary basis for the District Court's decision to affirm the transfer denial. C.R. 206-217. As set forth below, while we agree with the District Court's acknowledgement of the need to review the plain language of a water right in a transfer analysis (which the Hearing Officer did not do), the District Court has overstated the application of the "duty of water" in this case. While the "duty of water" serves as a limitation on the *land application*, or *use*, of water for irrigation purposes, it is not a legal basis to combine authorized irrigated acres on overlapping water rights and/or water entitlements that do not contain express combined acreage limitations on the face of the water rights and/or entitlements.

This Court's decision on this appeal will have far-reaching implications on the property rights adjudicated to water users in the Snake River Basin Adjudication and other ongoing adjudications in Idaho. It will determine whether a wise farmer or other water user who secures additional water supplies from an additional water source, primarily to ensure adequate water if one of the supplies is not available, legally combines these water supplies to the overlapping number of irrigated acres even though the water supplies were obtained and developed at separate times and contain no combined remarks within the four corners of either water supply entitlement. Without a reversal of the *Final Order*, this Court will effectively grant IDWR authority to infer conditions into water rights designed to pursue larger public policy goals (such as reducing overall consumptive water use of water in the State of Idaho) while, under the cover of regulation, diminishing the property rights of its citizens.

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[2] The condition provides in full: "This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above."

B. Course of Proceedings.

The application for 83160 was submitted on April 2, 2019. It was protested by the Surface Water Coalition (the "Coalition").[3] The Coalition intervened in the appeal to the District Court and are parties in the appeal to this Court.

In the underlying administrative case, Duffin and the Coalition determined that the contested case could proceed to a decision based on a negotiated and stipulated set of facts rather than proceeding with a formal contested case hearing to accept evidence and testimony and build the administrative record.[4] On May 22, 2020, the parties submitted a *Stipulated Statement of Facts* (the "*Facts*"), A.R. 370-383, which the Hearing Officer adopted into the evidentiary record for the contested case. *Id*. Four days later, the Hearing Officer gave the parties the opportunity to file briefs addressing the following question:

> Given the *Stipulated Statement of Facts*, the documents from the Department's water right records identified by the hearing officer, and any relevant previous decisions of the Department and/or the Idaho courts, does Application 83160 satisfy the transfer review criteria set forth in Idaho Code § 42-222(1)?

A.R. 385. Briefs were submitted by Duffin and the Coalition on July 17, 2020. On July 24, 2020, the Hearing Officer issued a *Preliminary Order Denying Transfer*. A.R. 590-601. On August 7, 2020, Duffin filed a petition for reconsideration. A.R. 603-630. The Hearing Officer granted the petition for reconsideration to address arguments raised by Duffin, but maintained the decision to deny approval of 83160 as explained in the *Final Order*.

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[3] The Coalition refers collectively to the A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, and Minidoka Irrigation District.

[4] As with any negotiation, one side though certain facts were relevant and necessary, while the other did not, and vice versa. Nevertheless, the agreed-to *Facts* represented the set of facts the parties agreed formed the factual basis for the legal arguments addressed in legal briefing before the Hearing Officer.

Duffin timely appealed the *Final Order* to the District Court seeking judicial review of this IDWR decision. C.R. 1-14. The matter was reassigned to Judge Eric Wildman pursuant to the Idaho Supreme Court's December 9, 2009 *Administrative Order* which requires "all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from [IDWR] be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." C.R. 15-16. Judge Wildman issued a *Memorandum Decision and Order* and corresponding *Judgment* on February 22, 2021 which affirmed the Department's *Final Order*. C.R. 204-217. Duffin timely appealed on April 2, 2021. C.R. 218-239.

C. Statement of Facts.

The underlying facts associated with 35-7667 and 83160 are undisputed as they were stipulated to. A.R. 370-383. While not fully restated here, the Court should carefully review the *Facts* as though they were set forth here in full. In the *Facts*, of particular importance are consideration of the original water right license document for 35-7667 and the current description document for 35-7667 found at A.R. 376-377. These descriptions contain the standard elements of a water right, along with the only condition contained within 35-7667: "This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above."

II. ISSUES PRESENTED ON APPEAL

1. Whether the District Court erred by affirming the Hearing Officer's conclusion that approval of 83160 will result in an enlargement because it ignored both the plain language of Idaho Code § 42-222, which limits an enlargement evaluation to the "original right," and the plain language of the definition of "enlargement" previously articulated by the Idaho Supreme Court.

2. Whether the District Court erred by affirming the Hearing Officer's conclusion that approval of 83160 will result in an enlargement because the Hearing Officer failed to engage in an interpretation analysis of the water right license for 35-7667.

3. Whether both the Hearing Officer and District Court failed to afford IDWR's *Transfer Memo*

"considerable weight" as an agency interpretation of Idaho Code § 42-222 given to agency construction of a statute.

4. Whether the District Court erred by affirming the Hearing Officer's conclusion that approval of 83160 will result in an enlargement based on *Barron* because the portion of the *Barron* opinion relied upon by the Hearing Officer and the District Court is judicial dicta.

5. Whether the District Court erred by concluding that the "duty of water" may be utilized as a basis to combine the authorized irrigated acres of these entitlements if there are no express conditions combining these supplies.

6. Whether the District Court and Hearing Officer's failure to properly decide the enlargement issue, the injury to other water rights, conservation of water resources, and local public interest criteria portions of the *Final Order* should also be reversed. Additionally, whether reliance on the Department's 1993 *Moratorium Order* by the District Court is persuasive authority in support of an injury finding.

7. Whether Duffin's substantial rights have been prejudiced by denial of 83160.

III. APPLICABLE LEGAL STANDARD

The applicable standard of review for the appeal of an administrative decision to the Idaho Supreme Court has previously been well explained:

> In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act ("IDAPA"), "we review the decision of the district court to determine whether it correctly decided the issues presented to it." *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). However, we review the agency record independently of the district court's decision. *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008). A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). Substantial evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (quoting *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)).
>
> Idaho Code section 67–5279(3) provides that the district court must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) not supported by substantial evidence on the record as a whole; or
(e) arbitrary, capricious, or an abuse of discretion.

> I.C. § 67–5279(3); *Clear Springs Foods*, 150 Idaho at 796, 252 P.3d at 77. Even if one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67–5279(4). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67–5279(3).

N. Snake Ground Water Dist. v. Idaho Dep't of Water Res., 160 Idaho 518, 522, 376 P.3d 722, 726 (2016). As to legal questions, a reviewing court exercises de novo review. *Eden v. State (In re SRBA Case No. 39576)*, 164 Idaho 241, 248, 429 P.3d 129, 136 (2018) ("We exercise de novo review over legal questions.").

IV. LEGAL ARGUMENT

Duffin's position is that the District Court's *Memorandum Decision and Order* reached an incorrect result, but further, it failed to address several specific arguments made by Duffin. Consequently, Duffin had no choice but to appeal to receive answers and analysis to these unaddressed arguments, which it fully anticipates this Court will provide, even if this Court ultimately affirms the District Court. The matters addressed on this appeal will have far-reaching effects on how water rights are interpreted and how they can be amended, or transferred, under Idaho Code § 42-222, and knowing this Court's rationale for reaching its conclusions is critical. For the reasons set forth below, the Hearing Officer's actions are "in violation of . . . statutory provisions" and "in excess of the statutory authority of the agency." Idaho Code § 67-5279(3)(a)-(b). Accordingly, this Court should reverse the *Final Order* and the District Court's decision to affirm.

A. The District Court erred by affirming the Hearing Officer's conclusion that approval of 83160 will result in an enlargement. The District Court ignored both the plain language of Idaho Code § 42-222, which limits an enlargement evaluation to the "original right," and the plain language of the definition of "enlargement" previously articulated by the Idaho Supreme Court.

As described in the *Facts*, there are 60 shares of stock in the Aberdeen-Springfield Canal Company ("ASCC")—issued on April 24, 1970—that are associated with the Duffin property. A.R. 370-371. Water that yields to these ASCC shares were historically delivered through the Hege Drain off the N Lateral of the ASCC system. A.R. 380. On February 2, 1977—approximately 7 years *after* the 60 ASCC shares were issued to Vern Duffin (Jeffrey Duffin's father)—Vern submitted the application to develop 35-7667, a ground water right, for irrigation of the same acreage the 60 ASCC shares provided water to. A.R. 371-373. The reason 35-7667 was sought after and developed was because Vern Duffin had difficulty receiving his ASCC water at the end of the Hege Drain. A.R. 380 (showing location of Hege Drain); C.R. 88. 35-7667 was developed and eventually licensed without any reference to the ASCC shares or other conditions making 35-7667 supplemental to the ASCC water entitlement. A.R. 376-377.

Once the ground water well authorized for construction by 35-7667 was drilled, it was used as the only source of irrigation water on the property until the end of 2016. In 2017, Duffin began exclusively using ASCC water on the property (as ASCC has made significant system and operational improvements over the years resulting in a reliable source of surface water supply). A.R. 378-379 (WMIS data confirming lack of electricity use at the well location). The same pump that was used to pump ground water from the well was removed from the well and repurposed to divert the ASCC water from the Hege Drain. A.R. 377-378.

35-7667—a ground water right—is the **only** water right subject to the proposed changes under 83160. This right is owned by Duffin. The ASCC water rights and other ASCC water

entitlements[5] that yield water to Duffin's shares are *not* owned by Duffin. As an ASCC stockholder, Duffin is only entitled to a proportionate share of the available ASCC water and is obliged to pay a proportionate share of the operating company's maintenance costs, "regardless of whether such water is used or not . . . ." Idaho Code § 42–2201. As a mere shareholder, Duffin is not authorized to amend ASCC's water rights and/or water entitlements without ASCC's consent.

Idaho Code § 42-222, the transfer statute, provides in part:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change **does not constitute an enlargement in use <u>of the original right</u>**, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. **The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use <u>of the original water right</u>**. 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.

(emphasis added). There is no statutory definition of enlargement, but the Idaho Supreme Court has defined this term previously:

> The 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. *See* I.C. § 42–1426(1)(a). **An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion**.

Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (emphasis added).

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[5] Water Right Nos. 01-23B and 01-297 are ASCC's natural flow rights. ASCC also possesses storage water it is entitled to receive pursuant to storage water contracts with the United States Bureau of Reclamation.

When interpreting statutes, the Idaho Supreme Court has specifically interpreted a statute using a singular term to exclude the plural:

> The first sentence of the statute states that the guardian has the "powers and responsibilities of *a parent* who has not been deprived of custody of his minor unemancipated child." (Emphasis added.) **The remainder of the statute lists specific powers and duties of the guardian and always refers to the guardian in the singular. There is no reference to multiple guardians or co-guardians**. Specifically, section 15-5-209(3) begins, "*The guardian* is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice." (Emphasis added.) It would be inconsistent with the provisions of Idaho Code section 15-5-209 to hold that multiple co-guardians can be appointed, with each having the powers and duties of *a parent* or with all of them together having the powers and duties of *a parent*.

Doe v. Doe, 160 Idaho 311, 314, 372 P.3d 366, 369 (2016) (emphasis added).

Both the plain language of Idaho Code § 42-222 and the language from the *Fremont-Madison* case define enlargement as specific to the elements of a singular water right ("the original water right."), not other water entitlements (such as water from canal company shares) that may be associated with the same property that are not subject to the transfer application. Stated another way, these legal authorities limit the enlargement evaluation to the water right or water rights listed on the transfer application. While both the Hearing Officer and District Court cited to the *Fremont-Madison* enlargement definition in their enlargement analyses, both ignored the plain language of these authorities, and instead fixated on the result that 53.9 acres would be irrigated under 35-7667 and 53.9 acres would be irrigated under the 60 ASCC shares if 83160 was approved. C.R. 210; A.R. 662 ("[t]he proposed change to water right 35-7667 will result in an increase in the number of acres irrigated, which is an enlargement, as noted above [in the *Fremont-Madison* case].").

These holdings are incorrect because they are based on conclusions that are contrary to the plain language of Idaho Code § 42-222 and the enlargement definition in *Fremont-Madison*. Duffin has not proposed to amend any element of ASCC's water rights, nor could he without

authorization from ASCC. Ownership of canal company shares does not vest legal title of the canal company water rights in the shareholder. Ownership is significant in Idaho water law as without ownership of such rights, even non-use by shareholders cannot result in forfeiture of the canal company's water rights. *See Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 86–87, 982 P.2d 917, 921–22 (1999) ("ASCC, as a Carey Act operating company, holds title to the canal system and is the appropriator of the water rights involved in this case. . . . . A finding of forfeiture in this case, where the appropriator did nothing to cause the nonuse of the water, would have troubling consequences for all Carey Act operating companies. **Such a ruling would give stockholders, who are not appropriators, the power to determine the fate of ASCC's water rights**") (emphasis added, citations omitted).

The Hearing Officer incorrectly overstated the language from the *Fremont-Madison* case concerning irrigation of additional acres to also apply to *all* water entitlements associated with the place of use of the original right, even those not owned by Duffin (in this case, those owned by ASCC). This is legal error. The enlargement analysis spoken of under Idaho Code § 42-222, and elaborated upon by the *Fremont-Madison* case, should only be directed at 35-7667. In this case, there is no proposed expansion under 83160 to change 35-7667's authorized diversion rate (1.08 cfs), maximum diversion volume (215.6 acre-feet), or irrigation of 53.9 acres with *ground water* that is authorized under 35-7667. The historic ground water diversion amount will be virtually identical at the proposed new place of use. In other words, there will be no material change[6] to the amount of ground water historically pumped from the ESPA under 35-7667 at the new location. Accordingly, there will be no enlargement.

[6] By material change, we mean that agricultural crops will still be irrigated, and depending on crop type, precipitation, etc., the actual amount diverted may vary year to year, but such yearly variation is already present at the current place of use of 35-7667 and is present with all irrigation water rights.

The Hearing Officer did not address the plain language of these legal authorities, but primarily based his enlargement analysis on the *Barron* case, as described herein. The Hearing Officer concluded that 83160, if approved, would result in an enlargement because an approval would violate the implied "single, combined beneficial use" element of a water right first described in the initial *Preliminary Order Denying Transfer*, A.R. 594, a phrase that was later shorted to "combined beneficial use" in the *Final Order*. A.R. 0662.

There is no "single, combined beneficial use" Idaho water law element described by statute. *See* Idaho Code § 42-1411(2)-(3). Rather, the Hearing Officer's legal basis for its imposition is the overlapping place of use description of ground water right 35-7667 within the place of use boundary of ASCC's water rights:

> The question of whether two water rights represent a combined beneficial use is determined by the place of use descriptions for the rights, not by the existence of or absence of water right conditions. If two water rights authorize the irrigation of the same acres, then the water rights represent a combined irrigation use on the overlapping acres, regardless of whether the water right overlap is recognized in a condition.

A.R. 662-663.

While the Hearing Officer did not address the above statutory arguments asserted by Duffin, the District Court upheld the Hearing Officer's enlargement determination based in part on other language from Idaho Code § 42-222(1), which is that the Director has an affirmative duty to "'examine **all** the evidence and available information' when evaluating a proposed transfer." C.R. 213 (quoting Idaho Code § 42-222(1); emphasis added). The District Court concluded that the word "all" in this statute grants IDWR discretion to consider "all" other information—without any sideboards—even information that is contrary to the plain language of other portions of this statute. Despite the plain language of Idaho Code § 42-222, which limits the evaluation of enlargement associated with the "original right," the District Court concluded that "[i]n this case,

that evidence and information includes the fact that the existing place of use is served by an overlapping water right." C.R. 213. However, the District Court's holding that the "all" language grants IDWR unchecked authority to consider whatever it wants in an enlargement review, no matter the property rights involved, or the statutory limitations imposed on its enlargement review, is inconsistent with existing Idaho law. If this position is upheld, then there are no limits on what the Department can consider in its enlargement evaluation.

There are clearly limits on the Department's discretion contemplated in applicable transfer statutory provision and definitions. For example, in the case of *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 376 P.3d 722 (2016), this Court held that the Director's local public interest discretion is not absolute, but limited by statute:

> The Director's interpretation of "local public interest" in this case is entitled to no deference because it is inconsistent with the plain language of the statutory definition provided in Idaho Code section 42–202B.
>
> . . .
>
> Nor is the Director's conclusion regarding local public interest supported by the record. The Director cited no evidence relevant to the statutory definition of local public interest in the pertinent section of the final order. **Because the Director exceeded his authority by evaluating local public interest based on factors not contemplated in the statutory definition, the district court did not err in setting aside the Director's conclusion.** We affirm the district court's order setting aside the Director's conclusion that the Districts' application was not in the local public interest.

N. Snake Ground Water Dist., 160 Idaho at 525, 376 P.3d at 729 (emphasis added). Similarly, here, the scope of the Department's enlargement review is not unlimited. In the *Final Order*, the Hearing Officer exceeded his authority by evaluating enlargement based on factors not contemplated in the statute.

Furthermore, the Idaho Legislature has amended definitions applicable to transfer review specifically to limit the scope of evidence and information IDWR can consider in a transfer proceeding. For example, in 2003, the Idaho Legislature amended the definition of "local public

interest" originally found in Idaho Code § 42-203A(5) (defined as "the affairs of the people in the area affected by the proposed use") to have a stand-alone statutory definition (Idaho Code § 42-203B(3)) as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." *See* 2003 Idaho Session Laws at 806. The primary reason for this amendment was because IDWR hearing officers were considering factors such as air quality and odor, impact on property values, flies, traffic, dust, and other factors as part of the local public interest review in contested water right transfer cases. *See* Robert L. Harris, *Narrowing the Local Public Interest Criterion in Idaho Water Right Transfers*, 39 IDAHO LAW REV. 713 (2003); *see also Statement of Purpose* for H.B. 284 (2003), *available at* https://legislature.idaho.gov/sessioninfo/2003/legislation/H0284/ (explaining the need to narrow IDWR's review to reduce delays because of protests "based on a broad range of social, economic and environmental issues having nothing to do with the impact to the proposed action on the public's water resource."). Based on these changes, the phrase "all" means all relevant evidence within the defined scope of evidence described in Idaho Code § 42-222. It cannot literally mean everything. Otherwise, the Director should not have been reversed in the *North Snake Ground Water District* case, and the Department could today consider matters that the narrowed local public interest definition now excludes. This would be contrary to decisions from this Court and legislation from the Idaho Legislature.

Despite the foregoing legal authority, the Hearing Officer concluded "[t]he proposed change to water right 35-7667 will result in an increase in the number of acres irrigated, which is an enlargement, as noted above [in the *Fremont-Madison* case]." R. 662. This is simply not correct. It would only be an enlargement if there was an increase in the number of irrigated acres **under 35-7667**, the only right subject to the transfer. The Hearing Officer has overstated language

from the *Fremont-Madison* case to also apply to irrigated acres under *all* water entitlements associated with the place of use of the original right, even those not owned by Duffin (here, ASCC).

Further, there is no proposal to change the nature of use (the "beneficial use") of 35-7667, which is the typical circumstance where consumptive use of the original water right is considered to avoid enlargement (*i.e.*, conversion of an irrigation water right to an industrial water right).[7] There will be no material change in the amount of ground water diversions (and therefore pumping impacts from the diversion of such ground water) if 83160 is approved.

35-7667 contains no express conditions combining this water right with the ASCC water rights or ASCC shares and/or describing 35-7667 as a supplemental right. Despite this and despite the foregoing legal authority, the Hearing Officer, relying on *Barron*, concluded that with or without supplemental conditions, "[t]he enlargement analysis would be identical in either case." A.R. 594. However, the Hearing Officer is bound by statute and cannot expand the statutorily prescribed enlargement analysis to other water entitlements not subject to the transfer. The plain language of Idaho Code § 42-222 limits enlargement review to the "original right," and does not expand the enlargement review to other water entitlements associated with Duffin's property. Consideration of canal company entitlements is no different than if a hearing officer were to again consider dust, flies, and traffic associated with a project despite the definition of local public interest because, as the District Court holds, the hearing officer can consider "all" the evidence and available information. Neither the Department nor the District Court can simply excise statutory language it does not like and insert language it prefers to justify the Hearing Officer's

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[7] Idaho Code § 42-222 does provide that "[t]he director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." However, as explained in the *Transfer Memo*, absent an express consumptive use condition, a consumptive use analysis is performed only when there is a proposed change in the nature or purpose of use element of a water right. *Transfer Memo* at 4.

conclusions. Even courts cannot "ignore or re-write the plain language of a statute simply to reach a more desirable result." *Berrett v. Clark Cnty. Sch. Dist. No. 161*, 165 Idaho 913, 928, 454 P.3d 555, 570 (2019). Accordingly, this Court should reverse the *Final Order* and the District Court's decision to affirm.

B. The District Court erred by affirming the Hearing Officer's conclusion that approval of 83160 will result in an enlargement. The Hearing Officer failed to engage in an interpretation analysis of the water right license for 35-7667.

The Hearing Officer's primary legal basis for the *Final Order* is the 2001 case of *Barron v. Idaho Dep't of Water Resources*, 19 P.3d 219, 135 Idaho 415 (2001). *See* A.R. 649 (". . . *Barron* is central to the outcome of this case."). Focused on this 2001 Idaho Supreme Court opinion, the Hearing Officer sidestepped more recent cases addressing water right interpretation and post-2001 statutory amendments addressing consumptive use. As a result, the water right interpretation question was not addressed in the *Final Order*.

Further, the District Court did not specifically find that the Hearing Officer erred by not engaging in water right interpretation but did consider the single condition on the license for 35-7667—the "duty of water" condition—even though the District Court's analysis overstated the meaning of this condition, as set forth below. Accordingly, this acknowledgment from the District Court suggests that water right interpretation is necessary in an enlargement review. Because this Court's review of the underlying decision from the Department is de novo, and independent of the District Court's decision, it is necessary on appeal for this Court to determine whether water right interpretation is a component of an enlargement review under Idaho Code § 42-222. Duffin asserts that it is, contrary to the Hearing Officer's conclusions otherwise.

Duffin is the described owner of 35-7667, a ground water right, which is a recognized property right in Idaho. *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150

P. 336, 339 (1915). The Hearing Officer's analysis in a contested transfer must include interpretation of the water right elements. This is particularly true when evaluating enlargement because enlargement is defined as an increase or expansion of what the express water rights elements provide as previously described in the *Fremont-Madison* case discussed herein. 35-7667 was obtained through the statutory water right permitting process. The legal effect of a licensed water right obtained through this process is equivalent to a decreed water right that has been judicially verified, as provided in Idaho Code § 42-220:

> **Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein,** and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, **or by any decree of court**, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. . . .

Idaho Code § 42-220 (emphasis added). Accordingly, the Department has held that "[e]xcept for clerical errors, or licenses that include a term limit or a condition authorizing subsequent review, the Department does not have authority to reconsider the elements of a license after the appeal period has passed." *In the Matter of Application for Transfer No. 82640 in The Name of Clinton K. Aston*, Amended Preliminary Order Approving Transfer, at 14 (October 29, 2019.[8]

Because licensed and decreed water rights have the same legal effect, the interpretation principles for SRBA partial decrees described in recent Idaho Supreme Court cases are the same for interpreting water right licenses. Partial decrees issued in adjudications like the SRBA are final orders of the Court, and licenses issued by IDWR are likewise final orders, neither of which are subject to subsequent collateral attack. In 2018, this Court explained its reluctance to relitigate already-decreed water rights:

[8] This decision is available at https://idwr.idaho.gov/files/legal/Transfer-82640/20191029-Amended-Preliminary-Order-Approving-Transfer.pdf. Counsel for Duffin was counsel for the transfer applicant Aston in this proceeding.

> Absent BCID undertaking appropriate proceedings to set aside a final judgment under Idaho Rule of Civil Procedure 60(b), we emphasize that the decrees are conclusive and final, **which comports our general reluctance to allow already-decreed water rights to be relitigated**. *See*, *e.g.*, *City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017) ("Furthermore, it is equally clear from the plain language of the decree that recharge is not listed as an authorized use under the purpose of use element of 181C. Claiming, at this stage, that recharge is an authorized use of 181C, is nothing more than an impermissible collateral attack...."); *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016) ("Allowing IGWA to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process."); *Rangen*, 159 Idaho at 806, 367 P.3d at 201 ("Any interpretation of Rangen's partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself."); *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) ("Finality in water rights is essential."). **Finality is for good reason, especially in water law**; otherwise, the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures. *See* Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 56 (2016).

In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532, 163 Idaho 144, 155, 408 P.3d 899, 910 (2018) (emphasis added). Further, this Court has held:

> When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. A decree is ambiguous if it is reasonably subject to conflicting interpretations. Whether ambiguity exists in a decree "is a question of law, over which this Court exercises free review."

City of Blackfoot v. Spackman, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017) (internal citations omitted; footnote omitted).

Already-decreed water rights should not be relitigated through imposition of unwritten elements or by otherwise interpreting the plain language of an element to include an implied condition affecting its exercise. *Rangen*, 159 Idaho at 806, 367 P.3d at 201. Idaho law does not support the injection of implied conditions into perfected water rights. "We have previously barred collateral attacks because of their ability to create uncertainty and to undermine water

adjudications." *McInturff v. Shippy (In re CSRBA Case No. 49576)*, 165 Idaho 489, 495, 447 P.3d 937, 943 (2019).

The *Blackfoot* decision holds that there cannot be implied water right conditions or a legitimate case of implied incorporation of a document into the elements of water right which define the right. *See id.* Thus, a water right decree is, in effect, an integrated contract, *i.e.*, a merged document that is the "complete and exclusive statement of the terms of the contract." *Anderson & Nafziger v. G. T. Newcomb, Inc.*, 100 Idaho 175, 180, 595 P.2d 709, 714 (1979) (citation omitted). An integrated document is subject to the parol evidence rule. *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). This means that "extrinsic evidence of prior or contemporaneous representations or negotiations are inadmissible to contradict, vary, alter, add to, or detract from the instrument's terms." *Kepler-Fleenor v. Fremont Cnty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012) (citation and internal quotation marks omitted).

In other disputes concerning water right interpretation, this Court has been extremely reluctant to find any ambiguity, uncertainty, or alternative meaning (either patent or latent) within partial decrees issued in the SRBA. *See, e.g.*, *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 203 (2016) ("the name Martin–Curren Tunnel is not ambiguous and does not create a latent ambiguity in Rangen's partial decrees"); *see also United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 408 P.3d 52 (2017).

In accordance with the foregoing Idaho law, the starting place for 83160 is the plain language of the current written 35-7667 license description. There is no element of 35-7667 indicating it is supplemental or otherwise limited in consumptive use or combined with the water allocated to Duffin's ASCC shares associated with the same property covered by the place of use of 35-7667. Without any such language, there can be no ambiguity contained within 35-7667.

This should end the inquiry as to whether there is any combined limit or connection with surface water allocated to Duffin's ASCC shares. If there are no words combining these rights (the water right elements, conditions, or other language in the water right), then no combination exists and no good faith argument for an ambiguity can exist. The *Blackfoot* case makes it clear that the absence of language in water rights has meaning. In that case, even with a recorded water right agreement referenced in an explanatory remark in the decree itself (which provided for ground water recharge recognition between the parties under Water Right No. 01-181C), the Court focused on the *absence* of the word "ground water recharge" under the beneficial use heading of the decree, and held that recharge was not authorized because it was not expressly described on the right:

> Furthermore, it is **equally clear from the plain language of the decree that recharge is <u>not listed</u> as an authorized use under the purpose of use element of 181C**. Claiming, at this stage, that recharge is an authorized use of 181C, is nothing more than an impermissible collateral attack on the partial decree. Allowing the City "to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process." *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016). As we recently stated in *Rangen, Inc.*, "[a]ny interpretation of [the] partial decree [ ] that is inconsistent with the [ ] plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself." 159 Idaho at 806, 367 P.3d at 201. Here, no such request was made.

City of Blackfoot v. Spackman, 162 Idaho at 308, 396 P.3d at 1190 (2017) (emphasis added). By reading in aspects of 35-7667 that are not expressly written, this no doubt impermissibly muddies the water right license for 35-7667.

The Hearing Officer read into 35-7667 a "single, combined beneficial use" element. This new water right element is simply another name for consumptive use, which is not an element of a water right. There are several significant problems with the Hearing Officer's determination.

First, it reads in a limitation on the water right that is not written anywhere on the water right. Implicitly imposing a restriction on a water right that could easily have been made express

in the licensing of 35-7667 would inject significant uncertainty into what legal rights water users received at the end of the statutory permitting process. Restrictions on the use of water rights must necessarily be express, and if it is not, it would constitute serious turmoil and confusion for water right holders.

Second, combined limits joining certain elements of water rights are easily added at the water right licensing stage and in adjudication proceedings. Relitigation over water right elements is likely if the *Final Order* is upheld on appeal as Idaho water users will necessarily need to seek to know whether their rights (decreed or licensed) are subject to implied combined conditions and what those conditions are. If the exercise of 35-7667 was truly supposed to be limited along with surface water allocated to ASCC shares to a combined consumptive use, then a condition could have been easily added when 35-7667 was licensed or when ASCC's water rights were decreed in the SRBA. If combined consumptive use conditions were not added, then the Hearing Officer can not reopen the question of what defines 35-7667.

Third, by statute, Idaho has made it clear that consumptive use is not an element of a water right and changes to consumptive use do not require filing a transfer application. This statutory change was made in 2004, three years after the *Barron* opinion was issued:

> (1) "Consumptive use" means 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. **Consumptive use is not an element of a water right**. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. "Authorized consumptive use" means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. **Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code**.

Idaho Code § 42-202B(1); *see also* 2004 Idaho Sess. Laws 258 (the addition of language that

consumptive use is not an element of a water right was made in 2004). The Hearing Officer's "single, combined beneficial use" element is another name for consumptive use. And, to the extent *Barron* imposed or found a consumptive use element on the water rights at issue in that case, the statutory change from 2004 to Idaho Code § 42-202B(1) supersedes *Barron*. "Courts must construe statutes under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed. . . . It is incumbent upon a court to give a statute an interpretation that will not render it a nullity." *Twin Lakes Canal Co. v. Choules*, 151 Idaho 214, 218, 254 P.3d 1210, 1214 (2011) (citations omitted); *see also Idaho Times Publ'g Co. v. Indus. Accident Bd.*, 63 Idaho 720, 735, 126 P.2d 573, 579 (1942) (Givens, C.J. dissenting) ("When a conflict occurs between the common law and a statute we, here in Idaho, are governed by the statute.").

Fourth, as described in the following section, current IDWR policy is that even water rights with express supplemental conditions can be amended to become primary water rights if historic diversion records demonstrate that the actual water use (as to 35-7667, the ground water diversion amount) will not increase.

For all the above reasons, this Court must perform the interpretation analysis under Idaho law that the Hearing Officer did not. We anticipate that once performed, the inevitable conclusion is that nothing in the plain language of the license for 35-7667 imposes the "single, combined beneficial use" (*i.e.*, consumptive use) element on this water right or on ASCC's water rights. Without the existence of such an element, there is no element to enlarge upon to violate the enlargement criterion of Idaho Code § 42-222. Based on the foregoing, the *Final Order*'s enlargement determination and the District Court's decision to affirm must be reversed.

C. Both the Hearing Officer and District Court failed to afford IDWR's *Transfer Memo* "considerable weight" as an agency interpretation of Idaho Code § 42-222 given to agency construction of a statute.

As to evaluation of consumptive use, the Department has prepared and issued documentation describing its interpretation of the review criteria of Idaho Code § 42-222 (which includes enlargement) in its *Administrator's Memorandum, Transfer Processing No. 24*, dated December 21, 2009 (the "*Transfer Memo*"). A.R. 127-163. The *Transfer Memo* is one of many guidance documents issued by IDWR as an administrative agency. *See* https://idwr.idaho.gov/legal-actions/guidance-documents/. The opening sentence of the *Transfer Memo* provides that "[t]he purpose of this memorandum is to provide policy guidance for processing applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, and other applicable law." A.R. 127.

Counsel for Duffin has practiced water law for over seventeen years, and frequently represents water right transfer applicants in both preparation of transfer applications and representing applicants in contested transfer proceedings. He and other lawyers and consultants who practice before IDWR are told they must follow these policies, otherwise, their transfer applications will be returned or not processed. In practice, these guidance documents are treated as the law. From the perspective of those who work daily in the trenches of administrative law before the Department, it is surprising to see the *Transfer Memo* dismissed as non-authoritative by the Hearing Officer, who otherwise is required to follow and enforce its polices in his role as a Department employee. It is equally surprising for the District Court to only mention the *Transfer Memo* in a two-sentence footnote, merely stating in passing that these policies "are not binding on the district court . . ." C.R. 214 (fn. 8).

The *Transfer Memo* cannot simply be ignored. Duffin is entitled to at least some explanation as to why the principles in the *Transfer Memo* suddenly do not apply, particularly when these policies are in Duffin's favor and formed a significant basis for his decision to file 83160 in the first place.[9] Neither the Hearing Officer nor the District court provided any such explanation, which is unfair to Duffin, but more importantly, ignores Idaho law on the deference afforded to agency interpretation of statutes it is charged with administering and enforcing.

Where the *Transfer Memo* is an interpretation of Idaho Code § 42-222, its statutory interpretation is entitled to "considerable weight" because IDWR meets all the prongs of the four-prong test applied to determine the appropriate level of deference to be given to agency construction of a statute. *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 571, 21 P.3d 890, 893 (2001). First, IDWR is the agency that has been entrusted with the responsibility of administering the statute at issue. *Hamilton*, 135 Idaho at 571, 21 P.3d at 893. Second, IDWR's statutory construction described in the *Transfer Memo* is reasonable because the statute describes how a transfer can be approved without enlargement or injury. *Id*. Third, the statutory language does not expressly treat the precise question at issue—in other words, Idaho Code § 42-222 does not specifically describe every instance of enlargement implicated in the movement or amendment of a water right. *Id*.

The fourth prong looks at the rationales underlying deference, including that of repose. *Id*. This focuses on whether others have relied upon the Department's interpretation. Water users and their representatives have relied upon the Department's interpretation contained in the *Transfer Memo*. In *State v. Hagerman Right Owners, Inc.*, the Idaho Supreme Court concluded that "[c]ase

[9] As of the date of submission of this brief, the *Transfer Memo* has not been withdrawn or amended by IDWR. It remains on IDWR's website as a guidance document binding on water users and applied by IDWR to water applications like 83160 here.

law and the record in this case show that the general public did indeed understand and depend upon the prior IDWR interpretation, policy and practice that partial forfeiture is a recognized concept in Idaho. . . The Court declines to 'unsettle the repose of all those who have detrimentally relied on . . . agency interpretations,' and will accord IDWR's interpretation deference in this case." *Hagerman,* 130 Idaho at 734, 947 P.2d at 407. The same rationale applies here.

The principle that there must be an express element or condition limiting consumptive use before such limitation can be enforced (and only then also subject to a transfer) is supported by language from the *Transfer Memo*. Under the section entitled "When a Transfer is not Required," it provides:

> Changes in Consumptive Use. Consumptive use of water under a water right is not, by itself, an element of the water right subject to the requirements to file an application for transfer. Unless there is a specific condition of the water right limiting the amount of consumptive use, changes in water use under a water right for the authorized purpose of use that simply change the amount of consumptive use do not require an application for transfer provided that no element of the water right is changed. However, when determining the amount of water that can be transferred pursuant to an application for transfer proposing to change the nature or purpose of use, and for certain other circumstances as described herein, historical consumptive use is considered.

A.R. 130. As described, consumptive use becomes a component of the enlargement analysis when there is a proposal to change the nature or purpose of use or if there are specific (*i.e.*, express) conditions imposing consumptive use limits (such as on an industrial water right). With 83160, there is no proposal to change the nature or purpose of use for 35-7667. It is authorized for irrigation, and it will continue to be used for irrigation purposes if 83160 is approved.

The Hearing Officer's rationale that overlapping places of use imply a combined use is also directly contrary to IDWR's position explained by IDWR agent Jeff Peppersack who testified as a designated Department representative at a deposition in a separate proceeding involving a similar situation to the instant matter. Mr. Peppersack is the author of the *Transfer Memo* and at the time of this deposition, he was the chief of IDWR's Water Allocation Bureau. He explained:

Q. Okay. And how does it not occur if the transfer goes forward?
A. Well, if there were -- if it was demonstrated, for example, that it wouldn't be an enlargement because of conditions or limitations that would be imposed or -- or perhaps, you know, an explanation of the relationship of the rights, that might get at trying to decide whether they are truly stacked or primary or supplemental or, you know, used in combination some way.
So if it's demonstrated that they really weren't, even though they might reside on the same place of use, then we might decide that it's not an enlargement because they haven't been used together to, you know, provide a full water supply for the place of use.

A.R. 438, 470. The Hearing Officer's rationale for imposing "a single, combined beneficial use" on 35-7667 was "**determined by the place of use descriptions for the rights**, not by the existence of or absence of water right conditions." R. 664 (emphasis added). This rationale is directly contrary to what Mr. Peppersack explained: "So, if it's demonstrated that they really weren't, **even though they might reside on the same place of use**, **then we might decide that it's not an enlargement because they haven't been used together** to, you know, provide a full water supply for the place of use." (emphasis added).

The *Transfer Memo* further provides that even a supplemental water right can be converted to a primary right without enlargement, provided that the "applicant can clearly demonstrate, using historic diversion records for the supplemental right as described in (5) below, or other convincing water use information, that there would be no enlargement of the water right being changed or other related water rights." A.R. 155. The "(5)" referred to is a section on historic beneficial use information, which generally provides that data from the most recent five consecutive years is presumed to be sufficient information. A.R. 155-156. Under the principles contained in the *Final Order*, this type of transfer would *also* not be

approvable. At the end of the day, enlargement is concerned about expanding the historical diversion of water beyond its prior use (allowing for year-to-year variation based on climate conditions), and the 5-year average use of 35-7667 between 2012 and 2016—the only right subject to 83160—is 122.2 acre-feet. A.R. 378-379.[10] This is the same average amount of water that will be used at the new place of use, meaning there will be no change in effect to the ESPA in the exercise of 35-7667 at the proposed new place of use.

In response, the Hearing Officer states that "Duffin's arguments related to the *Transfer Memo* are meaningless because Duffin is alleging a conflict where there is none." A.R. 664. We strongly disagree. There is conflict because there is no discussion in the *Transfer Memo* or elsewhere of an implied "single, combined beneficial use" element of a water right, nor does the Hearing Officer acknowledge—as the *Transfer Memo* does—that even a supplemental water right (which 35-7667 is not) can become an independent primary water right based on historic use despite the fact that a supplemental right shares a place of use with a primary right.

There is no discussion in the *Transfer Memo* or elsewhere of a "single, combined beneficial use." Despite the provisions of the *Transfer Memo*, the Hearing Officer placed more legal significance on overlapping places of use than the existence or absence of express conditions, and even on the actual historic water use for both water sources (*even if* 35-7667 were determined to be stacked or supplemental to ASCC water) as described in the *Transfer Memo*. The Hearing Officer simply dismissed Mr. Peppersack's deposition testimony of the *Transfer Memo* as his "personal interpretation[,]" A.R. 0664, but Mr. Peppersack was a designated IDWR representative in a deposition who spoke on behalf of the Department in his role of chief of the Water Allocation Bureau and provided additional interpretation and insight in response to questions about this

[10] The water use amounts based on WMIS data for this range, after rounding, is 611 acre-feet. 611 acre-feet divided by 5 years is 122.2 acre-feet.

document. The *Transfer Memo* and Mr. Peppersack's testimony is entitled to deference from the Hearing Officer and the District Court in this matter.

Duffin is a water user with two independent sources of water to irrigate his property—ground water under 35-7667 and surface water allotted to his ASCC shares. The separate nature of 35-7667 and Duffin's entitlement to surface water allotted to his ASCC shares is further evident by the fact that these water sources were originally developed separately and independently from one another. The ASCC shares were issued to Vern Duffin on April 24, 1970. A.R. 370-371. The application to develop 35-7667 was not submitted until February 2, 1977, nearly seven years later. A.R. 371. These sources were not developed together with a common goal of developing a set amount of combined consumptive use to justify imposition of a combined consumptive use amount. The dual and separate nature of these water entitlements is evidenced by the fact that Duffin pays separate monetary assessments for both based on different criteria and not based on the consumptive use associated with 53.9 acres of irrigated land. Duffin pays assessments to the ASCC based on 60 shares he owns that are associated with the property that is the place of use of 35-7667. In 2020, he paid $1,980 in share assessments to ASCC. A.R. 636. Duffin also pays assessments to the Bingham Ground Water District for 35-7667 based on the cfs amount (1.08 cfs), and for 2020, he paid $968.53. A.R. 0638.[11]

This Court should reverse the *Final Order* and approve 83160 as there is no statutory or other factual basis for imposing the implied "single, combined beneficial use of water" on 35-7667 under Idaho law. This position is contrary to the *Transfer Memo*. Further, the District Court did not address or discuss the *Transfer Memo* or why the agency interpretation of Idaho

[11] This assessment is to mitigate for its exercise as part of the approved CMR mitigation plan based on the IGWA-Coalition settlement agreement.

Code § 42-222 described in the *Transfer Memo* was not entitled to deference. For these additional reasons, the *Final Order* and the District Court's decision to affirm should be reversed.

D. The District Court erred by affirming the Hearing Officer's conclusion that approval of 83160 will result in an enlargement based on *Barron*. The portion of the *Barron* opinion relied upon by the Hearing Officer and the District Court is judicial dicta.

Despite the foregoing legal authority consisting of statutory language and recent Idaho Supreme Court authority on interpretation of water rights, the 2001 case of *Barron v. Idaho Department of Water Resources*, 135 Idaho 415, 19 P.3d 219 is the primary legal basis of the *Final Order*'s enlargement holding. The District Court affirmed. C.R. 210-212. Upon review of the language of this opinion, and other documents in the water right backfile associated with this case, our view of this opinion differs significantly.

First, the *Barron* opinion indicates that it was dealing with primary and supplemental water rights. As explained above, the plain language of Duffin's 35-7667 is that it is not a primary or supplemental water right—it is one of two separate water supplies for the Duffin property that is not combined by condition with any other water right or canal company share entitlements. Based on a review of the *Barron* transfer backfile, the water rights at issue in *Barron* were determined, without challenge from the applicant Barron, to be primary and supplemental as a matter of Department policy, which the Idaho Supreme Court did not address and reverse, even though there is nothing in the license for water right 37-7295 providing that it is or was supplemental to water right 37-2801B. In a letter found in the *Barron* transfer backfile dated April 1, 1998, Glen Saxton explained Department policy that the oldest right is considered primary and the more junior is supplemental or secondary if water rights overlap at their places of use:

> In general, when rights of different priorities are used upon the same tract of land, the oldest right is considered to be the primary right and the more junior rights are considered to be supplemental or secondary rights. A portion of the full supply of water is usually obtained in part from the original right and in part from the supplemental right with neither right supplying all the needed water. If these rights each become primary rights due to changes in place of use, there will be an enlargement in use.
>
> Please provide appropriate information or evidence to show that if the transfer is approved, the rights will not both become primary rights with an ultimate enlargement in use which results in injury to other water users. In some cases, as pointed out by Allen Merritt in his memo, one means of preventing an enlarged use is to cease the irrigation of some land which was formerly irrigated.

A.R. 619.

Barron is relied upon by the Hearing Officer for his conclusion that Duffin's 35-7667 and his ASCC share entitlement constitute a "single, combined beneficial use," even though he does not find that 35-7667 is a supplemental water right. It is evident that the basis for the Department's 1999 primary/supplemental policy has now been superseded by the *Transfer Memo*, and in our view, the water right interpretation legal authority discussed above (including the *Blackfoot* case and statutory amendments). In other words, the presumption and policy position described in Saxton's letter may have been the Department's position then, but it is not its position today.[12] The 2009 *Transfer Memo* explains that a supplemental right can be changed to a primary right if the applicant provides "convincing water use information" that the supplemental right was the only right used and there is no requirement to dry up acres. *See* A.R. 155-156 (discussion of changing a supplemental right to a primary water right). The Hearing Officer applied policies described in *Barron* (*i.e*, that *Barron* did not require the water sources to be used in the same year for there to be an enlargement; the lack of reference in conditions to 37-2801B, etc.) that are not

[12] This letter states that "one means"—not the only means—to prevent "an enlarged use is to cease the irrigation of some land which was formerly irrigated." This means there are other ways to address enlargement without drying up irrigated acres. In our view, the *Transfer Memo*'s explanation of looking at historical use, such as on supplemental rights to determine if actual water diversions support a full transfer of the supplemental right, is the correct analysis.

consistent with today's Department policies or statutes. The Court should rely upon the statutory and water right interpretation cases and the *Transfer Memo* instead.

Further, we submit that the Hearing Officer has overstated the actual holding of *Barron* by elevating portions of the opinion that are judicial dicta to controlling law. The Department's enlargement analysis in *Barron* was not based upon an actual evaluation of the combined beneficial use of the referenced rights, rather, the Department was *unable* to perform an enlargement evaluation because the applicant did not provide requested historical use information, even after *five* requests, as the *Barron* opinion clearly describes:

> Barron and the IDWR subsequently exchanged correspondence concerning the transfer application. On **five separate occasions**, the IDWR requested that Barron provide additional information to address the agency's concerns. Although Barron responded in writing to each of the Department's requests, the IDWR indicated in its final letter that Barron **had still not presented sufficient information for the Department to approve his transfer application**.
> . . .
> The record demonstrates, however, that **Barron did not present sufficient evidence of non-enlargement to the Department such that the director could approve Barron's transfer**. Because Barron has failed to establish this criterion, we concluded that the IDWR's findings were well supported.
> . . .
> The Department specifically requested evidence from Barron regarding the historic use of water right 37–02801B on three separate occasions. For example, on January 9, 1998, the IDWR requested that Barron provide detailed evidence about 37–02801's historical use. Specifically, the letter requested that Barron provide a legal description and supporting documentation showing when and where water right 37–02801B had been used during the previous ten years. In addition, the letter asked that Barron present evidence of the "extent of beneficial use made of this right, in terms of the rate and period when water has been diverted...." **Barron's response to these requests reveals that he was unable to present competent evidence to the IDWR**.
> . . .
> As the district court noted when reviewing the record, **absent are any meaningful statements regarding the period of use, the amount of water diverted or consumed, or whether and to what extent groundwater right 37–07295 was used to supplement the surface water right**.

Barron, 135 Idaho at 416, 418-19, 19 P.3d at 221, 223-24 (emphasis added). In other words, it was evident that there were forfeiture problems with the 1905 surface right at issue in the transfer, and no information was provided by the applicant to address those problems. In fact, in the SRBA, the surface water right (37-2801B) was eventually decreed as disallowed years later based on water right forfeiture, which is evidence that the Department's concerns with historic use were well founded. A.R. 639-645 (final order disallowing water right claim and water right report providing that the water right was disallowed because of forfeiture).

Accordingly, the Hearing Officer has misstated the primary basis for the Department's determination of enlargement in the *Barron* case. The Department presumed enlargement because the applicant was unable and/or unwilling to provide relevant information that would allow IDWR to perform a forfeiture and enlargement analysis. This lack of information as being the primary basis of denying the transfer is supported by other statements from the water right backfile record. For example, in the preliminary order for Transfer 5116, it does not contain an analysis based on an evaluation of the combined beneficial use authorized by water rights 37-2801B and 37-7295. Rather, it summarily provides the following findings of fact and conclusions of law without any discussion of a consumptive use analysis:

> 7. On December 18, 1997, January 9, 1998, April 1, 1998 and on May 12, 1998, the department corresponded with the applicant or his attorney seeking input relative to deficiencies on the application, ownership of the right sought to be transferred, enlargement of use and injury to other water users.
>
> 10. The applicant has not provided information which shows the actual extent of beneficial use historically made of the water right. In addition, the applicant has not provided a thorough description of past use of the water right.
>
> 11. The applicant has not provided information to show that the proposed changes would not injure other water rights.
>
> 12. The applicant has not provided information relative to availability of water at the proposed new points of diversion.

3. The applicant has not provided suitable information relative to past use of right no. 37-02801, non-injury to other water rights or to non-enlargement in use to allow the department to approve the application.

4. The proposed changes will injure other water rights.

5. The proposed changes will constitute an enlargement in use of the original right.

R. 646-650. Further, in the *Order on Appeal from the Department of Water Resources, State of Idaho*, the district court's entire discussion of enlargement does not contain an enlargement analysis, rather, it describes the district court's concern with Barron's "bold assertion" and lack of proof that that the current place of use of both 37-02801B and 37-07295 (which Barron did not own) would be dry farmed. *See* A.R. 624.

Based on the foregoing, the critical reason the *Barron* transfer was denied was because of a failure of the applicant to provide information necessary for IDWR to meet its statutory obligations to analyze the transfer under Idaho Code § 42-222. This is described in the Idaho Supreme Court's holding from the opinion:

> **Had Barron made a prima facie showing as to each of the required statutory elements, his application would have seemingly been approved**. However, as discussed above, the record supports the director's determination. Because Barron must present to the Department sufficient evidence of non-injury, **no enlargement**, and favorable public interest, **the Court holds that the IDWR's decision was not in violation of any statutory provisions**.

Barron, 135 Idaho at 421, 19 P.3d at 226 (emphasis added). This is the holding in *Barron*, and while there is further discussion in the opinion about the primary/supplemental nature of the rights at issue (and because of that described relationship, irrigation of more than 311 acres would be an enlargement),[13] this discussion was not necessary for the Court to decide the case and is dictum.

[13] The portion of the opinion we are referring to begins with "another area of concern," which indicates that the language is dicta, particularly where the preliminary order from which the appeal was taken does not contain this language. The language from *Barron* is:

Dictum is "opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight." BLACK'S LAW DICTIONARY at 569, (11th ed. 2019) (definition of "judicial dictum"). As explained by Chief Justice Marshall:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. **If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision**. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.).

Finding dicta in response to arguments asserted on appeal is relatively common, even in recent decisions from this Court. *See In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 158, 408 P.3d 899, 913 (2018) ("The Court went further, concluding that the SRBA court did not abuse its discretion in declining to address when a storage right is 'filled' or when it concluded that such a determination was within the director's discretion. *See id.* at 394, 336 P.3d at 801. This portion of the Court's opinion was dicta.") (Justice Brody concurring in part and dissenting in part.); *E. Side Highway Dist. v. Delavan*, 167 Idaho 325, 470 P.3d 1134, 1150 (2019) (holding that language from a 2010 case discussing a hostility requirement for establishing

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> Another area of concern for the Department was the potential enlargement of groundwater right 37–07295 should Barron's application be granted. As mentioned above, groundwater right 37–07295 is the supplementary right to surface right 37–02801B. The problem arising with Barron's proposed transfer is that the previously combined use of the two water rights is limited to the consumptive use on the 311 acre tract of land. If water right 37–02801 is moved to another tract, (or tracts) with the result that the two rights would irrigate more than 311 acres, then there is an enlargement of the water right. Barron contends that he provided evidence to the IDWR that 37–0281B is the primary or "stand alone" right and asserts that the proposed transfer would result in the licensed place of use being farmed as dry land. Barron, however, neither owns nor exercises any control over the land upon which 37–02801 or 37–07295 is appurtenant.

Barron, 135 Idaho at 419-20, 19 P.3d at 224-25.

a statutory right of public use was dicta. "The District contends that this holding is merely dicta and conflates the requirements for a private prescriptive easement and a public highway created under Idaho Code section 40-202(3). We agree."); *Shubert v. Ada County*, 166 Idaho 458, 461 P.3d 740 (2020) (holding that actions of public defenders are subject to the Idaho Tort Claims Act after finding "[t]he Ada County Defendants' reliance on *Sterling* is misplaced. First, this language from *Sterling* is dicta."); *Phillips v. Eastern Idaho Health Services, Inc.*, 166 Idaho 731, 463 P.3d 365 (2020) ("*Morrison* does not stand for the proposition that an entity cannot know the standard of care applicable to its employees or persons with whom it contracts to dispense care. To the extent the language employed in *Morrison* suggests such a result, it is dicta."). Similarly, this Court should hold that the portion of the *Barron* decision relied upon by the Hearing Officer is dicta, and even if it is not dicta, that the language from this opinion has been superseded as described herein.

Concerning the logic of the Hearing Officer's "single, combined beneficial use" element, it is also significant for this Court to consider that the surface water right at issue in the *Barron* case—water right 37-2801B—was eventually decreed as forfeited in the SRBA. The Department was suspicious of this right under Transfer 5116 because movement of a possibly forfeited right is the ultimate example of enlargement, and the Department was eventually proven right. It seems clear that the non-use of the right was the reason the applicant Barron did not provide any historical use information in the first place. But what is also important to note is that if *Barron* stands for the proposition that the Hearing Officer asserts it does—that water rights which share a common place of use represent a single, combined beneficial use of water—then water right 37-2801B should not have been decreed forfeited in the SRBA because its associated consumptive use right, water right 37-7295, was valid and did receive a partial decree in the SRBA affirming this right

on the very same day that water right 37-2801B was disallowed. A.R. 0652 (this right was split into an "A" portion and a "B" portion as shown on the partial decrees). The Hearing Officer's logic as to Duffin's water entitlements are that 35-7667 and Duffin's ASCC shares represent a single, combined beneficial use of water (the irrigation of 53.9 acres) "regardless of whether the acres have been irrigated with ground water, surface water, or both in the same irrigation season." A.R. 0662. Using this same logic, if full consumptive use is provided for irrigation under one right, then the exercise of the other right is not necessary, and the unused right should not be forfeited. This is not what happened with water right 37-2801B. This logical end supports Duffin's position that water rights which share a common place of use without combination conditions are not combined—they are independent rights to be analyzed independently of one another.

The proper enlargement analysis begins by interpreting the water rights based on the four corners of the water right document (for 35-7667, the license, and for ASCC's water rights, the partial decrees) to determine if the water rights expressly combine themselves. If they do not, then they are two separate water sources for a single property and either of them can be used to irrigate the property. If it is proposed to move either of them off the property, then the right or water entitlement being proposed to be moved is subject to a forfeiture and enlargement review. As for 35-7667, it is not subject to forfeiture. *See* A.R. 378-379. And neither is the ASCC water, even though it was not used for decades, because of Idaho Code § 42-223(7). The result of this analysis of both independent and uncombined water sources is that either water supply may be used to irrigate Duffin's property independent of one another and 35-7667 can be moved off the property while Duffin continues to irrigate with water allocated to his ASCC shares.

In sum, the *Barron* decision does not control the outcome of 83160, and this Court should reverse the *Final Order* accordingly.

E. The District Court erred by concluding that the "duty of water" may be utilized as a basis to combine the authorized irrigated acres of these entitlements if there are no express conditions combining these supplies.

The *Final Order*'s finding of enlargement was not based on the "duty of water" doctrine or the sole condition contained on 35-7667 that embodies the duty of water doctrine. Instead, on appeal before the District Court, the Department's counsel asserted the argument for the first time. C.R. 124. Further, the Department did not defend the overlapping place of use rationale in its briefing on appeal, but turned to the license condition in 35-7667 to justify the Hearing Officer's findings and conclusions. The District Court adopted the Department's position, but it is evident that the District Court stretched the "use" component of the duty of water beyond the breaking point as a basis to combine the water sources and limit the number of acres that can be irrigated from those water supplies. The District Court initially held:

> Thus, while the Duffins may irrigate the existing place of use with the ground water right, the ASCC shares, or both, their **use** may not exceed the duty of water limit. It follows that the Duffins may not **use** the full amount of water authorized under each overlapping water right at the same.

C.R. 209 (emphasis added). This is a correct statement of the duty of water doctrine, which limits the application of water, or use, on agricultural lands, but where the District Court erred is its subsequent statement holding that *non-use* of a water supply not subject to the transfer is actually *use* of the water supply that is relevant in an enlargement analysis: "[T]he record establishes the overlapping water rights have been used together in the same year. Nor have they been used to irrigate more than 53.9 acres." *Id.* at 210. Based on this, the District Court held that would be an increase in the number of irrigated acres under both water supplies, which was an enlargement. *Id*. This is incorrect.

The "duty of water" serves as a limitation on the *land application*, or *use*, of water for irrigation purposes. It is not a limit on the amount of water entitlements that can be made available for use on irrigated land or be used as a basis to combine the authorized irrigated acres of these entitlements in the absence of express conditions combining these supplies. Otherwise, the "duty of water" can simply be used to collaterally attack licensed and decreed water rights to impose combined use limitations, which will impact the certainty and finality of these rights.

The license condition in 35-7667 embodies Idaho's duty of water policy, which is use of "that amount of water reasonably necessary to achieve the purpose for which the water was appropriated, and no more." IDAHO WATER LAW HANDBOOK, Fereday et al., at 36 (October 8, 2020 version). In Idaho, this statutory presumption has been codified in Idaho Code § 42-202(6) and Idaho Code § 42-220. The plain language of the duty of water condition found in 35-7667 does not combine water rights to make it part of an enlargement analysis. Rather, whatever the source of water available for diversion and use on the Duffin property, it limits the use of a certain amount of water to prevent waste of water. "The duty of water and beneficial use requirements both are central concepts in the corollary rule of Western water law that a water right does not include the right to waste water." IDAHO WATER LAW HANDBOOK, Fereday et al., at 37 (October 8, 2020 version). This means, for example, that a farmer cannot simultaneously *use* water diverted from a ground water right, water rights leased through the Idaho Water Supply Bank, and leased storage water in excess of the duty of water to land apply water in excess of 1 cfs per each 50 acres. The explanation of this policy is clear as an early Idaho case describes:

> How the individual land owner may have used the water that was delivered to him under his contract is not, in any event, material in this case in the absence of proof that respondent knew, or was charged with notice, that it was being wasted to the possible injury of another land owner. **It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of**

> **water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it.**

Munn v. Twin Falls Canal Co., 43 Idaho 198, 207-08, 252 P. 865, 867 (1926) (emphasis added).

Accordingly, the duty of water condition contained in the license for 35-7667 is not a condition which combines water rights or limits the water rights or entitlements that can be procured to irrigate property. It does, however, limit the amount of water that can be land applied to prevent waste. Further, there is nothing in the *Transfer Memo* that identifies or addresses the duty of water condition as a condition that triggers an enlargement review, which is further authority that the duty of water condition does not combine water rights. The underlying decision to ascribe additional meaning for purposes of an enlargement analysis is unavailing.

If the District Court's holding is upheld by this Court, it will necessarily restrict water users' ability to obtain additional water for irrigation of existing acres. For example, will this duty of water principle now combine storage water utilized on irrigation lands such that the storage water cannot be used elsewhere? Water District 1, based in eastern Idaho, allows storage water users to supply up to 55,000 acre-feet of water for others to rent as additional water supply through a "common pool" under the *Water District 1 Rental Pool Procedures* (*available at* http://www.waterdistrict1.com/rental%20pool%20rules.pdf) (s*ee* Procedure 5.0). In 2021, these procedures were even amended to allow for an "assignment pool" to assign a portion of their individual storage allocation (which is different than the concept of the common pool) for flow augmentation in the Snake River or for rentals for other purposes above Milner Dam. One motivation for this assignment pool was to supply water to the Raft River Basin, a critical groundwater management area (under Idaho Code §§ 42-233a and 42-233b). If this rented water is used on existing ground water irrigated land in the Raft River area, does that storage water

thereafter become combined with the underlying ground water supply of a party who assigns storage water under the holding of this Duffin matter? Based on the *Final Order*, it would.

Or what about water rented through the Idaho Water Supply Bank, a water exchange program that allows water users to offer unused water for rent to the bank to be rented by other users pursuant to adopted administrative rules (IDAPA 37.02.03)? It allows a short-term change to a water right's elements without going through a formal transfer under Idaho Code § 42-222. *See* https://idwr.idaho.gov/water-rights/transfers/. Does this mean that the lessor of water through the water supply bank unknowingly risks combining the lessor's rented water with a lessee's existing water supply? The temporary nature of a water supply bank rental, which can only be for a maximum of five years before the contract expires, suggests that this latter example may be a stretch. Unfortunately, it is not. In decisions issued just last week, IDWR Regional Manager James Cefalo issued a *Preliminary Order Denying Application* which disallowed a temporary transfer (permitted in drought years under Idaho Code § 42-222A) of water rights associated with a farmer's pivot corners that he placed in the Water Supply Bank and then rented to himself to allow tail water from one farm system for use on another farm (not for the irrigation of any new acres) instead of the tailwater wasting into the desert. The Water Supply Bank was agreeable to this change and willing to release the rental contract. However, the regional manager, applying the principles of this Duffin matter, would not allow the water user to temporarily transfer a portion of these rented rights to his son's farm (devoid of surface water due to the drought) because the underlying irrigated acres irrigated by separate ground water rights (that were *not* involved in the Water Supply Bank rental) would not be dried up. The regional manager determined this would result in an enlargement, even though the pivot corners from where the water right portions offered into the bank have been dried up. *Preliminary Order Denying Application*, In the Matter of

Temporary Change Application TC-34-198 In the Name of Mark Telford, at 2; *Preliminary Order Denying Application,* In the Matter of Temporary Change Application TC-34-199 In the Name of Mark Telford, at 2, *available at* https://research.idwr.idaho.gov/files/relateddocs/tg5v01_.PDF and https://research.idwr.idaho. gov/files/relateddocs/tg6901_.PDF, respectively. The enlargement determination was made because there was a shared place of use—a "single, combined beneficial use"—even though two sets of water rights authorized the irrigation of these acres. This begs the question that if it is an enlargement, then what happens to the rented water rights when the rental contract expires at the end of 2021? Can the regional manager overrule the plain terms of a lease contract with the Idaho Water Resource Board and find that the rights are now combined?

These are only a few examples of the problems that can and will occur if this Court upholds the *Final Order*. If affirmed, this decision will be used as precedent as a basis to limit water users' collective ability to secure additional water supplies because of concern that those supplies will be combined once they are authorized for use on a specific irrigated parcel of land and that irrigated acres must be dried up to move those supplies back off. IDWR's desire to reduce consumptive use of water in Idaho by limiting irrigated acres should come from the Idaho Legislature, not through regulation that is contrary to established law and in contravention of established property rights.

Finally, the fundamental problem of combining water supplies that do not have combined use conditions is illustrated by the fact that there would be no enlargement determination if Duffin proposed the reverse of what he is attempting to do in this matter, which is to instead move the ASCC shares for use on different property and to use ground water under 35-7667 at its current

place of use. The District Court is aware of this as evidenced by this question to the Department's counsel during oral argument:

> THE COURT: I guess one question I would have: What if it was the reverse order and the shares were being – there's the shares that are appurtenant to the place of use. There's the water right appurtenant to the place of use, and Mr. Duffin is looking at and goes and transfers the shares to another parcel of property that's within – that's a different place of use that's within the boundaries of the canal company.
>
> Now, the department doesn't' regulate the transfer of shares within the boundaries. So and I guess I already know the answer that I'm asking, so how would that affect at all Mr. Duffin's ground water right?
>
> MS. CHAPPLE KNOWLTON: Your Honor, I believe his ground water right could still be used in the existing place of use in that regard. I mean, obviously, as you are aware when we're dealing with canal company shares, a lot of what can happen is very specific to what's in the operating agreement. So it would depend.
>
> It would depend, but my initial thought would be is that he would be able to use it as he has been using it because he's not – and IDWR would not be involved in that because it wouldn't require a transfer because he's not – unlike here, the petitioners wouldn't be asking to change elements of their water rights.
>
> THE COURT: Like I said, I think I knew the answer so it might have been rhetorical. Go ahead. That's it. I don't have any further questions.

Tr. p. 43, L. 25 through p. 45 L. 3.

For the reasons set forth above, the District Court has incorrectly applied the duty of water doctrine and duty of water condition found in 35-7667 to combine Duffin's water entitlements and limit the number of acres Duffin can irrigate under 35-7667 and the ASCC shares. Non-use of water not subject to the transfer is not properly considered to be use of water relevant to an enlargement analysis of the transfer. Accordingly, the *Final Order* should be reversed.

F. Because of the District Court and Hearing Officer's failure to properly decide the enlargement issue, the injury to other water rights, conservation of water resources, and local public interest criteria portions of the *Final Order* should also be reversed. Additionally, reliance on the Department's 1993 *Moratorium Order* by the District Court is not persuasive authority in support of an injury finding.

Because the Hearing Officer's "single, combined beneficial use of water" holding serves as the basis for the remainder of the *Final Order*'s conclusions relative to injury to other water

rights, conservation of water resources, and local public interest, these sections must be reconsidered in light of the arguments set forth herein. If the Court reverses the *Final Order* decision relative to the "single, combined beneficial use of water" position, then it follows that these remaining portions of the *Final Order* should likewise be reversed as the key holding served as the primary basis for finding that 83160 does not meet these other transfer criteria. As briefed before the agency, 83160 will not injure other rights, is not contrary to the conservation of water resources, and is in the local public interest. A.R. 447-452.

However, the District Court expanded upon the *Final Order* and cited to IDWR's 1993 *Moratorium Order* as an additional reason to uphold the *Final Order*. However, the *Moratorium Order* does not prohibit processing or approval of transfer applications, as the District Court knows. C.R. 215. Yet the District Court further states "[l]ike a new appropriation of water, the transfer would increase the burden **on the aquifer** for the reasons discussed in the enlargement analysis (i.e., an increase in irrigated acreage, diversion, and in consumptive use)." C.R. 215 (emphasis added). This is simply not true—there will be no increased burden on the ESPA if 83160 is approved. As set forth above, the 5-year average use of 35-7667 between 2012 and 2016—the only right subject to 83160—is 122.2 acre-feet. A.R. 378-379. This is the same average amount of ground water that will be used at the new place of use, meaning there will be no material change in effect to the ESPA in the exercise of 35-7667 at the proposed new place of use. Accordingly, the 1993 *Moratorium* does not provide persuasive authority in support of an injury determination. For these reasons, the *Final Order* should be reversed.

G. Duffin's substantial rights have been prejudiced by denial of 83160.

Having established that the *Final Order* violates each the provisions of Idaho Code § 67-5279(3), Petitioners must also demonstrate that at least one of its substantial rights have been

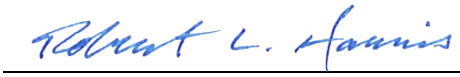
prejudiced. Idaho Code § 67-5279(4). In general, property rights, such as water rights, are substantial rights. See *Terrazas v. Blaine Cty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 198, 207 P.3d 169, 174 (2009). There is also a substantial right to have a governing board "properly adjudicate their applications by applying correct legal standards". *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 232–33, 254 P.3d 1224, 1228–29 (2011). The Idaho Supreme Court recently held that "[t]his Court has not articulated a bright line test governing whether a petitioner's substantial rights have been violated, however, we have held that such rights were harmed when: (1) property values are impacted; or (2) the variance will interfere with the use and enjoyment of property. *Hungate v. Bonner Cty.*, 166 Idaho 388, 458 P.3d 966, 972 (2020) (internal citations omitted).

Duffin's 35-7667 is a water right, and "[w]hen one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law." *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). Accordingly, the *Final Order* has impacted a substantial right of Duffin because the Hearing Officer has imposed a condition on Duffin's property right that is not contained anywhere on the express description of 35-7667 and is inconsistent with Idaho law. Duffin's property value associated with 35-7667 and his ability to transfer this right have been unlawfully impacted because he cannot transfer 35-7667 to a new location which prejudices his substantial rights.

IV. CONCLUSION

For the reasons set forth above, this Court should reverse the *Final Order* and the District Court's decision to affirm. Because there is no enlargement of 35-7667 and no violation of the remaining Idaho Code § 42-222 transfer review criteria, this Court should remand the matter back to the Hearing Officer with instructions to approve 83160.

Respectfully submitted this 10th day of August, 2021.



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CERTIFICATE OF SERVICE

I hereby certify that on this day of 10th August, 2021, one true and correct electronic copy of *Appellant's Brief* was served via iCourt electronic service, pursuant to the Idaho Rules for Electronic Filing and Service, and email on the following:

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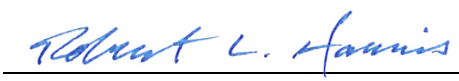

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