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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 COMPANY 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

RESPONDENT'S BRIEF OF THE IDAHO DEPARTMENT OF WATER RESOURCES

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, 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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STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This case is an appeal from the district court's decision affirming the denial of the Appellants' application to transfer—that is, to change—the "point of diversion" and "place of use" elements of a licensed ground water right (water right 35-7667). The Idaho Department of Water Resources ("Department") denied the application on the basis that the proposed transfer would enlarge the use of the ground water right, would injure other water rights, and would be contrary to the conservation of water resources and the local public interest. Idaho Code § 42-222(1). The district court affirmed the Department's denial of the application, concluding that the proposed transfer would result in an enlargement and would injure other water rights.

The central issue in the administrative and district court proceedings was the question of enlargement, and enlargement is also the central issue in this appeal. The relevant facts are undisputed. The question is how Idaho law applies to the facts.

This Court should affirm the district court's decision. Under Idaho law, the proposed transfer would enlarge the use of the ground water right by separating, or "unstacking," the ground water right from another irrigation water right that has exactly the same "place of use." The transfer proposes to "unstack" the overlapping water rights by moving the ground water right to a different place of use. Approving the transfer would have the unavoidable result—indeed, the intended result—of doubling the number of acres irrigated under two water rights that have previously been limited to the same 53.9 acre tract. This result constitutes an enlargement under this Court's decision in *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001).

Moreover, approving the transfer would open the door to the enlargement of hundreds of other similarly-situated "stacked" ground water rights diverting from the Eastern Snake Plain Aquifer ("ESPA").

The Appellants do not dispute that approving the transfer would double the acreage authorized for irrigation under the two overlapping water rights. Recognizing that this would constitute an enlargement under the traditional analysis, the Appellants propose an entirely new theory of enlargement that lacks support in Idaho law, and that if accepted would overthrow established standards and procedures for evaluating whether a transfer will result in an enlargement. The Appellants' arguments in support of this new theory mischaracterize the record and misapprehend the law, and should be rejected.

II. COURSE OF PROCEEDINGS.

The Department generally agrees with the Appellants' brief description of the course of proceedings before the Department and before the district court. *Appellants' Brief* at 3-4 (Aug. 10, 2021). Any further discussion or explanation of the course of the proceedings that may be relevant to the Department's arguments is set forth below, within those arguments. The Department also adopts the Appellants' convention of referring to the *Amended Preliminary Order Denying Transfer*, A.R. 0656-76,[1] as the "*Final Order*." *Appellants' Brief* at 1.

[1] The Clerk's Record and the Agency Record have been compiled in two separate electronic files. The pages within each file are numbered, but the individual lines on these pages are not numbered, and the files are not organized into "Volumes." In this brief, therefore, citations to the "Clerk's Record" will take the form "C.R." followed by the page number. Citations to the "Agency Record" will take the form "A.R.," followed by the page number. I.A.R. 35(e).

III. STATEMENT OF FACTS.

The relevant facts in this case are few and undisputed. The proposed transfer at issue is Application for Transfer No. 83160 ("Application"), which the Appellants filed with the Department on April 2, 2019. A.R. 285-340. The Application seeks to change the "point of diversion" and "place of use" elements of water right no. 35-7667, a ground water right for irrigation purposes. This water right was permitted in 1977 and licensed in 2001, in the name of Vern Duffin.[2] A.R. 0013-16, 0034, 0373-76. The Appellants acquired the license in 2011. A.R. 0377. The place of use element of the license authorizes the irrigation of 53.9 acres located in the south half of the SWNE, SENE, and SENW quarter-quarters of Section 20, Township 6 South, Range 31 East. A.R. 0376-77, 0657.

The Appellants also hold a certificate for 60 shares of stock in the Aberdeen-Springfield Canal Company ("ASCC"), which authorizes the use of ASCC water to irrigate the same 53.9 acres as those identified in the place of use element of water right 35-7667. A.R. 0370-71, 0657. The ASCC shares were originally issued to Vern Duffin in 1970, and acquired by the Appellants in 2011. A.R.0370-71.

Historically, the ASCC water was delivered to the place of use via the N lateral and the Hege Drain, but Vern Duffin had difficulty receiving the ASCC water, so in 1977 he applied for a ground water right for the same place of use. A.R. 0371-73, 0379, 0446; *Appellants' Brief* at 7.

[2] The permit lapsed in 1980 because Vern Duffin did not submit proof of beneficial use within the required time period. A.R. 0035, 0373-74, 0657 n.1. Proof of beneficial use was eventually submitted in 1992, and the Department ordered the permit reinstated with a 1992 priority date. *Id.*

This 53.9 acre tract was irrigated exclusively with ground water pumped under water right 35-7667 from 1980 until 2016. A.R. 0377-78, 0446, 0657, 662; C.R. 00230; *Appellants' Brief* at 7. Since 2017, the place of use has been irrigated exclusively with surface water from ASCC, and in those years the Appellants have not used water right 35-7667. *Id.* Thus, while water right 35-7667 and the ASCC shares have always had the same place of use, they have never been used in the same year. *Id.*

This situation will change if the Application is approved. The Application proposes to move water right 35-7667 to an entirely different place of use, which has no water rights, and where the transferred water right will be fully used every year, to irrigate 53.9 acres. A.R. 0288, 0662; *Appellants' Brief* at 9-10, 26-27. The ASCC shares will also be fully used every year, to continue irrigating the existing place of use. A.R. 0288, 0658, 0662. In short, if the Application is approved, both water right 35-7667 and the ASCC shares will be fully used every year, and the total number of acres irrigated annually under the two water entitlements will increase from 53.9 acres to 107.8 acres. A.R. 0662.

ADDITIONAL ISSUES PRESENTED ON APPEAL

The Department does not identify any additional issues for consideration in this appeal.

REQUEST FOR AN AWARD OF ATTORNEY'S FEES

The Department requests, pursuant to Idaho Code § 12-117(1), an award of reasonable attorney's fees as a result of this appeal. As discussed in a subsequent section of this brief, the Department has been forced to respond to an appeal that was filed without a reasonable basis in fact or law.

ARGUMENT

This is not a legally or factually complicated case, and the enlargement question it raises is not a close one. The undisputed facts confirm that approving the Application would result in a textbook example of enlargement under Idaho law.

There is no dispute that the Appellants' ground water right and canal company shares are appurtenant to exactly the same place of use. In other words, they are overlapping or "stacked" water rights to irrigate the same 53.9 acre tract.[3] There is no dispute that in the past, these 53.9 acres have been irrigated with either water right 35-7667 or canal company shares, but never with both in the same year. A.R. 0377-78, 0446, 0657, 0662; C.R. 00230; *Appellants' Brief* at 7. There is also no dispute that approving the transfer would make water right 35-7667 appurtenant to an entirely different place of use, to irrigate 53.9 acres. A.R 0662; C.R. 00229-30; *Appellants' Brief* at 9-10, 26-27. Finally, there is no dispute that if the transfer is approved, water right 35-7667 and the canal company shares would both be used every year, to irrigate a total of 107.8 acres. *Id.*

This result constitutes enlargement *per se* under this Court's decision in the *Barron* case. *Barron* also involved a proposal to transfer one of two overlapping water rights to a different place of use, such that both could be fully utilized every year. Neither of the water rights

[3] The Department considers water rights to be "stacked" when "two or more water rights, generally of different priorities and often from different sources, are for the same use and overlie the same place of use." A.R. 0154, 0665. The district court used the term "overlapping" to describe the same relationship. C.R. 0229. For purposes of this case, the terms "overlapping" and "stacked" are interchangeable.

included an express condition "combining" them with the other right, or designating either of the water rights as "primary" or "supplemental." The Department denied the transfer application, and the district court affirmed. This Court also affirmed, holding that if the transfer was approved it would result in an enlargement of the water right, because the two water rights would together irrigate a greater acreage than they had historically, under the "previously combined use of the water rights" to irrigate only a single 311 acre tract of land. *Barron*, 135 Idaho at 419-20, 18 P.3d at 224-25.

Contrary to the Appellants' argument, *Barron* is still good law, and it provides the rule for deciding this case. Nothing in subsequent decisions of this Court, or in subsequent amendments to the statutory definition of "consumptive use," Idaho Code § 42-202B(1), have undermined *Barron* or otherwise limited the nature or scope of the enlargement analysis required by Idaho Code § 42-222. The Appellants' arguments are actually an attempt to establish a new theory of enlargement that lacks any support in Idaho law, and that if adopted would set the stage for dramatically expanding ground water diversions from the ESPA. This Court should reject the Appellants' arguments and affirm the district court's decision.

I. STANDARD OF REVIEW.

In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act ("IDAPA"), this Court reviews the decision of the district court to determine whether it correctly decided the issues presented to it. *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 522, 376 P.3d 722, 726 (2016). This Court reviews the agency record, however, independently of the district court's decision. *Id.* 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 evidence in the record. *Id.* Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.* This Court freely reviews questions of law. *Sylte v. IDWR*, 165 Idaho 238, 243, 443 P.3d 252, 257 (2019).

The district court must affirm the agency action unless it finds that the agency's findings, inferences, conclusions, or decisions are: in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; not supported by substantial evidence on the record as a whole; or arbitrary, capricious, or an abuse of discretion. Idaho Code § 67–5279(3). Even if one of these conditions is met, an agency action must be affirmed unless substantial rights of the appellant have been prejudiced. Idaho Code § 67–5279(4). If the agency action is not affirmed, it is to be set aside, in whole or in part, and remanded for further proceedings as necessary. *Id.* § 67–5279(3).

II. APPROVING THE APPLICATION WOULD ENLARGE THE USE OF THE GROUND WATER RIGHT.

A. Approving the Application Would Enlarge the Number of Acres Irrigated.

This case arises from the Department's denial of the Application, which sought to transfer (change) the point of diversion and place of use elements of water right 35-7667. "Water transfers in Idaho are governed by Idaho Code section 42-222." *Barron*, 135 Idaho at 417, 18 P.3d at 222. This statute states that any person seeking to change the point of diversion

or the place, period, or nature of use of water under an established water right must apply to the Department for approval of the transfer. *Id.*; Idaho Code § 42-222(1).[4]

When a transfer application is protested, "it shall be the duty of the director of the department of water resources to investigate the same and conduct a hearing thereon." Idaho Code § 42-222(1). The director "shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided . . . the change does not constitute an enlargement in use of the original right . . . ." *Id*. (underlining added); *see also Barron*, 135 Idaho at 417, 18 P.3d at 222 (quoting Idaho Code § 42-222(1)). "The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." Idaho Code § 42-222(1).

The question in this case, therefore, is whether the record shows that approving the Application would result in an "enlargement in use" of water right 35-7667. *Id.* Idaho Code section 42-222 does not expressly define what constitutes an "enlargement in use" of a water right.[5] There also is no definition of this term elsewhere in Title 42 of the Idaho Code, or in the Department's administrative rules. IDAPA 37.01.01.000—37.03.12.999.

[4] Idaho Code section 42-222(1) is a lengthy provision that does not lend itself to being quoted in full in the text of this brief, or even in a footnote. Addendum 1 includes the full text of the Idaho Code § 42-222.

[5] The statute implies, however, that an increase in irrigated acreage would enlarge the use of any water right other than a storage water right, because of the provision stating that a "transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated . . . ." Idaho Code § 42-222(1)

In 1996, this Court confirmed that irrigating additional acres is an enlargement: "An enlargement may include such events as an increase in the number of acres irrigated . . . ." *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996). Five years later, in the *Barron* decision, this Court "expounded further on this principle[.]" C.R. 00230.

The *Barron* case involved two irrigation water rights having the same place of use, which consisted of 311 acres. *Barron*, 135 Idaho at 415-16, 18 P.3d at 220-21; C.R. 00230-31; A.R. 0659-61. The proposed transfer sought to change the point of diversion and place of use for only one of the two overlapping water rights. *Id.*[6] Thus, "[a]s in this case, the [*Barron*] transfer sought to separate the overlapping rights, with one to be moved to irrigate a separate parcel." C.R. 00230. The Department denied the application on several grounds, including that the transfer would "constitute an enlargement in use of the original right." A.R. 0408, 0414, 0660. The district court affirmed the Department's decision, and Barron appealed to this Court. *Barron*, 135 Idaho at 416, 18 P.3d at 221.

(underlining added). *See* A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 IDAHO LAW REVIEW 249, 278 (1990-1991) ("[Idaho Code section 42-222] prohibits enlargements generally but allows expansions in irrigated acreage of storage water, which in turn implies that expansions in irrigated acreage of direct flow rights are not authorized and are therefore considered an enlargement."). Addendum 2 includes a copy of the Kroghe-Hampe article.

[6] The transfer proposed to split the subject water right into two separate water rights with points of diversions and places of use several miles distant from the original point of diversion and place of use. *Barron*, 135 Idaho at 415, 18 P.3d at 220; A.R. 0659.

This Court addressed the question of "enlargement in use" at length, and including "the relationship between" the two overlapping water rights. *Barron*, 135 Idaho at 419-20, 18 P.3d at 224-25. In discussing the relationship, this Court stated as follows:

> 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*.

Id. (parenthetical in original; italics added).

This holding is directly applicable to this case, as both the hearing officer and the district court recognized. A.R. 0659-62; C.R. 00230-32. In this case, as in *Barron*, two irrigation water rights are appurtenant to the same place of use, and the Appellants seek to move one of these two overlapping or stacked water rights to a new location. *Id*. As in *Barron*, these two water rights have previously been used only to irrigate the same tract of land. *Id.*; A.R. 0370-71, 0376-78, 0446, 0657; *Appellants' Brief* at 7. As in *Barron*, if the transfer is approved, the two overlapping water rights would be "unstacked," and the total number of acres authorized for irrigation under the two water rights would increase significantly—in this case the authorized acreage would double, increasing from 53.9 acres to 107.8 acres. A.R. 0662; C.R. 0232; *Appellants' Brief* at 9-10.

There would be no enlargement if the total acreage to be irrigated under the Application was limited to historic levels, such as by drying up acres at the existing place or use, and/or limiting the irrigated acreage at the proposed place of use. *Barron*, 135 Idaho at 420, 18 P.3d at 225; A.R. 0663; *see also* A.R. 0140 (referring to the requirement of "drying up of acres at the

original place of use" when the transfer proposes "to change the place of use for an irrigation water right to another location"). The Appellants have represented, however, that they intend to continue irrigating the 53.9 acres of the existing place of use with the ASCC shares, and to irrigate the 53.9 acres at the proposed place of use with water right 35-7667. A.R. 0288, 0658, 0662; *Appellants' Brief* at 9-10, 26-27.

Under *Barron*, therefore, the conclusion is clear: approving the Application would impermissibly enlarge the use of water right 35-7667. *See Barron*, 135 Idaho at 419-20, 18 P.3d at 224-25 ("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.") (parenthetical in original).

B. <u>Approving the Application Would Enlarge Diversions and Consumptive Use.</u>

Enlargements are not limited to increases in irrigated acreage. An increase in the amount of water diverted or used is also an enlargement. *Fremont-Madison Irr. Dist.*, 129 Idaho at 458, 926 P.2d at 1305; *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012). "Under I.C. § 42–222(1), the director may consider historical consumptive use, as defined in I.C. § 42–202B, as a factor in determining whether a proposed transfer would result in an enlargement in use or injure other water rights." *Barron*, 135 Idaho at 419, 18 P.3d at 224 (footnote omitted).[7]

[7] "The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." Idaho Code § 42-222(1).

The record establishes that approving the Application would lead to a significant increase in the total volume of water diverted and consumptively used under the ASCC shares and water right 35-7667 as compared to when they were stacked. Even if only water right 35-7667 is considered, approving the Application would lead to a significant increase over its historic diversions and use.

Prior to applying for water right 35-7667, Vern Duffin held ASCC shares sufficient to irrigate the place of use with surface water delivered through ASCC's distribution system, but had difficulty receiving this water. A.R. 0377-79, 0446, 0657; C.R. 00230; *Appellants' Brief* at 7. He therefore sought and obtained a ground water right sufficient to irrigate the place of use, and from 1980 until the end of 2016, the place of use was irrigated exclusively with water from water right 35-7667. *Id.* Since 2017, however, the place of use has once again been irrigated exclusively with the ASCC water. *Id*.

In short, water right 35-7667 has been used only in years when the ASCC water has not been used. *Id.* There has never been a year in which both the ASCC shares and water right 35-7667 have both been used. *Id.* This would no longer be the case if the Application is approved. Approving the Application would allow both water sources—the ASCC shares and water right 35-7667—to be fully used in every year. The record confirms that this is what the Appellants intend to do. A.R. 0288, 0658, 0662; *Appellants' Brief* at 9-10, 26-27.

Clearly, both diversions and consumptive use will significantly increase over historic levels if both the ASCC shares and water right 35-7667 are fully used, every year, to irrigate two different 53.9 acre parcels. Even considering only water right 35-7667, diversions and

consumptive use would increase significantly with respect to historic use, because historically this water right has been used only in years when the ASCC shares were not used. A.R. 0377-78, 0446, 0657; 0662; C.R. 00230; *Appellants' Brief* at 7. Approving the transfer would allow the Appellants to fully use water right 35-7667 in any and all years, including years when the ASCC shares are being used. As a result, approving the Application would lead to a significant increase in the amount diverted and consumptively used under water right 35-7667. The district court expressly recognized this problem:

> Simply stated, the transfer would permit the Duffins to do what they cannot do now—use the full water supply under each overlapping water right at the same time for purposes of irrigation. The ability to use the full amount authorized under the ground water right for irrigation *even if* they are also irrigating the original place of use with their ASCC shares is an enlargement of the ground water right.

C.R. 0234 (underlining added; italics in original).

This conclusion follows from the undisputed facts in the record, and disproves the Appellants' contention that "[t]he historic ground water diversion amount will be virtually identical at the proposed new place of use" and that "there will be no material change to the amount of ground water historically pumped from the ESPA under 35-7667 at the new location." *Appellants' Brief* at 10 (footnote omitted); *see also id.* at 14, 26 (similar). This contention overlooks the undisputed fact that in the last five years *no* ground water has been pumped under water right 35-7667. It also ignores the undisputed fact that while the ASCC shares and water right 35-7667 have never been used in the same year, both will be used every year if the Application is approved.

Thus, a significant increase in the volume of water diverted and used under the formerly stacked water rights is guaranteed if the Application is approved. The total amount diverted under just water right 35-7667, alone, will also increase over historic levels, because it will be fully used every year—not just in years when the ASCC shares are not being used. By any measure, diversions will increase, which constitutes an enlargement in the use of water right 35-7667. *See City of Pocatello*, 152 Idaho at 835, 275 P.3d at 850 ("'An increase in the volume of water diverted is an enlargement'") (citation omitted).

In sum, the enlargement analysis in this case is simple and straightforward. The undisputed facts and this Court's decision in *Barron* compel the conclusion that approving the Application would significantly enlarge the irrigated acreage, and would also significantly enlarge diversions and consumptive use. The Application was therefore appropriately denied as an "enlargement in use of the original right." Idaho Code § 42-222(1). This Court should affirm the decision of the district court.

C. The Appellants' Attempts to Avoid *Barron* Lack Merit.

The Appellants cannot materially distinguish the facts and issues in case from those in the *Barron* case, and do not try to do so. Rather, the Appellants seek to escape *Barron*'s enlargement analysis and holdings by asserting they are merely dicta, that *Barron* has been superseded, and that in this case *Barron* is only relevant to the question of statutory forfeiture. Each of these arguments lack merit, as discussed below.

i. *Barron's* Enlargement Discussion Is Not Dicta.

The Appellants assert the only real issue in *Barron* was the procedural question of

whether Barron had complied with the Department's requests for more information regarding the proposed transfer. *Appellants' Brief* at 28-36. This assertion is simply incorrect.

The Department denied Barron's application for several reasons, including that it would "constitute an enlargement in use of the original right." A.R. 0408, 0414, 0660. Barron appealed this denial to the district court, and then to this Court. *Barron*, 135 Idaho at 416, 18 P.3d at 221. In the appeal, Barron contended that the issues before this Court included the question of whether the Department's denial of his application was supported by substantial and competent evidence, *id.* at 416, 18 P.3d at 221, and specifically argued that the Department "made several findings pertaining to enlargement that are not supported in the record." *Id.* at 418, 18 P.3d at 223. As previously discussed, this Court disposed of those arguments in a lengthy discussion entitled "Enlargement in Use," which specifically addressed the question of the "the relationship between" the two overlapping water rights. *Id.* at 418-21, 18 P.3d at 223-26. This Court concluded that approving the transfer would result in "an enlargement of the water right." *Id.* at 420, 18 P.3d at 225.

Thus, the question of enlargement was squarely before this Court in *Barron*, and was addressed at length. It was necessary for this Court to reach and resolve the question of enlargement in order to address the issues and arguments Barron raised in the case. The district court also determined that this Court's enlargement analysis in *Barron* "was necessary to decide the issue presented to [this Court]." C.R. 00232; *see also* A.R. 0661 ("Duffin's arguments about judicial dictum are not persuasive."). There is no merit in the Appellants' contention that the *Barron* enlargement analysis is "dicta." *See In re SRBA Subcase Nos. 65-23531 & 65-23532*,

163 Idaho 144, 157 n.8, 408 P.3d 899, 912 n.8 (2018) ("This basis of *In re SRBA*, in which we applied both statute and established case law, was essential to resolving the case and cannot be reduced to mere dicta.").[8]

ii. *Barron* Has Not Been "Superseded."

The Appellants also argue that *Barron*'s enlargement analysis and holdings have been "superseded" by other decisions of this Court, by statutory amendments to the definition of "consumptive use," and by a transfer policy guidance memorandum. *Appellants' Brief* at 21, 29, 34. These arguments are also unavailing.

1. *Fremont-Madison* and the "Water Right Interpretation" Cases Did Not "Supersede" *Barron*.

One of the decisions of this Court that the Appellants point to as "superseding" *Barron* is the *Fremont-Madison* decision. The Appellants argue that in *Fremont-Madison*, this Court interpreted Idaho Code § 42-222 as strictly limiting the enlargement analysis to the "original right," *Appellants' Brief* at 8-10, thereby superseding *Barron*'s approach of examining "all evidence," including "the relationship" between water rights having the same purpose and place of use. *Barron*, 135 Idaho at 418-20, 18 P.3d at 223-25.

These assertions lack merit. The *Fremont-Madison* decision did not interpret or apply Idaho Code § 42-222, but rather interpreted the "amnesty statutes," Idaho Code §§ 42-1425, 42-

[8] Even if *Barron*'s enlargement analysis and holdings did amount to "dicta," that would not mean this Court should disregard *Barron*. As the district court pointed out, "even if the analysis is dicta, the Court finds it persuasive and adopts it to the facts of this case in the same fashion as it was adopted by the hearing officer." C.R. 00232. This Court should reach the same conclusion if it determines that *Barron*'s enlargement discussion is "dicta."

1426, and 42-1427. *Fremont-Madison Irr. Dist.*, 129 Idaho at 455-63, 926 P.2d at 1302-10. The *Fremont-Madison* decision also did not mention *Barron*—indeed, the *Barron* decision was issued five years later, in 2001. If either one of these two decisions "superseded" the other, then it was *Barron* that "superseded" *Fremont-Madison*.

The Appellants' assertion that this Court should rely upon certain "water right interpretation" decisions that have "superseded" *Barron*, *Appellants' Brief* at 29, also lacks merit. The "water right interpretation" cases cited by the Appellants, *Appellants' Brief* at 16-19, 29, addressed (and rejected) arguments that a water right included a right or entitlement that was inconsistent with the plain language of the license or decree.[9] *Barron* did not address any such contention, and this Court did not state or imply that its analysis of "the relationship between" the subject water right and an overlapping irrigation water right had the effect of implying a new right or entitlement into the subject water right. *Barron*, 135 Idaho at 419-20, 18 P.3d at 224-25.

[9] *See McInturff v. Shippy (In re CSRBA Subcase No. 49576),* 165 Idaho 489, 496, 447 P.3d 937, 944 (2019) ("The disputed water license states: 'This water right is appurtenant to the described place of use.' Shippy and Cedar Creek argue that this language vests ownership of the water right with the owner of the land, Cedar Creek"); *In re SRBA, Subcase Nos. 65-23531 and 65-23531*, 163 Idaho at 149, 408 P.3d at 904 ("As relevant here, BCID contended the Late Claims were unnecessary because, as BCID asserted, the existing water rights already authorize the water rights asserted in the Late Claims."); *United States v. Black Canyon Irr. Dist*., 163 Idaho 54, 58, 408 P.3d 52, 56 (2017) (same); *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) ("recharge is simply not included in 181C's purpose of use element"); *Rangen, Inc. v. IDWR*, 159 Idaho 798, 803, 367 P.3d 193, 198 (2016) ("Rangen argued that although its partial decrees . . . state that the source for the right is the Martin–Curren Tunnel, the source actually includes the entire spring complex.").

Further, none of the cited "water right interpretation" decisions mentioned *Barron*, or can be read as implicitly "superseding" *Barron*'s enlargement analysis and holdings. *Appellants' Brief* at 29. None of these decisions addressed a question of whether a transfer would enlarge the use of a water right. None of these decisions interpreted or applied Idaho Code § 42-222, beyond the brief statements in the *City of Blackfoot* decision that Idaho Code § 42-222 requires the filing of an application for transfer in order to change the purpose or nature of use of a water right. *City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 310 & n.4, 396 P.3d 1184, 1190, 1192 & n.4 (2017). The Appellants simply mischaracterize the "water right interpretation" cases in asserting that they superseded *Barron*: they clearly did not.[10] *See also* C.R. at 00232 n.7 ("The Duffins appear to argue the *City of Blackfoot v. Spackman* . . . effectively overruled *Barron*. It did not.").

2. The 2004 Amendment to Idaho Code § 42-202B Did Not "Supersede" or Undermine *Barron*.

The Appellants also point to the 2004 amendment to the statutory definition of "consumptive use" as "superseding" *Barron*'s enlargement analysis and holdings. *Appellants' Brief* at 20-21. This amendment to Idaho Code § 42-202B(1) stated, in part, that "[c]onsumptive use is not an element of a water right," and that "[c]hanges in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." 2004 Idaho Sess. Laws 733.

[10] As discussed in a subsequent section of this brief, this mischaracterization is central to the Appellants' request that this Court adopt a new theory of "enlargement"—a theory that lacks any support in Idaho law, and that if adopted would not only overthrow well-established enlargement principles, but would also have far-reaching effects for water right administration generally.

The transfer in *Barron*, however, was not a request to change consumptive use, but rather a request to change the point of diversion and place of use. *Barron*, 135 Idaho at 415, 18 P.3d at 220. Moreover, in *Barron* this Court did not hold that consumptive use was an element of Barron's water right, but rather that "[u]nder I.C. § 42-222(1), the director may consider historical consumptive use, as defined in I.C. § 42-202B." *Id.* at 419, 18 P.3d at 224. Thus, had the Legislature intended in 2004 to overrule *Barron,* or otherwise prohibit consideration of consumptive use in an enlargement analysis under Idaho Code § 42-222(1), then the provision in that statute expressly authorizing such consideration of consumptive use would have been deleted. It was not, however, even though the statute was amended in 2004 to make other changes. 2004 Idaho Sess. Laws 280-83. This confirms that the 2004 amendment to Idaho Code § 42-202B did not abrogate or disapprove of this Court's enlargement analysis and holdings in the *Barron* decision.

3. The *Transfer Memo* and Peppersack Testimony Are Consistent with *Barron.*

The Appellants also argue that *Barron* was effectively "superseded" by the Department's 2009 policy guidance memorandum regarding the processing of transfer applications ("*Transfer Memo*"). *Appellants' Brief* at 29; *see also* A.R. 0127 ("The 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.") (italics in original). An administrative policy guidance memorandum such the *Transfer Memo* obviously cannot "supersede" a decision of this Court, however.

What the Appellants appear to argue, rather, is that the *Transfer Memo* is an agency interpretation of the changes in transfer law wrought by the "water right interpretation cases" and the 2004 statutory amendment, and therefore should be accorded "considerable weight" in this case. *Id.* at 22-27, 29-30. This argument is based on a false premise. As discussed above, nothing in the "water right interpretation cases" or the 2004 amendment "superseded" *Barron*, and nothing in the *Transfer Memo* states or implies otherwise. A.R. 0127-63.

Further, the Appellants mischaracterize the *Transfer Memo*'s plain language by asserting it proves "there must be an express element or condition limiting consumptive use before such limitation can be enforced" in a transfer proceeding. *Appellants' Brief* at 24.[11] The *Transfer Memo* simply recognizes that consumptive use is not a consideration when "'no element of the water right is changed,'" unless there is a specific condition limiting the amount of consumptive use. *Id.* (quoting A.R. 0130). This passage plainly does not require that there be a consumptive use condition before evaluating the potential for an enlargement under a proposal to change the place of use element of a water right.

The Appellants also mischaracterize the *Transfer Memo* in asserting it states that consumptive use is part of an enlargement analysis only "when there is a proposal to change the nature or purpose of use." *Appellants' Brief* at 24. The *Transfer Memo* expressly recognizes that "'historical consumptive use'" is considered in "'certain other circumstances" as well. *Id.*

[11] The water rights at issue in *Barron* did not have such conditions, A.R. 0663; *Appellants' Brief* at 28, and nothing in the *Barron* decision supports a conclusion that there must be an "express condition" limiting consumptive use before it can be considered in the enlargement analysis required by Idaho Code § 42-222(1).

(quoting A.R. 0130); *see also* A.R. 0154 ("Enlargement will occur if the . . . extent of beneficial use (except for nonconsumptive water rights) exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer.") (parentheticals in original). The *Transfer Memo* also states that a proposal to change the place of use for only one of two stacked irrigation water rights "is presumed to enlarge the right." A.R. 0154.

Thus, as the *Final Order* stated, "Duffin's arguments related to the *Transfer Memo* are meaningless because Duffin is alleging a conflict where there is none. This order is consistent with the *Transfer Memo*." A.R. 0664.

The Appellants' reliance on the 2017 deposition testimony of former Department employee Jeff Peppersack, the identified author of the *Transfer Memo*,[12] *Appellants' Brief* at 25-27, is also misplaced. The Appellants assert Peppersack's testimony proves the *Final Order* erred in reasoning that "overlapping places of use imply a combined use," and concluding that a combined use is "'determined by the place of use descriptions for the rights, not by the existence of or absence of water right conditions.'" *Id.* at 24-25 (quoting *Final Order*) (bold in *Appellants' Brief* omitted).

The testimony cited by the Appellants simply explains that the presumption of enlargement that arises when an application seeks to "unstack" two or more stacked irrigation water rights can be rebutted by an affirmative showing that there would be no enlargement of the

[12] As Peppersack explained in the deposition, the drafting of such administrative memoranda is "usually a group effort." A.R. 0467 (transcript page 19).

extent of water usage. A.R. 0469-70 (transcript pages 29-32); *see also id.* 0470 (transcript page 31, lines 16-17) ("we would presume that it enlarges the water right without other information showing otherwise."). The *Transfer Memo* also recognizes that this presumption can be rebutted. A.R. 0154-55. In this regard, both the *Transfer Memo* and Peppersack's testimony are consistent with *Barron*, which also recognized that the presumption of enlargement in use can be rebutted—but that it had not been in that case. *See, e.g.,* 135 Idaho at 420, 18 P.3d at 225 ("[Barron] 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," and "on several occasions failed to provide the Department with the requested information, instead relying on imprecise facts and assertions.").

In sum, the Appellants' assertions that the *Final Order* erred by not according "considerable weight" to the *Transfer Memo*, *Appellants' Brief* at 22, rely on mischaracterizations of the *Transfer Memo* and Peppersack's testimony. The *Final Order* is fully consistent with the *Transfer Memo* and Peppersack's testimony—and they are all consistent with *Barron.*

iii. *Barron* Is Not A Forfeiture Case.

The Appellants also argue that "if *Barron* stands for the proposition that the Hearing Officer asserts it does . . . then [the *Barron* water right] should not have been decreed forfeited in the SRBA . . . ." *Appellants' Brief* at 34. The *Barron* decision did not raise or address the question of whether the water right sought to be transferred was subject to forfeiture, however, nor did it address the standards for decreeing water rights as forfeited in a general stream

adjudication such as the SRBA. Statutory forfeiture of water rights is disfavored, *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001), and it does not appear there were any allegations of forfeiture in the *Barron* case. This Court should reject the Appellants' attempts to re-interpret *Barron* by reasoning backward from an SRBA decision based on an issue not raised or decided in *Barron*.

Further, the question of forfeiture is beside the point in this case. This case does not involve any allegation of forfeiture, and the Appellants have argued throughout the various proceedings in this case that water right 35-7667 has not been forfeited. A.R. 0455, 0626; *Appellants' Brief* at 35. The hearing officer apparently assumed, as the Appellants had repeatedly argued, that water right 35-7667 had not been forfeited. Clearly, therefore, the Application would still have been denied on enlargement grounds even if the *Final Order* had expressly determined the water right had not been forfeited. On the other hand, had the hearing officer determined that water right 35-7667 had been statutorily forfeited for non-use, Idaho Code § 42-222(2), the Application would still have been denied. A.R. 0148. The Appellants' attempt inject the question of statutory forfeiture into this case is pointless.

III. THE APPELLANTS' INTERPRETATION OF IDAHO CODE § 42-222(1) CONFLICTS WITH THE STATUTORY LANGUAGE.

The Appellants assert that because Idaho Code § 42-222 refers to enlargement of "'the original right,'" and the *Fremont-Madison* decision refers to enlargement of "'an existing water right,'" they "limit the enlargement evaluation to the water right or water rights listed on the transfer application." *Appellants' Brief* at 8-9 (quoting Idaho Code § 42-222 and 129 Idaho at

458, 926 P.2d at 1305) (underlining added by the Appellants). The Appellants thus assert the enlargement analysis "should be directed only at 35-7667," and Idaho Code § 42-222(1) "does not expand the enlargement review" to allow consideration of the ASCC shares, because no condition on water right 35-7667 expressly combines it with the ASCC shares. *Appellants' Brief* at 9-10, 13-14.[13] This argument has multiple flaws.

The Appellants' laser-like focus on the term "the original right" takes it out of its statutory context, and ignores language that applies directly to that term. *See St. Luke's Health Sys., Ltd. v. Bd. of Commissioners of Gem Cty.*, 168 Idaho 750, 756, 487 P.3d 342, 348 (2021) ("'the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant'") (citation omitted). This is evident when the missing context and language are restored:

> The director of the department of water resources *shall examine all the evidence and available information* and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement *in use* of the original right . . . .

Idaho Code § 42-222(1) (underlining and italics added).

Thus, rather than limiting the enlargement analysis to the elements of the "original right," Idaho Code § 42-222(1) "creates an affirmative duty on the part of the Director to 'examine all the evidence and available information' when evaluating a proposed transfer," as the district

[13] The Appellants reject the district court's conclusion that the license's "standard IDWR condition" regarding the "duty of water" authorizes consideration of the ASCC shares in enlargement analysis. *Appellants' Brief* at 2, 15, 36-41. This argument is addressed in a subsequent section of this brief.

court recognized. C.R. 0233 (quoting Idaho Code § 42-222(1)). In *Barron*, this Court also emphasized the significance of the statutory requirement to "examine all the evidence and available information" in transfer proceedings, by quoting or citing that provision at least four times. *Barron*, 135 Idaho at 417, 418, 420, 421, 18 P.3d at 222, 223, 225, 226.

The statutory prohibition against enlargement "in use" of the original water right also disproves the Appellants' contention that the enlargement analysis is limited to the "elements" of the original water right. *Appellants' Brief* at 9. A proposed transfer may involve a water right that has not have been "used" to its full extent consistently, if at all. As this case and *Barron* demonstrate, overlapping or stacked water rights often are not consistently used to the full extent of their licensed or decreed elements. *See also* A.R. 0155 ("The use of a supplemental right . . . can be highly variable from year to year"). This is the reason for the prohibition against enlargement "in use" of the original water right. Idaho Code § 42-222(1). The statute is intended to authorize consideration of how the subject water right has actually been used, as confirmed by the express authorization to "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." Idaho Code § 42-222(1).

It follows that in a case such as this one, Idaho Code § 42-222(1) unambiguously authorizes consideration of overlapping or stacked water rights, even if these water rights are not identified in the transfer application. This understanding of Idaho Code § 42-222(1) was confirmed by this Court in the *Barron* decision. As previously discussed, in *Barron* this Court analyzed "Enlargement in Use," and in so doing considered "The Relationship Between" the

irrigation water right proposed for transfer and another irrigation water right having the same place of use. *Barron*, 135 Idaho at 418-20, 18 P.3d at 223-25 (underlining added).[14]

The Appellants nonetheless argue that this Court should adopt their interpretation of Idaho Code § 42-222(1), because the district court allegedly held 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[.]" *Appellants' Brief* at 10. This is hyperbole, and a strawman argument that completely mischaracterizes the district court's decision. The district court simply held that the Department was authorized to consider "the fact that the existing place of use is served by an overlapping water right." C.R. 00233. The district court did not hold that the "all" language "grants IDWR unchecked authority to consider whatever it wants in an enlargement review," nor does anything in the district court's decision remotely support such an alarmist interpretation.

Moreover, as even the Appellants admit on a subsequent page of their brief, "the phrase 'all' means all relevant evidence within the defined scope of evidence defined in Idaho Code § 42-222. It cannot mean literally everything." *Appellants' Brief* at 13. The Department agrees, and notes that Idaho Code § 42-222(1) contemplates that the evidence and information must be

[14] This Court's application of Idaho Code § 42-222(1) in *Barron* was consistent with how the Department had been applying the statute for years, as evidenced by a 1990 law review article authored by a former deputy attorney general who represented the Department. *See* Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 IDAHO LAW REVIEW at 277 ("If one of the rights is moved to another 50 acre tract, with the result that the two rights irrigate a total of 100 acres, then there is an enlargement of the water right and an increase in the volume of diversion and consumptive use."). Addendum 2 includes a copy of the Kroghe-Hampe article.

relevant to the inquires required under the statute: injuries to other water rights, enlargements in use, consistency with the conservation of water resources within the State of Idaho and the local public interest, and, in some case, effects on the local economy of the watershed or area within which the source for the proposed use originates. Idaho Code § 42-222(1). Any question of whether the Department has considered evidence outside these parameters is subject to judicial review. Idaho Code § 42-222(5).

In sum, the Appellants' interpretation of Idaho Code § 42-222(1) is contrary to its plain language, and to this Court's decision in *Barron*. This Court should reject the Appellants' request to adopt a new and legally flawed interpretation of Idaho Code § 42-222(1).

IV. THE APPELLANTS' CHALLENGE TO THE *FINAL ORDER*'S "INTERPRETATION" OF THE LICENSE IS CONTRARY TO THE RECORD AND IDAHO LAW.

The Appellants argue the hearing officer's reliance on *Barron* "sidestepped more recent cases addressing water right interpretation and post-2001 statutory amendments addressing consumptive use," *Appellants' Brief* at 15, by impermissibly reading a new "element" into water right 35-7667 that is not in the license. *Id.* at 17-19. This argument mischaracterizes the *Final Order* and is contrary to Idaho law.

A. The *Final Order* Is Consistent With The Elements of The License.

The Appellants repeatedly assert the hearing officer read or implied a new "element" into water right 35-7667: the "element" of "single, combined beneficial use." *Appellants' Brief* at 1,

11, 19, 21, 25-27, 34. This allegation flatly mischaracterizes the *Final Order*.

A review of the *Final Order* confirms that it does not contain any finding or conclusion to the effect that water right 35-7667 includes any "elements" other than those stated in the license. What the *Final Order* concluded, rather, is that water right 35-7667 and the ASCC shares "in combination, represent a single beneficial use of water" because they "authorize irrigation of the same 53.9 acres":

> Currently, water right 35-7667 and the ASCC shares authorize irrigation of the same 53.9 acres. These two water rights, in combination, represent a single beneficial use of water at the existing place of use—the irrigation of 53.9 acres.

A.R. 0662. This conclusion was based on the existing elements of the 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. 0664. The *Final Order*'s references to the "combined beneficial use" represented by water right 35-7667 and the ASCC shares did not impose or imply a new "element" into water right 35-7667. These passages were, rather, an interpretation of the existing elements: "purpose of use" and "place of use." This interpretation was consistent with this Court's reasoning and holdings in *Barron*, as the district court recognized. C.R. 0230-31.[15] It also recognized what the

[15] The Appellants' arguments in the district court proceedings also included repeated assertions that the hearing officer had read or implied a new "element" into water right 35-7667. C.R. 0060, 0065, 0074, 0076, 0085, 0087, 0098, 00174-75, 00179, 00181, 00190. The fact that the district court did not even discuss this contention confirms that it simply is not a reasonable characterization of the *Final Order*.

parties had already agreed to in their *Stipulated Statement of Facts*: that the plain language of the license authorizes irrigation of the same 53.9 acre tract irrigated by the ASCC shares. A.R. 0370.

Thus, there is no merit in the Appellants' attempts to characterize the *Final Order* as reading or implying a new "element" into the license for water right 35-7667, or as "relitigating" or "collaterally attacking" the license. *Appellants' Brief* at 1, 11, 19, 21, 25-27, 34. The *Final Order*'s conclusion that water right 35-7667 and the ASCC shares "represent a combined beneficial use" for the irrigation of the same 53.9 acre tract was simply an application of longstanding enlargement principles confirmed in the *Barron* decision. This fact also disproves the Appellants' contentions that the hearing officer did not review the plain language of the license, *Appellants' Brief* at 2, and "failed to engage in an interpretation analysis of the water right license for 35-7667." *Appellants' Brief* at 15 (bold omitted).

B. <u>The Appellants Mischaracterize the "Water Right Interpretation" Cases.</u>

The Appellants' reliance on the "water rights interpretation" decisions, *Appellants' Brief* at 17-19, is also misplaced. The "water right interpretation" cases rejected arguments that a water right included a right or entitlement that was inconsistent with the plain language of the license or decree.[16] They do not support the Appellants' arguments because as discussed above the *Final Order* is consistent with the plain language of the license for water right 35-7667. The Appellants' arguments to the contrary are based on mischaracterizing the *Final Order* as

[16] *Supra* page 17 & note 9.

reading or implying a new "element" into the license, or as "relitigating" or "collaterally attacking" the license, which it clearly did not.

To the extent the "water right interpretation" cases might have any other application in this case, they undermine the Appellants' interpretation of the license for water right 35-7667. The Appellants contend the license's lack of a condition expressly linking water right 35-7667 and the ASCC shares "should end the inquiry[.]" *Appellants' Brief* at 18-19. This contention assumes that the license already confers a right or entitlement to transfer the full amount of the water right to a new place of use without regard to any overlapping water rights, a right that can be limited or negated only by imposing an affirmative condition on the license. The license contains no hint of any such right or entitlement, however, and "[w]ater transfers in Idaho are governed by Idaho Code section 42-222," *Barron*, 135 Idaho at 417, 18 P.3d at 222, not by water right licenses and decrees. The Appellants' position that the license implicitly embodies an unstated entitlement to transfer the full amount of water right 35-7667 without regard to any overlapping water rights is "inconsistent with the plain language" of the license, *City of Blackfoot*, 162 Idaho at 308, 396 P.3d at 1190 (internal quotation marks and citation omitted), and constitutes "an impermissible collateral attack" upon it. *McInturff v. Shippy*, 165 Idaho 489, 496, 447 P.3d 937, 944 (2019).

C. The Lack of a License Condition "Expressly" Combining Water Right 35-7667 with the ASCC Shares Is Irrelevant.

There is no merit in the Appellants' contention that there must be an "express condition" in the license combining it with the ASCC shares, or identifying either it or the ASCC shares as

"supplemental" to the other, before the question of combined or overlapping use can be considered within the enlargement analysis. *Appellants' Brief* at 1, 14, 24, 26, 36-37; *see also id.*at 19 ("If there are no words combining these rights (the water right elements, conditions, or other language in the water right) then no combination exists") (parenthetical in original). No such "express" condition or language is necessary because the elements of the license for water right 35-7667 already define it in terms of the same beneficial use authorized by the ASCC shares: irrigation of the 53.9 acre tract. As the *Final Order* stated, "[i]f 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. 0664.

This conclusion is consistent with *Barron*. The water rights in *Barron* also did not include any elements or conditions expressly "combining" them, or designating one as "primary" and the other as "supplemental." A.R. 0663; *Appellants' Brief* at 28. Even so, this Court concluded that it was appropriate to consider "the relationship between" the overlapping water rights for purposes of an enlargement analysis. *Barron*, 135 Idaho at 419-20, 18 P.3d at 224-25. The district court agreed that the presence or absence of such a condition in water right 35-7667 is not the controlling consideration. *See* C.R. 00233 ("even if the license did not contain the conditional remark, the Court still finds the hearing officer appropriately considered the ASCC shares.").[17]

[17] The "conditional remark" referenced by the district court is discussed below.

The question of whether water right 35-7667 is "supplemental" to the ASCC shares, or *vice versa*, is also legally irrelevant in this case, despite the Appellants' attempts to transform it into a determinative issue. *Appellants' Brief* at 7, 14, 18, 21, 25-26, 28-29. While Idaho law does not provide a formal definition of a "supplemental" water right, in general terms it can be understood as "an additional appropriation of water to make up a deficiency in supply from an existing water right." *Barron*, 135 Idaho at 416, 18 P.3d at 221. The *Transfer Memo* provides a similar and somewhat more detailed description:

> A supplemental irrigation right is a stacked water right authorizing the diversion of water for irrigation from a secondary source to provide a full supply for crops when used in combination with a primary right. A supplemental right can provide additional water in conjunction with a primary source, or at times when the primary source is unavailable. The use of a supplemental right is dependent on the supply available under the associated primary right and can be highly variable from year to year.

A.R. 0155.

Thus, in any given case the determination of which overlapping or stacked water right is "supplemental" is often fact-driven, and can get quite complicated. *See generally id.* at 0155-56; 0465-66, 0470-81. In this case, however, it does not matter which source of water is considered "supplemental" or "primary" because the undisputed facts show that "the enlargement analysis would be identical in either case." A.R. 0662. Both water right 35-7667 and the ASCC shares authorize a full supply of water for the 53.9 acre tract, but they have never been used in the same year and have never irrigated more than 53.9 acres. *Id.* If the Application is approved, however, both water sources would be fully used, every year, to irrigate a total of 107.8 acres. *Id.* This constitutes an enlargement in the use of water right 35-7667, *Barron*, 135 Idaho 419-20, 18 P.3d

at 224-25, regardless of whether the water right is considered to have been "supplemental" or "primary" in the past. *See also* A.R. 0476 (transcript page 55) ("I guess you can call it whatever you want. . . . I don't know the value of calling it supplemental or not . . . ultimately I think we'd want to get to the same place, and that's look at the data, look at the relationship, and see if there's an enlargement in a transfer.").

The license does contain a "conditional remark" stating "[t]his 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." C.R. 00229; A.R. 0034. The Appellants argue the district court erred in partially relying on the conditional remark. The Appellants assert it is simply a "standard IDWR condition that embodies the 'duty of water'" that "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 water entitlements." *Appellants' Brief* at 2; *see also id.*at 36-38 (similar).

The Department does not dispute that the conditional remark is a standard condition that reflects the "duty of water" limitation, and that the remark does not "expressly" combine water right 35-7667 with the ASCC shares. All of that is irrelevant, however, because any limitations that the conditional remark may have on water right 35-7667 are imposed as a matter of Idaho law, regardless of whether they are reflected or acknowledged on the face of the license. The district court expressly recognized this principle. *See* C.R. 00229 ("Under Idaho law, a water right is limited by the duty of water whether or not it is expressly stated on the face of the instrument memorializing the right."); *id*. at 00233 ("even if the license did not contain the

conditional remark, the Court still finds the hearing officer appropriately considered the ASCC shares").

More to the point, however, is the fact that Idaho Code § 42-222(1), as interpreted and applied by this Court in *Barron*, expressly authorizes consideration of overlapping or stacked water rights in the enlargement analysis. The question of whether the conditional remark is "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 water entitlements," *Appellants' Brief* at 2, need not be addressed.

V. THE APPELLANTS' ARGUMENTS GO BEYOND THE RECORD.

A. The Appellants' Arguments Regarding Rentals, Leases, and Temporary Transfers Have Been Waived, and Lack Merit.

The Appellants contend that if this Court affirms the district court and the *Final Order*, its decision will be used as "as a basis to limit water users' collective ability to secure additional water supplies," out of concerns "that those supplies will be combined once they are authorized for use on a specific parcel" pursuant to a rental, lease, or temporary transfer. *Appellants' Brief* at 40. The Appellants argue that under the reasoning of the *Final Order*, water rights offered for rental or lease through the Water District 1 Storage Rental Pool or the Idaho Water Supply Bank, or temporarily transferred pursuant to Idaho Code § 42-222A, are at risk of being deemed "combined" with the renter or lessor's water rights. *Id.* at 38-40.

These arguments were not raised or developed before the hearing officer or the district court. There is nothing in the record that supports these arguments, or any ruling that remotely

supports raising them for the first time on appeal. These arguments have been waived and should not be considered by this Court. *See, e.g., Izaguirre v. R & L Carriers Shared Servs., LLC*, 155 Idaho 229, 233, 308 P.3d 929, 933 (2013) ("'This Court has often stated that '[i]ssues not raised below and presented for the first time on appeal will not be considered for review. . . . [i]t is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error.'") (citations omitted).[18]

Further, there is no merit in the Appellants' argument that *Final Order* provides a legal basis or precedent for deeming water rights rented, leased, or temporarily transferred to have been permanently "combined" with other water rights during the rental, lease, or transfer period. The *Final Order*'s conclusion that water right 35-7667 and the ASCC shares "represent a combined beneficial use" for irrigation of the 53.9 acre tract was based on the fact that both are already appurtenant to the 53.9 acre tract: they were both developed and perfected to irrigate the same place of use. A.R. 0664.

Water rights made available for rentals, leases, or temporary transfers, however, are appurtenant to lands other than those upon which they are used during the rental, lease, or temporary transfer. The rental, lease, or temporary transfer does not, and cannot, make the water

[18] In particular, the discussion of the Telford temporary transfer application, *Appellants' Brief* at 39-40, appears to challenge the denial of that application. (The same law firm that represents the Appellants in this case also represented Telford, as the link provided in the *Appellants' Brief* confirms.) Any argument challenging the denial of Telford's application should presented to the Director or the district court in accordance with the Idaho Administrative Procedure Act. This appeal does not include the Telford record, and this Court should not consider challenges to the denial of Telford's application in this appeal.

rights appurtenant to any other lands. *See, e.g.,* Idaho Code § 42-1764(3) ("The rental of water rights from the water supply bank shall not constitute a dedication to the lands of any renter since the rental or distribution of water by the water bank is only incidental to its primary purposes listed in section 42-1761, Idaho Code."); *id.* § 42-222A(4) ("All temporary changes approved pursuant to the provisions of this section shall expire on the date shown in the approval . . . and thereafter the water right shall revert to the point of diversion and place of use existing prior to the temporary change."). An established irrigation water right can be made appurtenant to a new place of use only by filing a formal application pursuant to Idaho Code § 42-222. Nothing in the *Final Order* changes or undermines these statutory provisions.

B. The Record Does Not Support the Appellants' Assertions Regarding Transfer of the ASCC Shares.

The Appellants appear to argue that the Application should have been approved because they could have moved their ASCC shares rather than water right 35-7667. *Appellants' Brief* at 40-41. There are at least two problems with this argument.

The first problem is that this argument raises a question outside the scope of this appeal. The Application did not propose to move the ASCC shares to a different place of use. The record on that question has not been developed, and the statutory authority applicable to moving ASCC shares is not Idaho Code § 42-222(1) but rather Idaho Code §§ 42-2501, 42-2507.[19]

The second problem is that it cannot be assumed the Appellants actually would be able to transfer the ASCC shares while leaving water right 35-7667 in place. This is shown by the

[19] ASCC is "a Carey Act operating company." *Appellants' Brief* at 10.

online "Rules and Regulations, and Polices of the Aberdeen-Springfield Canal Company," which state, in part, that "[n]o shares with associated ground water rights will be transferred without a transfer of the ground water right as well (or an appropriate proportion to match the total acreage of the transfer)." http://www.ascanal.org/Shareholders-Resources/policies-and-procedures (visited Sept. 21, 2021).[20]

VI. THE APPELLANTS ARE ASKING THIS COURT TO ADOPT A NEW THEORY OF ENLARGEMENTS UNDER IDAHO CODE § 42-222.

The Appellants' contentions that the *Final Order* misinterpreted Idaho Code § 42-222(1), that *Barron* was dicta and has been superseded, and that the "water right interpretation" cases govern transfers of water rights, are simply an attempt to have this Court adopt an entirely new theory of enlargement under Idaho Code § 42-222(1). *See* A.R. 0666 ("The *Duffin Brief* and *Petition* propose a new method of evaluating enlargement in transfer applications seeking to separate or unstack irrigation rights."). This theory has been cobbled together from implausible legal premises and mischaracterizations of the administrative record, as discussed above.

Further, the Appellants' theory of enlargement, if adopted, would have significant consequences. It would require this Court to overrule *Barron*, upend well-established standards and procedures for evaluating whether a proposed transfer would enlarge the use of the water right, open the door to a significant expansion in ground water diversions from the ESPA, and

[20] This citation is not an attempt to enlarge the record, but rather to illustrate that this Court should not simply accept the Appellants' characterization of facts and issues that are outside the record developed in this case.

have far-reaching implications for many other aspects of water rights administration in Idaho. This Court should reject the Appellants' new theory of enlargement and reaffirm *Barron*.

A. Accepting The Appellants' Theory of Enlargement Would Overrule *Barron* and Open the Door to Vastly Expanding Ground Water Irrigation on the Eastern Snake Plain.

The Appellants seek a ruling from this Court to the effect that "the four corners" of a water right license or decree establish the boundaries of an enlargement analysis under Idaho Code § 42-222(1). *Appellants' Brief* at 2; *see also id.* at 10 ("The enlargement analysis . . . should be directed only at 35-7667."). Under this approach, the Appellants assert, there can be no consideration of any water rights other than one for which the transfer is sought, including overlapping, stacked, or supplemental water rights for exactly the same purpose of use and place of use, unless the license or decree includes a condition that *expressly* identifies those other water rights, and links them to the water right to be changed. *Id.* at 1, 14, 18-19, 36-38.

This novel theory is directly contrary to *Barron*'s interpretation and application of Idaho Code § 42-222(1), as discussed above. The Appellants do not argue otherwise, but rather incorrectly characterize *Barron* as "dicta" or "superseded." Adopting the Appellants' theory of enlargement, therefore, would require this Court to overrule *Barron*.

Adopting the Appellants' theory of enlargement would also require this Court to re-interpret Idaho Code § 42-222(1)'s mandate that that the Director of the Department "shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided . . . the change does not constitute an enlargement in use of the original right . . . ." Idaho Code § 42-222(1). In particular, the Appellants' theory would require

this Court to ignore the requirement to examine "all" the evidence and available information, and to read the words "in use" out of the phrase "enlargement in use of the original right." No other interpretation of the statute supports the Appellants' enlargement theory.

Adopting the Appellants' theory would also overthrow enlargement standards and procedures the Department has used for decades in evaluating transfer applications. The Department has considered overlapping, stacked, and supplemental water rights in evaluating enlargements under Idaho Code § 42-222(1) since at least 1990. *See* A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 IDAHO LAW REVIEW 249, 277 (1990-1991) ("If one of the rights is moved to another 50 acre tract, with the result that the two rights irrigate a total of 100 acres, then there is an enlargement of the water right and increase in the volume of diversion and consumptive use.").[21] As the *Transfer Memo*, which was written in 2009, states: "An application for transfer proposing to 'unstack' one or more water rights used for irrigation other use, without changing all the rights for the same use, is presumed to enlarge the water right." A.R. 0154. Peppersack's deposition testimony 2017 confirmed that consideration of overlapping or stacked water rights has always been central to the enlargement analysis conducted pursuant to Idaho Code § 42-222(1). A.R. 0469-70 (transcript pages 29-32). The *Final Order* also recognized that "[h]istorically, the Department has held that water rights appurtenant to the same irrigated acres cannot be separated or unstacked without a reduction in the total authorized beneficial use under one or both of the rights." A.R. 0666.

[21] Krogh-Hampe is a former deputy attorney general for the Department. *Id.* at 249. Addendum 2 contains a copy of this article.

Consistency in interpreting and applying the law is important to the Department and to water users, as the Appellants acknowledge. *Appellants' Brief* at 22. If the Appellants' new enlargement theory is accepted, however, the Department's well-established standards and understandings would no longer have any place in the enlargement analysis required by Idaho Code § 42-222(1). In transfers involving overlapping or stacked water rights, the Appellants' theory would often reduce the enlargement analysis to a simple review of the elements and conditions of the subject water right. *See Appellants' Brief* at 19 ("This should end the inquiry").

The practical ramifications of such a change include the potential for significantly increasing ground water diversions from the ESPA. *See* A.R. 0666 ("Duffin's new approach to enlargement, if adopted by the Department, could have far-reaching effects."). For example, as the *Final Order* pointed out, approximately 27,000 acres within the service boundary of the Aberdeen-Springfield Canal Company have ground water rights that overlap with the company's surface water rights. *Id.* "The vast majority" of these overlapping ground water rights—more than 23,000 acres—were decreed *without* the type of "express conditions" necessary to authorize consideration of the overlap under the Appellants' theory. *Id.*; *see Appellants' Brief* at 1, 14, 24, 36-37 (referring to "express condition" or "express conditions").

Under the Appellants' theory, the lack of such conditions will "end the [enlargement] inquiry" regarding proposals to change the place of use for these water rights. *Appellants' Brief* at 18-19. Thus, these overlapping or stacked ground water rights could be transferred to new places of use without any consideration of the "relationship between" the overlapping surface water and ground water rights, including whether the total acreage irrigated and amount of water

diverted under both water rights would increase as a result of the transfer. *Barron*, 135 Idaho at 419-20, 18 P.3d at 224-25. This approach would not be limited to overlapping water rights within ASCC's service boundary, but would apply across the entire ESPA, and indeed all of Idaho. The Appellants' theory thus opens the door to a "vast expansion" in irrigated acreage and ground water diversions on the Eastern Snake Plain, A.R. 0666-67, and other water-limited areas. The district court also implicitly recognized this potential outcome. *See* C.R. 00235 ("Like a new appropriation of water, the transfer would increase the burden on the aquifer for the reasons discussed in the enlargement analysis").[22]

B. Accepting The Appellants' Arguments Would Lay The Legal Foundation for Far-Reaching Changes in Licensing, Decreeing, and Administering Water Rights in Idaho.

Accepting the Appellants' new theory of enlargement would also lay the legal foundation for fundamentally altering many other aspects of water rights administration. The premise of the Appellants' "water right interpretation" argument is that water right licenses and decrees contain a "'*complete and exclusive statement*'" of all limitations on the water right, and any restrictions on the use of a water right "*must necessarily be express*" in the license or decree itself. *Appellants' Brief* at 18, 20 (citation omitted) (italics and underlining added). This premise

[22] There is no merit in the Appellants' contention that "there will be no change in effect to the ESPA in the exercise of 35-7667 at the proposed new place of use." *Appellants' Brief* at 26. This contention is contrary to the undisputed facts in the record, for reason discussed previously. *Supra* pages 11-14.

sharply diverges from established Idaho law.

Idaho water law is based on the prior appropriation doctrine. Idaho Const. Art. XV § 3; *see also Drake v. Earhart*, 2 Idaho 750, 753, 23 P.541, 542 (1890) (describing "prior appropriation" as "the settled law"). Many essential principles of the prior appropriation doctrine as established by Idaho law are not expressly stated in all (or even most) water right licenses or decrees. For instance, most water right licenses and decrees do not recite the well-prohibition against wasting water. *See Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900) ("It is the policy of the law to prevent the wasting of water."). Most water right licenses and decrees also do not recite the restriction against using any more water than required for the authorized beneficial use, even if the water right is licensed or decreed for a larger quantity. *See Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207, 252 P. 865, 867 (1926) ("The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it. . . . No person is entitled to use more water than good husbandry requires."). Most water right licenses and decrees do not even include provisions expressly restricting use of the water right when necessary to protect senior-priority water rights. *See* Idaho Code § 42-607 ("It shall be the duty of said watermaster . . . to shut and fasten . . . the headgates or controlling works for the diversion of water . . . in order to supply the prior rights of others").[23]

[23] Even the basic principle that "first in time is first in right" often is not stated or recognized in water right licenses and decrees. Rather they simply define a "priority date." But that is not the same as "expressly" authorizing curtailment in order to protect senior-priority water rights. *See Appellants' Brief* at 20 (arguing that restrictions on the use of water rights "*must necessarily be express*" in the license or decree itself) (italics and underlining added).

The obvious reason that these restrictions and limitations often are not expressly stated in water right licenses or decrees is because they are implied into every water right as a matter of law under Idaho's prior appropriation doctrine. *See, e.g., In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013) ("The prior appropriation doctrine is comprised of two bedrock principles—that the first appropriator in time is the first in right and that water must be placed to a beneficial use."); *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 113, 157 P.3d 600, 607 (2007) ("Beneficial use is enmeshed in the nature of a water right"). These aspects of the prior appropriation doctrine are binding on all water right holders and apply in water rights administration, even if they are not "expressly" recited in water right licenses and decrees.

This principle is explicitly recognized in the SRBA's *Final Unified Decree*. *See In re SRBA, Final Unified Decree* at 13 (Idaho 5th Jud. Dist.) (Aug. 25, 2014) ("The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state, and tribal law") (underlining added). This Court implicitly recognized the same principle in *American Falls Reservoir District No. 2 v. IDWR,* 143 Idaho 862, 154 P.3d 433 (2007), another case in which it was argued that consideration of facts or legal principles not stated within the four corners of a water right decree would constitute a "re-adjudication" of the water right. *See* 143 Idaho at 877, 154 P.3d at 448 ("reasonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication."); *id*. at 880, 154 P.3d at 451 (rejecting an assertion that irrigators "should be permitted to fill their entire storage water right,

regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights" as "simply not the law of Idaho.").

Thus, it is directly contrary to well-established Idaho law for the Appellants to assert that a water right license or decree is a "'complete and exclusive statement'" of all limitations on the water right, and that any restrictions on the use of a water right "must necessarily be express" in the license or decree itself. *Appellants' Brief* at 18, 20 (citation omitted). Adopting such a theory would have the effect of requiring that all future water right license and decrees issued in Idaho must include not only the statutorily required elements, Idaho Code §§ 42-202, 42-219, 14-1411(2), 42-1412(6), but must also expressly recite all the possible scenarios in which the use of the water right might be restricted or limited in the future. "Administering a water right is not a static business," *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 414, 958 P.2d 568, 571 (1997), however, and it is impractical, if not well-nigh impossible, to envision every possible application of Idaho's prior appropriation at the time a water right is licensed or decreed.

Adopting the Appellants' theory would also effectively overrule many of this Court's decisions regarding water rights administration, or at least cast significant doubt upon them. The *AFRD2* decision, for instance, states that "[s]omewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director." *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 880, 154 P.3d at 451. Another example is this Court's

decision approving the use of a "baseline methodology" in conjunctive administration. *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho at 648-53, 315 P.3d at 836-41. Both of these decisions—and these are just two obvious examples—would be effectively overruled if this Court were to accept the Appellants' theory that a water right license or decree is a "'complete and exclusive statement'" of all limitations on the water right, and that any restrictions on the use of a water right "must necessarily be express" in the license or decree itself. *Appellants' Brief* at 18, 20 (citation omitted).

Finally, accepting the Appellants' theory would throw the administration of existing water rights into disarray, because water rights have been licensed and decreed with the understanding that all principles of Idaho's prior appropriation doctrine apply, even though they are not expressly recited within the license or decree. Any future administration action regarding such water rights would be limited by what is expressly stated within the four corners of the license or decree, and open to legal challenge on grounds that the license or decree did not expressly authorize the action taken.

There is no merit in the Appellants' argument that "it would constitute serious turmoil and confusion for water right holders" if the Appellants' theory of water rights is not adopted. *Appellants' Brief* at 20. Idaho statutes and decisions of this Court put all water users on notice that all of the principles of Idaho's prior appropriation doctrine apply in water rights administration, even if they are not "expressly" recited in water right license and decrees. *See* Idaho Code § 42-602 ("The director of the department of water resources shall distribute water in

water districts in accordance with the prior appropriation doctrine."); *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) (same). Idaho water right holders are charged with knowledge of the prior appropriation doctrine as established by Idaho law. *See Wilson v. State*, 133 Idaho 874, 880, 993 P.2d 1205, 1211 (Ct. App. 2000) ("it is axiomatic that citizens are presumptively charged with knowledge of the law once such laws are passed").

VII. THE DEPARTMENT IS ENTITLED TO AN AWARD OF ATTORNEYS FEES.

The Department is entitled to an award of reasonable attorney's fees pursuant to Idaho Code § 12-117(1). This statute states that "in any proceeding involving as adverse parties a state agency . . . the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees . . . if it finds that the nonprevailing party acted without a reasonable basis in fact or law." The Appellants' arguments demonstrate that they did not have a reasonable basis in fact or law for filing this appeal.

As previously discussed, a number of the key factual assertions in the Appellants' arguments are clear mischaracterizations of undisputed facts established in the record. The Appellants repeatedly asserted, for instance, that the hearing officer read or implied a new "element" in the license for water right 35-7667, and either ignored or failed to "interpret" the plain language of the license. The hearing officer's analysis, however, did not read a new element into the license but rather recognized and interpreted the existing elements.

The Appellants also repeatedly asserted that there will be no increase in the amount of water diverted under water right 35-7667 if the Application is approved, and that approving the

Application will not increase the burden on the ESPA. The undisputed facts and Appellants' admissions demonstrate, however, that both ASCC shares and water right 35-7667 will be fully used every year if the Application is approved, even though that has never been true in the past. Approving the Application would result in a significant increase in diversions and consumptive use, regardless of whether the analysis focuses on both the ASCC shares and water right 35-7667, or focuses solely on water right 35-7667.

The Appellants also asserted that the *Transfer Memo* and the Peppersack testimony prove the Department does not consider overlapping or stacked water rights in an enlargement analysis under Idaho Code § 42-222(1) unless the subject water right has an express condition combining it with the overlapping or stacked water rights. The plain language of the *Transfer Memo* and the Peppersack testimony demonstrate that the opposite is true: the Department has always considered overlapping or stacked water rights in the enlargement analysis required by Idaho Code § 42-222(1), regardless of whether there are express conditions combining the water rights.

The Appellants also made facially implausible legal arguments. The Appellants essentially argued that the terms "original right" and "original water right" in Idaho Code § 42-222(1) require a court to ignore related statutory language that unambiguously authorizes consideration of overlapping or stacked water rights, and to strictly confine the enlargement analysis to the elements of the subject water right. The Appellants also argued that under the "water right interpretation" cases and other decisions of this Court, a water right license or decree is the complete and exclusive statement of restrictions or limitations on the use of the water right, and all restrictions or limitations on the use of the water right must be expressly

stated within the license or decree. The Appellants further argued that the license for water right 35-7667 includes an unqualified, unconditional entitlement to have the water right moved to a new place of use and be fully exercised each and every year, regardless of the fact that it was developed and used exclusively to irrigate the existing place of use when the ASCC water was not used for this purpose.

In this case the Appellants did not raise an issue of first impression, and did not make a good faith argument for extension of the law. As explained in this brief, the Appellants seek to have this Court adopt a new interpretation of Idaho Code § 42-222(1) that is at odds with *Barron*. The Appellants also seek to have this Court adopt a new theory of "interpretation" of water right licenses and decrees that flies in the face of Idaho's prior appropriation doctrine, and which if adopted would overturn fundamental principles of Idaho water law.

All this, simply so the Appellants can move water right 35-7667 to place of use other than the one for which it was perfected, expand their irrigated acreage, and divert more water than they have previously. The Appellants did not have a reasonable basis in fact or law for filing this appeal. The Department is therefore entitled to an award of reasonable attorney fees. Idaho Code § 12-117(1).

CONCLUSION

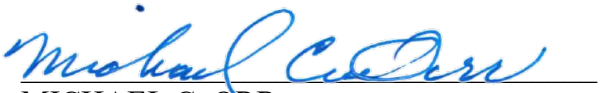
Approving the Application would enlarge the use of water right 35-7667. The Appellants' arguments to the contrary mischaracterize the record and are contrary to Idaho law. If accepted, the Appellants' new theory of enlargement would require this Court to overrule *Barron* and ignore the plain language of Idaho Code § 42-222(1), would open the door to a vast

expansion of irrigated acreage on the Eastern Snake River Plain, and would lay the foundation for fundamental changes in the licensing, adjudication, and administration of Idaho water rights. The Department respectfully requests that this Court affirm the decision of the district court.

RESPECTFULLY SUBMITTED this 21st day of September, 2021.

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division



MICHAEL C. ORR
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September 2021, I caused to be served true and correct copies of the foregoing on the persons listed below by the indicated methods:

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ADDENDUM 1

West's Idaho Code Annotated
Title 42. Irrigation and Drainage--Water Rights and Reclamation
Chapter 2. Appropriation of Water--Permits, Certificates, and Licenses--Survey (Refs & Annos)

I.C. § 42-222

§ 42-222. Change in point of diversion, place of use, period of use, or nature of use of water under established rights--Forfeiture and extension--Appeals

Effective: July 1, 2020

Currentness

(1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence. For applications proposing to change only the point of diversion or place of use of a water right in a manner that will not change the effect on the source for the right and any other hydraulically-connected sources from the effect resulting under the right as previously approved, and that will not affect the rights of other water users, the director of the department of water resources shall give only such notice to other users as he deems appropriate.

When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.

When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use.

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

(2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code. The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.

(3) Upon proper showing before the director of the department of water resources of good and sufficient reason for nonapplication to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years.

(4) Application for an extension shall be made before the end of the five (5) year period upon forms to be furnished by the department of water resources and shall fully describe the right on which an extension of time to resume the use is requested and the reasons for such nonuse and shall be accompanied by the statutory filing fee; provided that water rights protected from forfeiture under the provisions of section 42-223, Idaho Code, are exempt from this requirement.

(a) Upon the receipt of such application it shall be the duty of the director of the department of water resources to examine the same and to provide notice of the application for an extension in the same manner as applications under section 42-203A, Idaho Code. The notice shall fully describe the right, the extension which is requested and the reason for such nonuse and shall state that any person desiring to object to the requested extension may submit a protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, to the director of the department of water resources within ten (10) days of the last date of publication.

(b) Upon receipt of a protest it shall be the duty of the director of the department of water resources to investigate and conduct a hearing thereon as in this chapter provided.

(c) The director of the department of water resources shall find from the evidence presented in any hearing, or from information available to the department, the reasons for such nonuse of water and where it appears to the satisfaction of the director of the department of water resources that other rights will not be impaired by granting an extension of time within which to resume the use of the water and good cause appearing for such nonuse, he may grant one (1) extension of five (5) years within which to resume such use.

(d) In his approval of the application for an extension of time under this section the director of the department of water resources shall set the date when the use of water is to be resumed. Sixty (60) days before such date the director of the department of water resources shall forward to the applicant at his address of record a notice by certified mail setting forth the date on which the use of water is to be resumed and a form for reporting the resumption of the use of the water right. If the use of the water has not been resumed and report thereon made on or before the date set for resumption of use such right shall revert to the state and again be subject to appropriation, as provided in this section.

(e) In the event the director of the department of water resources determines that a proposed extension of time within which to resume use of a water right shall not be approved as provided in this section, he shall deny same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

(5) Any person or persons feeling themselves aggrieved by the determination of the department of water resources in approving or rejecting an application to change the point of diversion, place, period of use or nature of use of water under an established right or an application for an extension of time within which to resume the use of water as provided in this section, may, if a protest was filed and a hearing held thereon, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If no protest was filed and no hearing held, the applicant may request a hearing pursuant to section 42-1701A(3), Idaho Code, for the purpose of contesting the action of the director and may seek judicial review of the final order of the director following the hearing pursuant to section 42-1701A(4), Idaho Code.

Credits

S.L. 1903, p. 223, § 11; S.L. 1905, p. 27, § 1; S.L. 1907, p. 507, § 1; S.L. 1915, ch. 34, § 1; S.L. 1917, ch. 166, § 1; S.L. 1921, ch. 146, § 1; S.L. 1933, ch. 193, § 1; S.L. 1943, ch. 53, § 2; S.L. 1945, ch. 63, § 1; S.L. 1969, ch. 303, § 2; S.L. 1980, ch. 238, § 6; S.L. 1981, ch. 147, § 3; S.L. 1982, ch. 202, § 1; S.L. 1986, ch. 313, § 5; S.L. 1988, ch. 153, § 1; S.L. 1990, ch. 141, § 5; S.L. 1994, ch. 64, § 3; S.L. 1996, ch. 297, § 5; S.L. 1996, ch. 333, § 1; S.L. 1997, ch. 373, § 2; S.L. 2000, ch. 85, § 1; S.L. 2003, ch. 298, § 3; S.L. 2004, ch. 62, § 1. Amended by S.L. 2020, ch. 296, § 1, eff. July 1, 2020.

Codifications: R.C. 1909, § 3264; C.L. 1919, § 3264; C.S. 1919, § 5582; I.C. § 41-216.

Notes of Decisions (179)

Statutes and Constitution are current with Chapters 1 to 364 and S.J.R. No. 102 of the 2021 First Regular Session of the 66th Idaho Legislature, which convened on Monday, January 11, 2021.

End of Document

ADDENDUM 2

IDAHO LAW REVIEW

COLLEGE OF LAW
UNIVERSITY OF IDAHO

ARTICLES

COMMENTS

NEW DEVELOPMENTS

Volume 27 1990-1991 Number 2

INJURY AND ENLARGEMENT IN IDAHO WATER RIGHT TRANSFERS

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I. INTRODUCTION

The Snake River Basin Adjudication (SRBA) is an action to determine existing rights to water from the Snake River Basin in Idaho.[1] The boundaries of the basin include approximately 87% of the state of Idaho (all or part of thirty-eight of Idaho's forty-four counties), and the SRBA is expected to result in the determination of approximately 140,000 claims to water rights. Approximately 90,000 claims to water rights appropriated under state law have been filed with the Idaho Department of Water Resources (IDWR), and the State of Idaho and the United States are engaged in negotiations of the federal reserved right claims.[2]

IDWR is required to file a report with the district court containing IDWR's recommendations as to water rights appropriated under state law and abstracts of claims to water rights reserved under federal law.[3] IDWR will be filing the reports on a sub-basin basis, with forty-three reports to be filed over an estimated five-year period beginning in mid-1990. A period of time is allowed for filing objections to the reports, followed by a period of time for filing responses to the objections; the objections then proceed to trial singly or in groups where the objections raise related issues.[4] The adjudication statute provides for prompt entry of a number of partial decrees, beginning with entry of a

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1. IDAHO CODE § 42-1406A (1990). The SRBA was commenced by order of the district court on November 19, 1987.

2. A negotiated agreement of federal reserved rights may be filed in lieu of a notice of claim in a general adjudication of water rights pursuant to IDAHO CODE § 42-1409(6) (1990).

3. IDAHO CODE § 42-1411 (1990). The abstract may summarize the claim or negotiated agreement but may not "change in any substantive manner the claimed or negotiated water right." *Id.* § 42-1411(3).

4. *Id.* § 42-1412.

partial decree of uncontested matters shortly after the end of the response period.[5] Additional partial decrees that are subsequently entered as objections are tried and the contested rights are determined.[6]

The magnitude of the SRBA and the staging of the adjudication process will provide Idaho courts with a steady stream of water law issues over the next seven years. The claims filed in the SRBA raise issues spanning the spectrum of state and federal water law, particularly the spectrum of issues relating to changes in use of water rights.

Beginning in 1969, any person who desired to make a change in use of a water right was required to obtain IDWR approval prior to making the change; IDWR was required to approve the proposed change, in whole or in part or on conditions, if the proposed change met the standards set forth in the statute.[7] Many of the water rights claimed in the SRBA include changes in use made prior to the adoption of the statute. In fact, many include changes made after adoption of the statute without obtaining the required approval. Recent legislation allows rights to be decreed in the SRBA, including changes in use made without the required approval, if the change meets the substantive requirements of the change-in-use statute.[8]

A variety of issues under the general category of change in use will arise in the SRBA. These issues include: (1) the different types of change in use, such as change in source, point of diversion, purpose of use, place of use and season of use; (2) issues as to special types of appropriators, such as cities, water delivery organizations, state and federal governments and Indian tribes; (3) issues as to special types of water, such as developed water, salvaged water, storage water and waste water; and (4) issues as to loss of water rights.

Many Idaho lawyers, including many who do not regularly practice in the area of water law, will likely become involved in water right controversies as the SRBA proceeds to the objection stage of the adjudica-

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5. *Id.*

6. *Id.*

7. 1969 Idaho Sess. Laws 905, codified with subsequent amendments at IDAHO CODE § 42-222 (1990). A statute providing for approval of changes in use by IDWR was first enacted in 1903 and amended many times afterwards, but administrative approval was not clearly made mandatory for all water rights until the 1969 amendment. 1903 Idaho Sess. Laws 223.

8. IDAHO CODE § 42-1416A (1989) allows water rights that have been changed prior to commencement of a general adjudication without IDWR approval to be claimed as changed and to be recommended by the Director of IDWR and decreed by the court as changed if the change meets the substantive requirements of IDAHO CODE § 42-222. Proposed changes and "accomplished" changes occurring after commencement of a general adjudication remain subject to the procedural requirements of section 42-222 as well as the substantive requirements.

tion. The purpose of this article is to provide an overview of changes in use of water rights in Idaho, noting both the frontier issues and the settled law that provides the framework for the frontier issues.[9]

Changes in use will continue to be a major issue after the SRBA is completed. Indeed, one of the expected benefits of the SRBA is that water rights will be more transferable, since one of the impediments to transfer is the need to first determine the status and extent of the right sought to be changed.[10] This is particularly true in Idaho, where, until 1963 with respect to ground water[11] and 1971 with respect to surface water,[12] water rights could be established by actual diversion and use without any permit or license requirement.[13]

II. RIGHT TO CHANGE

It has been held that, absent injury, the right to make a change in use of a water right is inherent in the constitutional right of property ownership and that the statute setting forth the procedure and standards for changes in use neither adds to nor detracts from existing

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9. Reference is made in several footnotes to Colorado water law cases because Colorado is an appropriation doctrine state with a well-developed body of case law regarding water right issues. *See generally* G. VRANESH, COLORADO WATER LAW (1987). The one major difference between Colorado and Idaho water law is that Colorado has a wholly judicial system for the appropriation and determination of water rights, while Idaho has a system that is partly judicial and partly administrative. *See generally* COLO. REV. STAT. tit. 37, ch. 92; IDAHO CODE tit. 42, ch. 2 & 14. Reference is made to some notable cases from other appropriation doctrine states; this article does not, however, offer a comparative summary of the law of each of the western states as to each issue considered. For an overview of the law governing changes in use of six of the western states, *see generally* 31 ARIZ. L. REV. 687-905 (1989).

10. A transfer of a water right does not necessarily give rise to a change-in-use issue. Where a water right is transferred along with the land to an owner who intends to continue the same use of the land and the water, there is no change-in-use issue. However, the land and the water right may be transferred to an owner who intends to use the water at a different place or for a different purpose, or the water right alone may be transferred to an owner who intends to use the water at a different place or for a different purpose, both of which often occur when municipalities acquire irrigation rights. Under Idaho law, the water right may be conveyed separately from the land on which it is used, but there is a rule of construction which deems that the water right passes with the land when the deed is silent and a mutual, contrary intent is not clearly shown. Koon v. Empey, 40 Idaho 6, 19, 231 P. 1097, 1102 (1924).

11. 1963 Idaho Sess. Laws 623, codified with subsequent amendments at IDAHO CODE § 42-229 (1990).

12. 1971 Idaho Sess. Laws 843, codified with subsequent amendments at IDAHO CODE § 42-201 (1990).

13. 1903 Idaho Sess. Laws 223. A permit and license statute for the appropriation of water was initially enacted in 1903 and amended many times afterwards, but administrative approval of appropriations was not clearly made mandatory until much later.

rights.[14] It therefore appears that the right to change is a constitutional right much like the constitutional "right to appropriate," although the right to change is not expressly stated in the Idaho constitution.[15]

The state's authority to regulate the appropriation, diversion and use of water is well established.[16] Historically, the state has exercised its regulatory authority over changes in use of water rights through Idaho Code section 42-222 which first sets forth the procedure for obtaining IDWR approval of changes in use. The statute then establishes the substantive standard for when such approval will be granted, stating that the director shall approve the proposed change in whole, in part, or upon conditions, provided that:

> [1.] no other water rights are injured thereby, [2.] the change does not constitute an enlargement in use of the original right, and [3.] 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 Idaho Code section 42-203A(5); [4.] except 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.[17]

The first two criteria, no injury and no enlargement, are primarily legal criteria. They are a codification of a considerable body of case law and are included in the analysis below. The last two criteria, the "public interest criteria," are primarily policy criteria. They are a recent development in water law in the western states, and the author refers the reader to other excellent publications addressing the public interest in water appropriations generally and changes in use particularly.[18]

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14. Hillcrest Irrigation District v. Nampa, 57 Idaho 403, 409, 66 P.2d 115, 117 (1937); First Security Bank v. State, 49 Idaho 740, 744, 291 P. 1064, 1065 (1930).

15. IDAHO CONST. art 15, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied . . . .").

16. *See* Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909); Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 P. 45 (1927); Twin Falls Canal Co. v. Huff, 58 Idaho 587, 76 P.2d 923 (1938); Ex rel. Tappan v. Smith, 92 Idaho 451, 444 P.2d 412 (1968); Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973); Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1977).

17. IDAHO CODE § 42-222(1) (1990).

18. *See generally* Grant, *Public Interest Review of Water Right Allocations and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L.J. 681 (1987); Johnson and DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 NAT. RES. J. 347 (1989). It may be appropriate to note, however, that the public interest criteria may be applied differently to existing changes claimed in an adjudication, as opposed to proposed changes pursuant to the permit statute. In some circumstances, restraining an accomplished change may be substantially more costly to the appropriator than restraining a proposed change, in which case the public interest concerns may have to be weightier to convince an administrative or judicial decision-maker to restrain the change.

III. BURDEN OF PROOF

Is the burden of proof on the appropriator making the change to show no injury, or is the burden of proof on objectors to show injury?

There is no Idaho case that clearly states who has the burden of proof in a proceeding involving a change in use of a water right. The general rule in civil proceedings is that the burden of proof is on the party seeking affirmative relief.[19] Once the party seeking affirmative relief has made a prima facie case, the adverse party has a burden of going forward with evidence to refute the case.[20] Nonetheless, the ultimate burden remains on the party seeking affirmative relief to establish his or her case by a preponderance of the evidence.[21]

Applying these general rules of Idaho law to changes in use of water rights, the burden of proof should be on the appropriator making the change in use to show non-injury, since it is the person who is making the change who is seeking administrative or judicial relief in the form of recognition of the change. However, once the claimant of the change has made a prima facie case of no-injury, then the burden shifts to the party claiming injury to go forward with evidence of the specific injury alleged. The ultimate burden of proving non-injury would remain, however, with the appropriator making the change.[22]

IV. CONDITIONS ON CHANGES

As noted above, in Idaho, the right to make changes in use of a water right, absent injury, is inherent in the rights of ownership of property. In other words, the right to make changes in use is a constitutional right, and Idaho's change-in-use statute allows the director to approve or deny proposed changes, approve them in part, or approve them subject to conditions. Colorado has taken the constitutional right to change, the common-law rules governing burden of proof and a statute allowing approval of changes subject to conditions, mixed them to-

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19. Woodruff v. Butte and Market Lake Canal Co., 64 Idaho 735, 740, 137 P.2d 325, 327 (1943).

20. Harman v. Northwestern Mutual Life Insurance Co., 91 Idaho 719, 721, 429 P.2d 849, 851 (1967).

21. *See* Reddy v. Johnston, 77 Idaho 402, 407, 293 P.2d 945, 948 (1956); Bongiovi v. Jamison, 110 Idaho 734, 739, 718 P.2d 1172, 1177 (1986).

22. The rules as to burden of proof in civil cases generally were applied in this manner in cases involving changes in use of water rights in Colorado and New Mexico. *See* Wagner v. Allen, 688 P.2d 1102, 1108 (Colo. 1984); Ensenada Land and Water Ass'n. v. Sleeper, 107 N.M. 494, 499, 760 P.2d 787, 792 (Ct. App. 1988), *cert. quashed* 107 N.M. 413, 759 P.2d 200 (1988).

gether and come up with a rule which states that an appropriator is entitled to change the use of the water right if the appropriator can show no injury or can show that the change can be conditioned to prevent injury.[23] No case in Idaho has spelled this out the way the Colorado courts have, but a similar result could be reached under Idaho law.

V. STANDING

In Idaho, a junior appropriator has no right to complain of a change that occurred prior to the junior's appropriation.[24] Thus, if an appropriator with a 1930 priority makes a change in 1940 and if there are no appropriators with priorities between 1930 and 1940, there is no potential for injury to *junior* appropriators because there are no juniors with standing to challenge the change.

The injury or enlargement analysis is generally not concerned with injury to senior appropriators because seniors are protected by their priorities. If the junior makes any use that deprives a senior of water, the senior can demand that the junior's use be shut off to provide water to the senior, regardless of whether the use is original or not. Nonetheless, to the extent that a senior appropriator claims injury resulting from a junior's change, against which the senior's priority is insufficient protection, the senior appropriator should have standing to raise the issue.

VI. DETERMINING WHEN CHANGE HAS OCCURRED

There are several cases in Idaho that address the issue of when a change has in fact occurred.[25] All of these cases involve disputes as to ownership of the water right, where the first claimant asserts that the water right is appurtenant to the original place of use (now owned by the first claimant), and the second claimant asserts that the water right is appurtenant to a new place of use (now owned by the second claimant).[26] In such a dispute, the burden of proof is on the person claiming

23. Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064, 1068 (Colo. 1981).

24. Hall v. Blackman, 22 Idaho 539, 542, 126 P. 1045, 1047 (1912).

25. Harris v. Chapman, 51 Idaho 283, 5 P.2d 733 (1931); Federal Land Bank v. Union Central Life Insurance Co., 51 Idaho 490, 6 P.2d 486 (1931) [hereinafter *Federal Land Bank I*]; Howard v. Cook, 59 Idaho 391, 83 P.2d 208 (1938); Federal Land Bank of Spokane v. Union Central Life Insurance Co., 54 Idaho 161, 29 P.2d 1009 (1934) [hereinafter *Federal Land Bank II*].

26. Duplicate claims filed in the SRBA (where the same right is claimed by different claimants) give rise to a number of ownership issues, including the issue as to when a change has occurred.

that the right was changed to show that the person alleged to have made the change owned the water right and intentionally transferred all or part of the right to a new tract.[27] Where the two parcels were originally in common ownership, the general use of water by the owner on adjoining parcels is not sufficient to show an intent to transfer.[28]

VII. SPECIAL CASES

A. Water Delivery Organizations

There are a variety of water delivery organizations and other legal arrangements under which a water user can receive water. One example is shareholders of a mutual canal company. There, the canal company holds the water right, and the shareholders hold shares which entitle them to delivery of a certain portion of the water diverted under the company's water right. Another example is Bureau of Reclamation contractors who receive water from federal reclamation projects under contracts that provide for repayment of at least some of the costs of construction, operation and maintenance of the project.[29] Yet another example is persons who receive water from an irrigation district[30] and who pay assessments to cover the irrigation district's costs. Finally, a water user can receive water for a fee as a customer of a city or water utility company.

The right of these water users to make changes in use has been specifically upheld, including mutual canal company shareholders,[31] entrymen on Carey Act projects[32] and users of water from carrier-ditch companies.[33] However, if the water right sought to be changed is repre-

27. *Federal Land Bank I*, 51 Idaho at 494, 6 P.2d at 487; *Howard*, 59 Idaho at 400, 83 P.2d at 212; *Federal Land Bank II*, 54 Idaho at 166, 29 P.2d at 1010 (1934).

28. *Federal Land Bank I*, 51 Idaho at 497, 6 P.2d at 488; *Howard*, 59 Idaho at 399, 83 P.2d at 212. A water right is real property, the conveyance of which must be in writing pursuant to Idaho's statute of frauds. IDAHO CODE §§ 55-101, 55-601 (1988 & Supp. 1990). The holding in these cases is probably a reflection of a general policy requiring clear evidence of an intent to convey real property before a conveyance will be recognized.

29. A special purpose local government, or a quasi-municipal corporation are often Bureau of Reclamation contractors.

30. *See generally*, IDAHO CODE §§ 43-101 - 43-119 (1990).

31. In Re Rice, 50 Idaho 660, 299 P. 664 (1931).

32. Sanderson v. Salmon River Canal Co., 34 Idaho 145, 199 P. 999 (1921).

33. Hard v. Boise City Irrig. and Land Co., 9 Idaho 589, 76 P. 331 (1904). The distinction between a mutual canal company and a carrier-ditch company is that a mutual canal company holds legal title to the water right, and the shareholder has a beneficial interest in a portion of the water right represented by her shares. A carrier-ditch company does not own the water right. Rather, it has a contract with the water right owner whereby the company maintains and operates the diversion works for a fee.

sented by shares in a mutual canal company or if the diversion works are owned by an irrigation district, then the person seeking the change is required to obtain the consent of the canal company or irrigation district prior to making the change, except as to lands which may be irrigated through the same system.[34] At least one other state qualifies the consent requirement by providing that it may not be unreasonably withheld.[35] There is no Idaho case directly on point; however, since the right of appropriators to make changes in use is recognized in Idaho subject to reasonable regulation by the state, it is likely that an Idaho court would reach a similar result in a case that properly raised the issue.

One question that remains is whether the rules are any different for Bureau of Reclamation contractors. Although the United States Supreme Court has not spoken on this particular issue, the Ninth Circuit, in *United States v. Alpine Land & Reservoir Co.*,[36] held that Nevada law applies to transfers of water rights from Bureau of Reclamation projects in Nevada, including the requirement that transfers must be approved by the Nevada State Engineer.[37] In that case, the court upheld the State Engineer's decision which approved certain applications submitted by Bureau of Reclamation contractors to transfer water rights from a Bureau of Reclamation project that lacked federal approval in accordance with the contract.[38] The court expressly stated, however, that the jurisdiction of the State Engineer arose by virtue of *federal* law.[39] Therefore, by virtue of the same federal law, Idaho water

34. IDAHO CODE § 42-108 (1990). This requirement was upheld against constitutional challenge in Johnston v. Pleasant Valley Irrigation Co., Ltd., 69 Idaho 139, 204 P.2d 434 (1949). However, a lateral ditch association (which did not own the water right) rule that prohibited a change in point of diversion without the association's consent was held contrary to the statute. This holding recognized the right of an appropriator to change the point of diversion, absent injury, on the basis that the only consent provision recognized by statute was for mutual canal companies and irrigation districts. Bishop v. Dixon, 94 Idaho 171, 174, 483 P.2d 1327, 1330 (1971).

35. *See* Ft. Lyon Canal Co. v. Catlin Canal Co., 642 P.2d 501, 509 (Colo. 1982).

36. 878 F.2d 1217 (9th Cir. 1989); *see also* Pyramid Lake Tribe of Indians v. Hodel, 878 F.2d 1215 (9th Cir. 1989). The federal court had appellate jurisdiction over the decision of the state engineer pursuant to stipulation and decree in U.S. v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th Cir. 1983), *cert. denied* 464 U.S. 863 (1983).

37. *Alpine Land*, 878 F.2d at 1223.

38. *Id.*

39. *Id.* (citing § 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 (1988), which provides, "Nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, . . . and the Secretary of the Interior in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .").

law should apply to changes in use of water rights from Bureau of Reclamation projects in Idaho.

B. Tribal Water Rights

The State of Idaho, the United States and the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation ("Tribes") have entered into a negotiated agreement[40] concerning the Tribes' surface and ground water right claims in the SRBA.[41] The agreement has been ratified by Congress and signed by the President. In April, 1991, the agreement was ratified by the Idaho Legislature and signed by the governor.

A major issue in the negotiations was changes in use of the reserved water rights which resulted in some notable provisions regarding future transfers of water rights. The agreement provides that none of the water rights may be "sold, leased, rented, transferred, or otherwise used" off the reservation, except for certain storage rights.[42] Storage rights from the Palisades Reservoir may be used anywhere in Upper Snake River Basin (above Milner Dam), and storage rights from the American Falls Reservoir may be used anywhere in the Snake River Basin.[43] The agreement also establishes a Shoshone-Bannock Water Bank to provide a mechanism for the rental of tribal storage rights.[44] Water rights may be transferred within the reservation so long as the transfer is to a beneficial use and does not exceed the maximum diversion rate and maximum annual volume of diversion and consumptive use set forth in the agreement.[45] Finally, if the Tribes desire to change or add a point of diversion or to change the period of use of a surface water right, the agreement provides for notice of the proposed change and requires any person objecting to the change to seek mediation before an "intergovernmental board" prior to seeking judicial relief.[46]

Idaho's adjudication statute expressly provides that negotiated agreements of federal reserved water right claims are to be filed in

40. The 1990 Fort Hall Indian Water Rights Agreement [hereinafter AGREEMENT].

41. Ratification by Congress should meet any applicable requirements of the Indian Non-Intercourse Act, which restricts the rights of Indian Tribes to sell, grant, lease, or convey its lands. *See* 25 U.S.C. § 177 (1988).

42. AGREEMENT at § 7.9.

43. *Id.*

44. *Id.*

45. *Id.* at § 7.5.

46. *Id.* at § 7.8. The intergovernmental board is composed of the Chairman of the Fort Hall Business Council, the Director of IDWR and the United States Secretary of Interior. *Id.* at § 9.2.

place of notices of claims in a general adjudication of water rights.[47] The agreement is then included, without substantive change, in the director's report and, absent objection or upon resolution of any objection, is decreed by the district court.[48]

C. Interstate Transfers

Diversion of water for out-of-state use is a hot political issue in Idaho, particularly with the recent speculation concerning long-distance diversions from the Columbia and Snake River Basins to California. Despite a popular protectionist sentiment, legislative efforts to restrict out-of-state water exports face a significant hurdle raised by the United States Supreme Court in *Sporhase v. Nebraska*.[49] The Court in *Sporhase* held that water is an article of commerce and that the dormant commerce clause prohibits any restrictions on the export of water that constitute an unreasonable burden on interstate commerce.[50] The Court struck down a requirement of Nebraska law that the state to which the water was to be exported grant reciprocal rights to export water to Nebraska.[51] Although most of the controversy has centered on new appropriations of water for out-of-state use, the issue may also arise in the context of transfers.

The Idaho legislature recently enacted a statute governing applications for permits for new appropriations and applications for transfer of existing water rights for use out-of-state.[52] The statute made these applications subject to the same procedures and standards as any other application for permit or transfer. This requirement is constitutional, since it "regulates evenhandedly to effectuate a legitimate local public interest."[53] However, the statute also requires that IDWR consider the following factors in ruling on an application:

> (a) The supply of water available to the state of Idaho; (b) The current and reasonably anticipated water demands of the state of Idaho; (c) Whether there are current or reasonably anticipated water shortages within the state of Idaho; (d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho; (e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and (f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.[54]

47. IDAHO CODE § 42-1409(6) (1990).
48. *Id.* §§ 42-1411(3) and 42-1412(8) & (9).
49. 458 U.S. 941 (1982).
50. *Id.* at 945.
51. *Id.* at 954.
52. IDAHO CODE § 42-401 (1990).
53. *Sporhase*, 458 U.S. at 954.

This language was clearly drafted in response to the following discussion in that portion of the *Sporhase* opinion which held that the Nebraska statute was not narrowly tailored to the legitimate purpose of conservation and preservation:

> If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demonstrably arid State might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water.[55]

It remains to be seen whether Idaho's "factors" constitute a reasonable burden on interstate commerce. Since the factors were drafted in the form of "considerations" rather than criteria, the success of any challenge may depend heavily on the evidence in the particular case and on the application of the factors to that evidence by IDWR in a manner that comports with a general conservation and preservation purpose, as opposed to a purpose of "preservation solely for the citizens of Idaho."[56]

VIII. INJURY GENERALLY

The fundamental premise underlying the no-injury rule is that a junior appropriator has a vested right to maintenance of stream conditions existing at and after the time of the junior's appropriation.[57] Therefore, a change by a senior appropriator will not be permitted

54. IDAHO CODE § 42-401(3) (1990).
55. *Sporhase*, 458 U.S. at 958.
56. For an argument that *Sporhase* applies only to appropriated and not unappropriated waters, *see generally* Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. R. 347 (1985).
57. Crockett v. Jones, 47 Idaho 497, 504, 277 P. 550, 552 (1929).

when changes to the stream conditions will injure the junior appropriator.[58]

Injury will result where a change makes a junior appropriator subject to a priority to which the junior was not previously subject[59] or where a change increases the burden on the stream or reduces the volume of water flowing in the stream.[60] The injury, however, must be to a water right[61] and must be real and substantial.[62]

Although the fundamental no-injury rule is the basis for the analysis of any change in use, the analysis varies considerably depending on the type of change. There are six basic types of change in use: change in source, change in point of diversion, change in manner of diversion, change in place of use, change in nature of use, and change in season of use. Each of these types of change in use is analyzed in the discussion below.

IX. CHANGE IN SOURCE

Is a change in source a new water right or should a change in source be evaluated using a change in point of diversion analysis? If the use of water from the new source is a new water right, then the water user must comply with the requirements for a new appropriation, which results in a new priority. If the use of water from the new source is a change in use, then the water user must comply with the requirements for a change in use; the right will retain the original priority but may be subject to conditions to prevent injury.

A purported change to a source that is not tributary to the original source must be considered a new appropriation. Therefore, a right that was established to the original source is a right only to the waters of that source and to other sources that provide a substantial supply of water to the original source.[63] Since the original right did not include any right to non-tributary sources of water, the use of water from a non-tributary source is a new appropriation. Therefore, a purported

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58. *Id.*

59. Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982).

60. Beecher v. Cassia Creek Irrig. Co., 66 Idaho 1, 8, 154 P.2d 507, 509 (1954).

61. Colthorp v. Mountain Home Irrig. District, 66 Idaho 173, 180, 157 P.2d 1005, 1008 (1945). Injury other than to a water right may be relevant, however, if the injury complained of comes within the recently enacted public interest criteria of IDAHO CODE § 42-222(1) (1990).

62. *Beecher*, 66 Idaho at 7, 154 P.2d at 509.

63. *See* United States v. Haga, 276 F. 41, 43 (D.C. Idaho 1921); Franklin Cub River Pumping Co. v. Le Fevre, 79 Idaho 107, 311 P.2d 763 (1957); Martiny v. Wells, 91 Idaho 215, 419 P.2d 470 (1966).

change to a source that is not a tributary to the original source must be considered a new appropriation.

With respect to a change to a tributary source, however, case law indicates that the change should be evaluated using a change in point of diversion analysis. In an early case, a junior appropriator on the mainstem below a fork sought an injunction against a senior appropriator who had a right to water on the first fork for use on certain lands and who started using water from the second fork for the same use on the same lands.[64] The junior argued that the senior had no right to water from the second fork. The court held that the junior had no cause for complaint because the junior was entitled to the full benefit of all waters left after use by senior, whether the senior took from the first fork or the second.[65]

Although the change-in-use statute does not specifically provide for changes in source, the statute does provide for changes in point of diversion.[66] Since a change in source necessarily includes a change in point of diversion and since the case law indicates that at least some changes in source should be treated as a change in point of diversion, the statute should not be interpreted as prohibiting changes in source.

A. Change from Surface to Ground Water

There is no Idaho case law addressing changes in point of diversion from surface water to ground water.[67] Applying the general rules applicable to changes in source, a purported change from a surface source to a non-tributary aquifer would be a new appropriation while a change from a surface source to a tributary aquifer would be evaluated as a change in use.[68]

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64. Saunders v. Robison, 14 Idaho 770, 95 P. 1057 (1908) (the issue was limited to a right to change the source of the water right; there was no further discussion as to injury or enlargement).

65. *Id.* at 775, 95 P. at 1058.

66. IDAHO CODE § 42-222 (1990) provides in part that "Any person, entitled to the use of water . . . who shall desire to change the point of diversion, place of use, period of use or nature of use . . . ."

67. In Colorado, the right to use a well as an alternate point of diversion of a surface water right, absent injury, is expressly recognized by statute. COLO. REV. STAT. § 37-92-301(B)(6) (1990). In New Mexico, however, the Templeton Doctrine allows a surface water appropriator to drill wells upstream into waters that are flowing to the stream above the appropriator's surface diversion, but the appropriator may not withdraw ground water that is flowing away from the surface source or flowing to the surface source below the appropriator's surface diversion. Brantley v. Carlsbad Irrig. District, 92 N.M. 280, 282, 587 P.2d 427, 429 (1978).

68. There is a rebuttable presumption that all water within a basin is tributary to the stream; Idaho courts have applied this presumption in cases where junior appropria-

The determination of whether there is injury will depend heavily on the hydrology of the aquifer, the surface water interconnection with the stream to which it is tributary and the location and priority of both junior ground water appropriators and junior stream appropriators. For example, if the stream is a losing stream (where water travels from the stream to the aquifer), then it might be assumed that the rate-of-loss from the stream would be no greater if the appropriator diverted from the aquifer instead of the stream. That assumption might be wrong, however, if the location of the new diversion results in an increase in seepage from the stream in a different stretch than where the diversion was previously located, particularly if the stretch where the increased seepage occurs is downstream from the original point of diversion. Also, depending on the rate at which the stream recharges the aquifer, the new ground water diversion will impact nearby junior ground water appropriators if the diversion of ground water depletes ground water faster than the stream recharges it, even with the water previously diverted by the senior appropriator. Since hydrologic data can be difficult and costly to obtain, the burden of proof is particularly significant for an appropriator who proposes to make a change in source from a stream to tributary ground water.[69]

B. Change from Ground Water to Surface Water

As noted above, a change from non-tributary ground water to a stream should be considered a new appropriation while a change from tributary ground water to a stream should be evaluated using the no-injury rule. In all but the most unusual circumstances, however, a change from tributary ground water to the stream to which it is tributary will result in injury to junior appropriators on the stream. The reason is that even if the surface water users are subject to the priorities of the tributary ground water users, the effect on the stream from the use of the ground water rights is not immediate; but if the water right is changed to the stream, then the effect is immediate, which in most instances will injure junior appropriators on the stream.

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tors have sought judgments declaring that their appropriations were not subject to senior priorities. Hill v. Green, 47 Idaho 157, 160, 274 P. 110, 111 (1928); Martiny v. Wells, 91 Idaho 215, 217, 419 P.2d 470, 472 (1966). It is questionable whether this presumption would apply when a senior appropriator, who has the burden of proving no injury, seeks a judgment that her source is tributary, in order to receive the benefit of her original priority on the new source.

69. *See generally* Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 LAND & WATER L. REV. 63 (1987).

C. Changes from One Sub-Basin to Another

A change from one sub-basin to another can include a change from one tributary to another tributary of the same stream, a change from a tributary to the mainstem, or a change from the mainstem to a tributary. The first step in the analysis, however, is to determine if the sources that are in fact tributary are nonetheless deemed separate.

1. Sources Administered Separately

It is possible for sources which are in fact tributary, such as two sub-basins of the same basin, to be deemed separate. Where the sources are deemed separate, then a change from one source to the separate source is analogous to a change from one source to a non-tributary source, so the use of water from the new source should be treated as a new appropriation rather than as a change in use.

Idaho's ground water statute requires conjunctive administration of surface and tributary ground water,[70] so surface and tributary ground water should not be treated as separate sources. Another statute, however, divides the Snake River Basin into two separate basins.[71] The statute provides in part:

> For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.[72]

Based on this statute, a change in point of diversion from the Snake River upstream from Milner Dam to a point of diversion downstream from Milner Dam should be treated as a new appropriation.

Some tributaries of the Snake River have historically been administered as separate pursuant to Idaho's water distribution statute, which provides for the creation of water districts for distribution of water from adjudicated sources.[73] The fundamental basis for the no-injury rule is protection of the junior from injurious changes to existing conditions. The historical administration of tributary sources as separate sources is an existing condition. It can therefore be argued that a purported change in source to a source historically administered as

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70. IDAHO CODE § 42-237a(g) (1990).
71. *Id.* § 42-203B(2).
72. *Id.*
73. *Id.* § 42-604.

separate should be treated as a new appropriation, though there is no Idaho case that directly addresses this issue.[74]

2. Change from One Tributary to Another Tributary

In most instances, a change from one tributary to another tributary of the same stream will result in injury to junior appropriators. If there are junior appropriators on the new tributary, either upstream or downstream, then these appropriators would be subject to a priority to which they were not previously subject. Although there is no Idaho case directly on point, this is consistent with the no-injury rule. As the Idaho Supreme Court stated in one recent case, "[p]riority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to the water right holder."[75]

Even if there are no junior appropriators on the new tributary, there may be injury to a junior appropriator on the mainstem below the tributary if use of the new tributary enables the appropriator to better fulfill his right than he could on the old tributary. In such cases, the appropriator is diverting water from the new tributary that would otherwise have been available to the junior appropriator on the mainstem. Such injury might be prevented if the change can be effectively conditioned to limit the change to the amount of water available at the old point of diversion. Although there is no Idaho case directly on point, this is consistent with the no-injury rule, which prohibits a change that decreases the volume of water in a stream to the injury of other appropriators.[76]

3. Change from Tributary to Mainstem

As with changes from one tributary to another, a change from a tributary to the mainstem will in most instances result in injury to junior appropriators. If the change is to a point of diversion on the mainstem above the confluence of the tributary and the mainstem, then there would be injury to junior appropriators on the mainstem above

74. There is a Colorado case in which it was held that an appropriator has no right to insist on conjunctive management of tributary surface sources where those sources have historically been administered as separate. Alamosa—La Jara Water Users Protection Association v. Gould, 674 P.2d 914 (Colo. 1983).

75. Jenkins v. State, Dept. of Water Resources, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982) (IDWR has jurisdiction to determine forfeiture issues in a change-in-use proceeding). *See* Harvey v. Davis, 655 P.2d 418 (Colo. 1982). Loss of water rights is further discussed below.

76. Beecher v. Cassia Creek Irrig. Co., 66 Idaho 1, 8, 154 P.2d 507, 509 (1944). *See* Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981).

the confluence because the junior appropriators would be subject to a priority to which they were not previously subject.[77]

If the change is to a point of diversion on the mainstem below the confluence of the tributary and the mainstem, then the appropriator would receive the benefit of flows from other upstream tributaries that he did not previously receive. This would result in injury to mainstem appropriators who previously did receive such flows. The change might be permissible if it could be effectively conditioned to limit the change to the amount of water available at the old point of diversion.[78] An argument could be made that no injury exists if the other tributaries are fully appropriated to the point that no water flows from the tributaries to the mainstem, but in fact, this would deprive the mainstem appropriators of the benefit of forfeiture or nonuse that they would otherwise receive.

4. Change from Mainstem to Tributary

Where the change is to a tributary upstream from the original point of diversion, the junior appropriators on the tributary were already subject to the right on the mainstem. Prior to the change, however, the appropriation on the mainstem would have been satisfied from more than one source. After the change, if junior water users have to be shut down to provide water to senior appropriators, then it is the tributary appropriators *only* who would bear the burden of reducing their diversions to satisfy the senior's appropriation. This additional burden on the junior appropriators on the tributary is an injury to those appropriators resulting from the change in source.[79]

Where the change is to a tributary downstream from the original point of diversion, the junior appropriators on the mainstream are not injured because they were already subject to the right on the mainstem. The junior appropriators on the tributary, however, were not previously subject to the right on the mainstem; consequently, any use of water at the new point of diversion would result in injury to junior appropriators on the tributary.

77. Junior appropriators below the confluence would already be subject to the right on the tributary.

78. Juniors downstream from the confluence would already be subject to the right on the tributary, but juniors upstream would not. This does not necessarily mean that all such changes would result in injury to upstream juniors because the upstream juniors should be protected by a condition limiting the change to the amount of water available at the old point of diversion.

79. *See Beecher*, 66 Idaho at 8, 154 P.2d at 509 (1944).

X. CHANGE IN POINT OF DIVERSION

Since an appropriator's right is measured at the point of diversion, junior appropriators will suffer injury from a change in point of diversion where more water is necessary to deliver the water right at the new point of diversion than at the old point of diversion.[80] Whether any particular change will result in injury depends heavily on the hydrology of the stream. A stream might be "gaining" because the water table is so high that tributary ground water is flowing into the stream and/or because springs in or near the course of the stream are augmenting its flow. A stream might be "losing" because the water table is so low that the surface flow is seeping away from the stream through porous soils and into the aquifer.

Whether any particular change will result in injury also heavily depends not only on the existence of junior appropriators but on their location (whether upstream from both the old and new points of diversion, downstream from both the old and new points of diversion, or between the old and new points of diversion).

A. Point of Diversion Moved Upstream on a Losing Stream

Generally, a change in point of diversion upstream on a losing stream will not injure juniors because they will bear the same burden as they did before. Further, the juniors will actually benefit because less water is required to supply the senior priority.

To illustrate, assume that Senior Appropriator A wants to move upstream from point A1 to point A2 and that A and Junior Appropriator B each have a right to ten cfs.[81] Also assume that the flow of the stream under natural conditions at each point of diversion is as shown below: a decrease of ten cfs in the stretch between each point of diversion.

```
stream---/------------/------------/--->
        30 cfs      20 cfs      10 cfs
        A2          B1          A1          (first scenario)
        B2          A2          A1          (second scenario)
        A2          A1          B3          (third scenario)
```

In the first scenario, Appropriator B's point of diversion is *between* Appropriator A's old diversion and her new diversion. At point A1, A receives ten cfs and B receives nothing. Because of the decrease in stream flow of 10 cfs between B1 and A1, it takes the full 20 cfs at

80. Crockett v. Jones, 42 Idaho 652, 659-60, 249 P. 483, 485 (1926).

81. The rate of flow of water is measured in cubic feet per second (cfs).

point B1 to deliver 10 cfs to point A1. At point A2, A and B both receive 10 cfs, because the 20 cfs remaining after A's diversion will deliver 10 cfs to point B1. The change actually benefits B.

In the second scenario, Appropriator B's point of diversion is *above both* Appropriator A's old and new diversions. At point A1, A receives 10 cfs and B receives nothing because it takes the entire 30 cfs available at point B2 to deliver 10 cfs to point A1. At point A2, both A and B receive 10 cfs because it only takes 20 cfs at point B2 to deliver 10 cfs to point A2. Again, the change actually benefits B.

In the third scenario, Appropriator B's point of diversion is *below both* Appropriator A's old and new diversions. At point A1, A receives 10 cfs and B receives nothing because the 10 cfs remaining at A1 is lost in the channel. At point A2, A receives 10 cfs and B still receives nothing because all the water remaining is still lost in the channel. B is neither benefitted nor injured.

One caveat to the above analysis should be noted. Generally, when junior diversions are shut off to provide water for a senior priority, junior appropriators are nonetheless allowed to continue diverting if cessation of the junior diversions would not cause water to reach the senior in an amount sufficient to make beneficial use.[82] However, if the senior appropriator moves upstream on a gaining stream, cessation of junior diversions may no longer be futile. Is this an injury to the junior appropriator? A Colorado case under similar circumstances deemed that the injury was *de minimus* and held that the benefit to the juniors outweighed the injury to the juniors.[83] Since Idaho law does not recognize *de minimus* injuries,[84] a similar result could be reached in Idaho.

B. Point of Diversion Moved Upstream on a Gaining Stream

Assume that Senior Appropriator A wants to move upstream from point A1 to point A2 and that A and B each have a right to 10 cfs. Assume also that the flow of the stream under natural conditions at each point of diversion is as shown below: an increase of 5 cfs in the stretch between each point of diversion.

82. Martiny v. Wells, 91 Idaho 215, 219, 619 P.2d 1130, 1133 (1966). When a senior appropriator demands that junior uses be shut off to supply the senior's priority, this is sometimes referred to as "calling the river." The rule that a senior cannot demand cessation of junior diversions if cessation would not produce a usable quantity of water at the senior's diversion is sometimes referred to as the "futile call rule."

83. CF & I Steel Corp. v. Rooks, 178 Colo. 110, 114, 495 P.2d 1134, 1136 (1972).

84. *Beecher*, 66 Idaho at 7, 154 P.2d at 509.

stream---/----------/----------/--->

5 cfs	10 cfs	15 cfs	
A2	B1	A1	(first scenario)
B2	A2	A1	(second scenario)
A2	A1	B3	(third scenario)

In the first scenario, Appropriator B's point of diversion is *between* Appropriator A's old diversion and her new diversion.[85] At point A1, A receives 10 cfs and B receives 5 cfs because although there will be only 5 cfs left at point B1, the gain in stream flow will still provide 10 cfs to A. At point A2, A receives 5 cfs and B still receives 5 cfs because of the gain in stream flow. There is no injury to B, but A loses the benefit of the gain in stream flow.

However, this only works if there is sufficient gain in the stream to make up for the water diverted by B. Now assume the flow of the stream at point A2 is 10 cfs, with a gain of 2 cfs in the stretch between each point of diversion. At point A1, A receives 10 cfs and B receives 4 cfs, because the 8 cfs left at point B1 plus the 2 cfs gain in the stream will be sufficient to supply A's senior priority. But at point A2, A receives 10 cfs and B only receives the 2 cfs gain in the stream. The change results in injury to B. Generally, therefore, a change in point of diversion on a gaining stream to a location upstream past a junior appropriator will result in injury to the junior appropriator, unless there is sufficient gain in the stream to supply the intervening junior the same as in the past. The change might be conditioned to avoid injury by providing that A only receives the amount of water available under his priority, either at the old point of diversion or the new point of diversion, whichever is less.

In the second scenario, Appropriator B's point of diversion is *above both* Appropriator A's old and new diversions. At point A1, A receives 10 cfs and B receives 5 cfs because even though there would be no water left at B's point of diversion, the gain in the stream would be sufficient to provide A with 10 cfs. At point A2, A receives 10 cfs and B receives nothing because the 5 cfs at point B2 plus the 5 cfs increase in the stream is necessary to provide A with 10 cfs. The change results in injury to B. Generally, therefore, a change in point of diversion upstream on a gaining stream below a junior appropriator will result in injury to the junior appropriator. The change might be conditioned to avoid injury by providing that A is not entitled to shut off B to make

85. This is the fact pattern addressed in Crockett v. Jones, 42 Idaho 652, 249 P. 483 (1926).

up for the gain in stream flow that A would have had at the original point of diversion.

In the third scenario, Appropriator B's point of diversion is *below both* Appropriator A's old and new diversions. At point A1, A receives 10 cfs and B receives 5 cfs because of gain in stream flow between point A1 and point B3. At point A2, A receives 5 cfs and B receives 10 cfs because of gain in stream flow between point A2 and point B3. There is no injury to B, but A loses the benefit of the gain in stream flow. Consequently, there is generally no injury to a junior appropriator when an upstream senior appropriator moves further upstream on a gaining stream because the person seeking to make the change is the only one that is injured.

C. Point of Diversion Moved Downstream on a Losing Stream

Assume that Senior Appropriator A wants to move downstream from point A1 to point A2 and that A and B each have a right to 10 cfs. Assume also that the flow of the stream under natural conditions at each point of diversion is as shown below: a decrease of 10 cfs in the stretch between each point of diversion.

stream---/----------/----------/--->

30 cfs	20 cfs	10 cfs	
A1	B1	A2	(first scenario)
B2	A1	A2	(second scenario)
A1	A2	B3	(third scenario)

In the first scenario, Appropriator B's point of diversion is *between* Appropriator A's old and her new diversion.[86] At point A1, A receives 10 cfs and B receives 10 cfs. At point A2, A receives 10 cfs and B receives 0 cfs because it takes the entire 20 cfs at point B1 to deliver 10 cfs to point A2. The change results in injury to B. Generally, therefore, a change in point of diversion downstream on a losing stream past a junior appropriator will result in injury to the junior appropriator. The change might be conditioned to avoid injury by providing that A is not entitled to shut off B to make up for the increase in loss in the stream.

In the second scenario, Appropriator B's point of diversion is *above both* Appropriator A's old and new diversions.[87] At point A1, A and B both receive 10 cfs, because the remaining flow is sufficient to deliver 10 cfs to point A1. At point A2, A receives 10 cfs and B receives

86. This fact pattern is addressed in Walker v. McGinness, 8 Idaho 540, 69 P. 1003 (1902).

87. This fact pattern is addressed in *Walker*, *id.*

nothing because it takes 30 cfs to deliver 10 cfs to A. The change results in injury to B. Therefore, a change in point of diversion downstream on a losing stream below a junior appropriator will generally result in injury to the junior appropriator. The change might be conditioned to avoid injury by providing that A is not entitled to shut off B to make up for the increase in loss in the stream.

In the third scenario, Appropriator B's point of diversion is *below both* Appropriator A's old and new diversions. At point A1, A receives 10 cfs and B receives nothing because the 20 cfs remaining at point A1 is lost in the stream channel. At point A2, A receives 10 cfs and B still receives nothing because the 10 cfs remaining at point A1 is lost in the stream channel. As a result, B is neither benefitted nor injured by the change. Generally, therefore, a change in point of diversion downstream on a losing stream above a junior appropriator will not result in injury to the junior appropriator because the burden of stream loss remains the same for the junior appropriator.

D. Point of Diversion Moved Downstream on Gaining Stream

Assume that Senior Appropriator A wants to move downstream from point A1 to point A2 and that A and B each have a right to 15 cfs. Assume also that the flow of the stream under natural conditions at each point of diversion is as shown below: an increase of 5 cfs in the stretch between each point of diversion.

```
stream---/-----------/-----------/--->
    5 cfs      10 cfs      15 cfs
    A1         B1          A2          (first scenario)
    B2         A1          A2          (second scenario)
    A1         A2          B3          (third scenario)
```

In the first scenario, Appropriator B's point of diversion is *between* Appropriator A's old and her new diversion. At point A1, A receives 5 cfs and B receives 5 cfs from the increase in stream flow. At point A2, A receives 15 cfs and B receives nothing because it takes the 10 cfs at point B1 plus the 5 cfs gain in stream flow to provide 15 cfs to point A2. The change results in injury to B. Therefore, a change in point of diversion downstream on a gaining stream past a junior appropriator will generally result in injury to the junior appropriator. The change might be conditioned to avoid injury by providing that B could not be shut off to provide A with the gain in stream flow between the original point of diversion and the proposed point of diversion that originally went to B.

In the second scenario, Appropriator B's point of diversion is *above both* Appropriator A's old and new diversions. At point A1, A receives 10 cfs and B receives nothing. At point A2, A receives 15 cfs and B still receives nothing. There is no injury to B. However, if there was a little more gain in the stream or if A moved a little farther downstream, B would benefit because the gain in the stream between point B2 and point A2 would be enough to meet A's right. Generally, therefore, when a senior appropriator moves further downstream on a gaining stream, there is either no injury to an upstream junior or the junior in effect receives the benefit of the gain in the stream.

In the third scenario, Appropriator B's point of diversion is *below both* Appropriator A's old and new diversions. At point A1, A receives 5 cfs and B receives 10 cfs from the gain in the stream. At point A2, A receives 10 cfs and B receives 5 cfs. The change, therefore, results in injury to B. However, the change might be conditioned so that B could not be shut off to provide A with the gain in the stream flow between the original point of diversion and the proposed point of diversion that originally went to B.

E. Change in Point of Diversion Upstream or Downstream: Stream Not Gaining or Losing

Although it is difficult to imagine a perfect balance of stream conditions, assume that Senior Appropriator A and Junior Appropriator B each have a right to 10 cfs and that the natural flow of the stream is 15 cfs. In this situation, a receives 10 cfs and B receives 5 cfs regardless of the position of their respective points of diversion. Therefore, there is generally no injury from a change in point of diversion on a stream that is neither gaining or losing.

F. Change in Point of Diversion of Ground Water

1. Injury to Ground Water Rights

The cases discussed below involve conflicts between senior ground water rights and junior ground water uses where the issue is injury to a senior. The same analysis applies to changes in use where the issue is usually injury to a junior but could involve injury to a senior.

Idaho Code section 42-226 provides:

> [W]hile the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriation of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director [of IDWR] . . . .

Idaho Code section 42-237a(g) further provides:

> Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

The first major case interpreting these sections of the Ground Water Act was *Baker v. Ore-Ida Foods, Inc.*[88] The court in that case held that 1) a ground water user is entitled to a reasonable pumping level, not the historic pumping level;[89] 2) determination of reasonable pumping levels is vested in the director of IDWR, and the director's findings are vested with a (rebuttable) presumption of correctness;[90] and 3) section 42-237a(g) forbids "mining" of the aquifer,[91] thus rejecting the argument that the aquifer can be mined to the average reasonable pumping level.[92]

There is an apparent inconsistency in ruling that a ground water user is entitled only to maintenance of a reasonable water level but that others cannot "mine" the aquifer to a reasonable pumping level. The appropriate resolution is that the no-mining standard applies to questions of injury to the aquifer as a whole while the reasonable pumping level standard applies to questions of interference by one well with another. Thus, interference may be enjoined where the interfering well reduces the water in the injured well below reasonable pumping levels even if use of the interfering well does not result in withdrawal of ground water beyond the average annual recharge rate of the aquifer as a whole. In *Briggs v. Golden Valley Land & Cattle Co.*,[93] a sequel to *Baker*, the court affirmed that mining results only where ground water is withdrawn at a rate which exceeds the *average* annual recharge rate.

Another issue is whether the reasonable pumping level limitation applies to small domestic wells.[94] In *Parker v. Wallentene*,[95] the court

88. 95 Idaho 575, 513 P.2d 627 (1973).
89. *Id.* at 584, 513 P.2d at 636.
90. *Id.*
91. *Id.* at 583, 613 P.2d at 635.
92. For more discussion of reasonable ground water pumping levels, *see generally*, Grant, *Reasonable Groundwater Pumping Levels Under the Appropriation Doctrine: The Law and Underlying Economic Goals*, 21 NAT. RES. J. 1 (1981); Grant, *Reasonable Groundwater Pumping Levels Under the Appropriation Doctrine: Underlying Social Goals*, 23 NAT. RES. J. 53 (1983).
93. 97 Idaho 427, 435, 546 P.2d 382, 390 (1976). In *Briggs*, IDWR used a five year average to calculate the average annual recharge rate.
94. "Domestic" is defined in IDAHO CODE § 42-111 (1990):

held that the exemption for domestic wells in the Ground Water Act exempted domestic wells from the reasonable pumping level limitation, so domestic well owners were still entitled to maintenance of historic ground water levels.[96] The Act was later amended to exempt domestic wells only from the permit requirements of the Act, thereby making domestic wells subject to the reasonable pumping level limitation.[97] The question then arises whether domestic wells drilled prior to the change in the statute are "exempt" from "retroactive" application of the reasonable pumping level limitation. The answer is probably no since the reasonable pumping level limitation applied to non-domestic wells which were established prior to adoption of the Ground Water Act.

The court also held in *Parker* that it could order the improvement of a domestic well at the expense of the junior when the junior's use would reduce the level of water in the senior domestic well below the historic ground water level.[98] Based on this holding, a court could order the improvement of a well at the expense of the junior when the junior's use would reduce the level of water in the senior's well below the reasonable pumping level. A court could also order the improvement of a junior's well at the expense of a senior where a change in use by the senior would result in a reduction of the water level in the junior's well below reasonable pumping levels. It is unclear whether IDWR has similar authority, although a voluntary settlement of a contested change in an administrative proceeding could be resolved in that manner.

2. Injury to Spring Rights

Do the rules applicable to ground water also apply to springs? In other words, can an appropriator of water from a spring halt the diversion of tributary ground water that reduces the artesian flow of the

> A. The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (½) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
>
> B. Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.
>
> For purposes of these sections, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection B. of this section.

95. 103 Idaho 506, 650 P.2d 648 (1982).
96. *Id.* at 512, 650 P.2d at 654.
97. *See* IDAHO CODE § 42-229 (1990).
98. *Parker*, 103 Idaho at 514, 650 P.2d at 656.

spring, or can the spring appropriator be required to drill to reasonable pumping levels before he can complain of injury by others? Idaho law provides no clear answer to this question. On one hand, reason dictates that the use of water from a spring should not be allowed to defeat the full economic development of ground water, a policy stated in the ground water statute.[99] On the other hand, unless it can be said that the means of diversion is unreasonable, then the person who reduces the flow of the spring should be responsible for improving the diversion works of the spring appropriator. However, an argument can be made that the latter rule begs the question, since what is a reasonable means of diversion may take into account the effect of maintaining the spring on use of the aquifer.[100]

XI. CHANGE IN MANNER OF DIVERSION—ROTATION

Can a long standing pattern of rotation delivery give rise to a right to have rotation delivery continue even though the result is a change that defeats or affects the rotation delivery pattern?[101]

The Idaho Supreme Court in an early case refused to decree a rotation provision solely on the basis of the policy of promoting efficiency but noted that the situation *might* be different if the rotation practice were based on a contract or if it were a settled and fixed practice in the community.[102] The Idaho Supreme Court had stated previously that contracts for delivery by rotation would be enforced.[103] However, no case has yet arisen in Idaho upholding a decree mandating rotation on the basis of a long-standing practice.

In a Colorado case, the court held that the state's water court did not err in failing to require continuation of the historic rotation pattern when a shareholder of a mutual canal company proposed to change the nature of use of its shares from irrigation to power pur-

99. IDAHO CODE § 42-226 (1990).

100. *See* Schodde v. Twin Falls Land & Water Co., 161 F. 43 (C.A. 9th, 1908); *affirmed* 224 U.S. 107 (1912) (an appropriator may not claim the entire current of a river for purposes of lifting a relatively small amount of water over the bank).

101. Rotation practices can take two forms. One practice allows an appropriator to divert a greater quantity of water than the amount of the water right but for a shorter period of time. For example, Appropriators A, B, and C, each with rights to 10 cfs, might agree that Appropriator A will take 30 cfs for one week, Appropriator B will take 30 cfs the next week, and so on. Another practice allows the appropriator to take a greater quantity of water in times of shortage than would otherwise be allowed under his or her priority. Again, Appropriator A, B, and C each have rights to 10 cfs, but there is often less than 30 cfs in the stream. The appropriators might agree that Appropriator A will get 10 cfs one week, Appropriator B will get 10 cfs the next week, and so on.

102. Muir v. Allison, 33 Idaho 146, 161, 191 P. 206, 210 (1920).

103. State v. Twin Falls Canal Co., 21 Idaho 410, 443, 121 P. 1039, 1050 (1911).

poses.[104] The court found that the evidence did not show any contractual or other rights of the objectors to insist on a particular method of delivery and held that the following three conditions properly mitigated any injury: non-irrigation of formerly irrigated land, return of historic return flows to the river, and a guarantee of delivery of the pro rata share of available water to other shareholders.[105] It is, however, difficult to say how much the court based its decision on the fact that the articles and bylaws of the company gave it broad discretion with respect to the method of delivery of water.

Policy considerations militate both ways. On one hand, rotation practices can result in greater efficiency by allowing junior appropriators more water than would otherwise be available under their priorities. On the other hand, rotation practices are generally followed by those using less efficient flood irrigation systems, and a right to rotation other than by agreement could prevent an appropriator from switching to more efficient sprinkler diversion systems. At the very least, it is appropriate to consider rotation practices in determining whether a change will result in an increase in the volume of water diverted and in developing conditions to prevent such increases.[106]

XII. CHANGE IN PLACE OF USE

Changes in place of use do not fall into readily definable categories as do changes in source or point of diversion. An analysis of any change in place of use should focus on whether the change will result in an increase in the rate or volume of diversion or in an increase in consumptive use.[107] The discussion that follows identifies certain issues that may arise regarding changes in place of use.

A. Enlargement in Use: Expansion in Irrigated Acreage

Idaho Code section 42-222 clearly establishes that an expansion in irrigated acreage is an enlargement and that such an enlargement is prohibited. That section prohibits enlargements generally but allows expansions in irrigated acreage of storage water, which in turn implies

104. Wagner v. Allen, 688 P.2d 1102 (Colo. 1984).

105. *Id.* at 1108.

106. *See* Beecher v. Cassia Creek Irrig. Co., 66 Idaho 1, 8, 154 P.2d 507, 509 (1944) (change will not be permitted without limitations if the enlarged use in time or amount increases burden on stream or decreases volume therein to injury of other appropriators on stream).

107. *Id.*

that expansions in irrigated acreage of direct flow rights are not authorized and are therefore considered an enlargement.[108]

The statute codifies case law with respect to expansions in irrigated acreage. In *Hall v. Blackman*,[109] the court held that since Blackman had water rights decreed to a specific tract of land and since Hall had junior decreed rights downstream, Blackman could not use the decreed rights to irrigate an adjoining tract in addition to the decreed tract if in so doing, he deprived Hall of seepage, waste, and percolating waters he formerly received from use of Blackman's rights on the decreed tract.[110]

In Colorado and Arizona, the courts agree that enlargements in irrigated acreage are not permissible changes in place of use. Colorado takes a practical approach, emphasizing the injury that would result to junior appropriators from an increase in consumptive use or decrease in return flows.[111] Arizona emphasizes the appropriation doctrine, relying on the rule that an appropriator is entitled to use of water for the purpose for which it was appropriated to the lands to which it was appurtenant but only as much of his appropriation as he needs for that purpose, with anything left over to be left for the use of junior appropriators.[112] In Arizona, this holds true whether the appropriator seeks through water saving practices to use water on lands in addition to which the water right was originally appurtenant or whether the appropriator seeks to move the water right from one tract of land to another larger tract of land.[113]

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108. A discussion in changes in use of storage rights will follow.

109. 22 Idaho 556, 126 P. 1047 (1912).

110. *Id.* at 558, 126 P. at 1048. *But see* IDAHO CODE § 42-1416(1) (1990), which establishes a *rebuttable presumption* that holders of *decreed rights* (but not licensed, permitted, or beneficial use rights) may claim expansions in irrigated acreage in general adjudications with no change in priority date. This presumption is discussed further below.

111. *See* Steffens v. Rinebarger, 756 P.2d 1002 (Colo. 1988).

112. Salt River Valley Water Users' Association v. Kovacovich, 3 Ariz. App. 28, 29, 411 P.2d 201, 202 (1966). *But see* Sun Vineyards, Inc. v. Luna County Wine Development Corp., 107 N.M. 524, 760 P.2d (1988). In that case, the state engineer had approved an application to "spread" a 467 acre water right over 720 acres. In *dictum*, the court described this action as "salutary" and noted that Arizona law prohibited spreading. However, a footnote indicates that the applicant proposed to grow grapevines in eleven foot strips with hedgerow drips that resulted in strips of irrigated land six feet wide separated by unirrigated strips five feet wide. The irrigated strips received the historic three AFA per acre. There is some doubt, therefore, whether this was really a spreading case at all. Two states have enacted statutes that allow an appropriator who conserves water to get some of the benefit of the conserved water. ORE. REV. STAT. §§ 537.455 - 537.500 (1988 & Supp. 1990); CAL. WATER CODE §§ 1010, 1011 (1971 & Supp. 1991).

113. *Id.*

B. Permissible Place of Use

There is a "permissible place of use" where an appropriator has the right to irrigate X number of acres, but the acres irrigated can be any X acres within a larger tract whose boundaries are specifically described. A permissible place of use is statutorily recognized for irrigation districts and irrigation projects whose canals cover 25,000 acres or more.[114]

IDWR has in the past recognized transfers involving a permissible place of use for other appropriators as well. The typical situation is where a person has acquired several adjacent tracts of property with different water rights appurtenant to the individual tracts and has commingled all of the water diverted pursuant to all of the rights in a single diversion system that irrigates the entire property. To prevent enlargement and consequent injury to junior water rights, a condition is added providing that the water right is limited to the irrigation of X acres, with X being the number of acres originally irrigated pursuant to the right.

C. Supplemental Water Rights

Assume that an appropriator has a right from a source to 1 cfs for irrigation of 50 acres, but the source is unreliable. Consequently, the appropriator obtains the right to another 1 cfs from another source for irrigation of the same 50 acres. The total amount the appropriator may divert from both sources is 1 cfs because that is all that is required for the irrigation of the 50 acres, but the appropriator can choose how much of that total may be diverted from either source. Both rights are generally referred to as supplemental rights.

If the appropriator decides to change the place of use of both water rights to another 50 acre tract, then there are no issues other than the usual change in place of use issues. But, if the appropriator seeks to move just one right to a new place of use or seeks to move both to different places of use, then a problem arises that is unique to supplemental water rights.

The problem arising is that previously the combined use of the water rights would have been limited to the maximum diversion rate, diversion volume, and consumptive use that could be beneficially used on that one 50 acre tract. If one of the rights is moved to another 50 acre tract, with the result that the two rights irrigate a total of 100 acres, then there is an enlargement of the water right and an increase in the volume of diversion and consumptive use. To effectuate a trans-

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114. IDAHO CODE § 42-219 (1990).

fer of a supplemental water right alone, the appropriator would need to show either that the transfer could be made without such increases or that the right can be conditioned to avoid such increases.

XIII. CHANGE THAT RESULTS IN LOSS OF RETURN FLOW

It is a well-established rule that a junior appropriator is entitled to the condition of the stream at the time he or she made the appropriation and that an expansion of a water right results in a second water right with a later priority. Both of these rules, discussed further below, support the conclusion that a junior appropriator may complain of injury from a change in amount or place of return flow. However, it is also a well-established rule that one appropriator cannot compel another to continue to waste water. Although waste water can be appropriated, this right is subject to the right of the original appropriator to change the place or manner of wasting it, to cease wasting it, or to recapture it, so long as he applies it to a beneficial use. These rules, discussed further below, support the conclusion that a junior appropriator may not complain of injury from a change in amount or place of return flow. These general rules are obviously conflicting, and the appropriate resolution of this conflict is a frontier issue in Idaho water law.[115]

A. Cases Indicating Injury

There are four Idaho cases in which the court prohibited a change on the basis that it would deprive someone of return flows. In *Hall v. Blackman*,[116] the court prohibited use of an irrigation water right on other lands in addition to the lands to which the water right was decreed on the basis that it resulted in injury to others who depended on seepage, waste, and percolating waters from use of the water right on the decreed tract.[117] *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.*[118] involved a senior appropriator who used water in a mill, then returned it to the stream. The court enjoined a change in point of return from a point above the junior appropriator's headgate to a point below the junior appropriator's headgate.[119] In *Washington*

115. *Id.* § 42-222 does not require IDWR approval of a proposed change in point of return, although such a change might be included in a proposed change in point of diversion or place of use for which IDWR approval would be required.
116. 22 Idaho 556, 126 P. 1047 (1912).
117. *Id.* at 558, 126 P. at 1048.
118. 49 F. 430 (D. Idaho 1892).
119. *Id.* at 432.

State Sugar Co. v. Goodrich,[120] the court denied a proposed change that included both a change in point of diversion upstream past junior appropriators and a change in nature of use from a sawmill to irrigation that would have defeated any use by the juniors.[121] In *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land and Water Co.*,[122] the court held that the senior appropriator was limited to the number of acres irrigated prior to the junior's appropriation because to allow an expansion in irrigated acreage would result in a loss of return flow to the stream that the junior depended upon.[123]

B. Cases Indicating No Injury

There are two cases in which the court granted a change despite real or potential injury resulting from a change in amount of place of return flows. In *Colthorp v. Mountain Home Irr. District*,[124] a plaintiff sought to enjoin a change in point of diversion and place of use by an irrigation district that acquired an upstream ranch; the plaintiff alleged that 75% of the upstream water right returned to the stream via seepage and that the change deprived him of the use of the seepage water. The complaint was dismissed for failure to state a cause of action on the grounds that 1) seepage water may be appropriated, but this right is subject to the right of the original appropriator to cease wasting it or, in good faith, to change the place or manner of wasting it so long as the original appropriator applies it to a beneficial use; and 2) that the plaintiff failed to allege injury to his decreed water rights.[125] One commentator distinguished this case on the ground that the return flow was excessive and therefore constituted waste rather than return flow.[126] *Colthorp* can also be distinguished based on the stricter rules of pleading at the time of the case compared to modern pleading requirements.

In *Application of Boyer*,[127] the plaintiff sought to change the point of diversion and place of use of a water right twenty miles downstream. The court's decision to affirm approval of the change was based on the rule that no appropriator may compel another to continue to waste water by use at a certain place and thereby preventing a change in

120. 27 Idaho 26, 147 P. 1073 (1915).
121. *Id.* at 44, 147 P. at 1079.
122. 245 F. 9 (C.A. 9th, 1917).
123. *Id.* at 28.
124. 66 Idaho 173, 157 P.2d 1005 (1945).
125. *Id.* at 182, 157 P.2d at 1009.
126. Hutchins, *Idaho Law of Water Rights*, 5 IDAHO L. REV. 70 (1968).
127. 73 Idaho 152, 248 P.2d 540 (1952).

point of diversion or place of use.[128] A commentator has also distinguished this case on the basis that it involved excessive return flows.[129] Actually, the court seemed to be saying that the protestant failed to show injury because it was not shown how much water would return to the stream and to whom it benefitted.

Five other cases have been decided in which the waste principle was also applied to defeat the claims of the junior appropriator.[130] These cases can be distinguished on the basis that the party protesting the change sought a right based on an appropriation of the waste water before it returned to a natural source.

Finally, in two other cases, the waste principle was applied to defeat the claims of junior appropriators to waters that had been allowed to return to the natural source. In *U.S. v. Haga*,[131] it was held that an irrigation appropriator's right extends to waste and seepage incidental to irrigation even where the appropriator has not maintained continuous actual possession of the water so long as the appropriator can identify it.[132] In *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*,[133] it was held that the right to reclaim waste water includes both seepage and waste occurring before use and after use but is limited to reasonable waste. Therefore, the junior who had used the seepage and waste water for forty years could not complain when the senior reclaimed reasonable waste resulting from the senior's use.[134] These cases did not involve any transfers or any allegations of enlargement, which may be an important distinction.

C. Resolution

Subject to an exception for cities noted below, at least part of the conflict between the general principles seems resolvable based on the cases above. At one extreme, a junior appropriator may not complain of loss of return flow or waste water where 1) the reason for the loss is that the original claimant is no longer diverting the water or diverting

128. *Id.* at 162, 248 P.2d at 546.

129. Hutchins, *supra* note 126.

130. Crawford v. Inglin, 44 Idaho 663, 258 P. 541 (1927); Reynolds Irrig. District v. Sproat, 70 Idaho 217, 214 P.2d 880 (1950); Linford v. G.H. Hall & Son, 78 Idaho 49, 297 P.2d 893 (1956); Thompson v. Bingham, 78 Idaho 305, 302 P.2d 948 (1956); Franklin Cub River Pumping Co. v. Le Fevre, 79 Idaho 107, 311 P.2d 763 (1957)(in this case the court recognized the right to reclaim the water for use on the land to which the original water right was appurtenant).

131. 276 F. 41 (D.C. Idaho 1921).

132. *Id.* at 43.

133. 101 Idaho 677, 619 P.2d 1130 (1980).

134. *Id.* at 681, 619 P.2d at 1134.

as much water; 2) the appropriator is using water more efficiently but without enlarging the uses made with the water; or 3) where the waste or return flow appropriator is appropriating the water from an artificial wasteway, and the water would not otherwise return to the stream. In such cases, the junior appropriator is really seeking nothing more than to compel waste for his benefit. At the other extreme, a junior appropriator may complain of a change that results in an enlargement in use or in an increase in diversion volume or consumptive use.[135] In those cases, it would be inequitable to allow a senior to expand his use at the expense of a junior. The area in the middle involves those situations where there is no enlargement, but there is nonetheless a loss of return flow. In other words, the return flow is the same, but its location is different. The outcome in such a case is likely to depend on the important policy considerations at issue—the transferability of water rights—which weighs in favor of the claimant seeking the change versus the expectations of those who have come to depend on the status quo, which weighs in favor of the junior appropriator who is affected by the change.

135. Recent cases in Colorado clearly establish that any proposed change that results in an increase in consumptive use or a decrease in return flow results in injury to a junior appropriator. In re May 756 P.2d 362, 370 (Colo. 1988); Southeastern Colorado Water Conservancy District v. Ft. Lyon Canal Co., 720 P.2d 133, 144 (Colo. 1986); Wagner v. Allen, 688 P.2d 1102, 1108 (Colo. 1984). However, Colorado distinguishes between return flow, defined as water returning to the stream via seepage after use, and waste water, defined as water that is collected in a ditch or other conveyance system and returned to the stream. A junior may complain of a change in amount or place of return flow but not of a change in amount or place of return of waste water. Boulder v. Boulder and Left Hand Ditch Co., 192 Colo. 219, 222, 557 P.2d 1182, 1185 (1976). In practice, the result appears to depend heavily on the pleadings. Where a junior complained of a change on the basis of enlargement due to an increase in consumptive use or decrease in return flow, the change was denied or the senior was required to go to substantial lengths to devise conditions to mitigate the injury. Where the junior complained solely on the basis of loss of waste water, the junior lost, sometimes on motion to dismiss for failure to state a basis for relief.

In New Mexico, the court has not expressly stated a rule that injury will result where there is an increase in consumptive use or a decrease in return flow, but there are cases holding that a proposed transfer limited to consumptive use did not result in injury. Ensenada Land and Water Association v. Sleeper, 107 N.M. 494, 499, 760 P.2d 787, 792 (Ct. App. 1988); *writ quashed* 107 N.M. 413, 759 P.2d 200 (1988). New Mexico law defines "artificial water" as waters whose continuance depends on acts of man, and provides that once released to the stream they become part of the stream and are subject to appropriation but not recapture and that no appropriator can compel the continuance of such supply. NEW MEX. STAT. ANN. 72-5-27 (1978 & Supp. 1985). Again, the practical result appears to be that a junior is more likely to win by pleading enlargement than by pleading loss of return flow, even though loss of return flow may be the result of the enlargement.

D. Cities

There appears to be a clear rule with respect to discharge of effluent from municipal use. Although there is no Idaho case directly on point, the Arizona, Colorado, New Mexico, and Wyoming courts agree that discharge of municipal effluent does not give downstream users a right to a continuation of the amount or place of return of the effluent.[136] In each case, the court's decision was based partly on the rule that an appropriator cannot compel waste and partly on the public policy consideration that effluent from municipal use is a special category of water because it is a noxious waste that cities have a duty to dispose of without threat to the public health and welfare, which can only be done at great expense.[137] Another factor in Idaho would be the fact that forfeiture does not apply to cities or at least does not apply to cities the same that it does to others.[138]

XIV. CHANGE IN NATURE OF USE

A. General Rule

IDWR requires that the following three parameters must be met for a change in nature of use: the new use cannot exceed the rate of diversion, the volume of diversion, and the amount of water consumed by the old use. This is consistent with the general rule that a change will not be permitted if it increases the burden on the stream or decreases the volume therein to the injury of other appropriators.[139] The consumptive use limitation is consistent with the holding in *Washington State Sugar Co. v. Goodrich*,[140] where the court held that a change in point of diversion upstream past a junior appropriator plus a change

136. Arizona Public Service Co. v. Long, 160 Ariz. 429, 773 P.2d 988 (1989); Metropolitan Denver Sewage Disposal Dist. v. Farmers Reservoir and Irrig. Co., 179 Colo. 36, 499 P.2d 1190 (1972); Reynolds v. Roswell, 99 N.M. 84, 654 P.2d 537 (1982) (it was also held that a city's change in use of a municipal right from one section of a city to use throughout the city was not necessarily an expansion, as the state engineer had ruled). Wyoming Hereford Ranch v. Hammond Packing Company, 33 Wyo. 14, 236 P. 764 (1925). The Arizona court distinguished the situation where the city has purified the water and is selling it, noting that once the city purifies it, "the water must be returned to the stream because the water element of sewage always belongs to the public." *Arizona Public Service*, 160 Ariz. at 434, 773 P.2d at 993. *See also* Pulaski Irr. Ditch Co. v. Trinidad, 70 Colo. 565, 203 P. 681 (1922).

137. *Arizona Public Service*, 160 Ariz. at 436, 773 P.2d at 993; *Metropolitan Denver*, 179 Colo. at 42, 499 P.2d at 1193; *Reynolds*, 99 N.M. at 87, 654 P.2d at 540; *Wyoming Hereford*, 33 Wyo. at 14, 236 P. at 772.

138. A discussion of forfeiture follows.

139. *Beecher*, 66 Idaho at 8, 154 P.2d at 509.

140. 27 Idaho 26, 147 P. 1073 (1915).

in the nature of use to a more consumptive use would result in injury.[141]

B. Alternate or Additional Purpose of Use

An alternative purpose of use refers to a situation in which the former use ceases, and the water right is used for an entirely different purpose. Where a water right is used for the original purpose and is then used for an additional purpose, it is referred to as an additional purpose of use.

The question arises as to whether an additional purpose of use should always be considered an enlargement even when there is no actual injury. In Idaho, there is no case law directly on point concerning this issue. Applying general appropriation of water rights rules, it can be argued that an additional purpose of use is always an enlargement. For example, in Colorado, it has been expressly held that every decree has the implied limitation that a water right is limited to the water reasonably necessary and actually used for the purpose for which it was appropriated on the lands to which it is appurtenant even if a greater amount is decreed.[142] In Arizona, it has been held that a landowner who has a valid appurtenant water right may not apply water saved through conservation practices to lands other than those to which water was originally appurtenant.[143] Any water remaining after use for the original purpose must be left in the stream for use by junior appropriators.[144]

The competing, general principle is the right of an appropriator to make changes in use absent injury to other water rights. If the appropriator can show that the additional purpose of use will not increase the rate or volume of diversion or volume of consumptive use, then it can be argued that a junior appropriator cannot be heard to complain of the change.[145]

C. Historical Note

In *Beker Industries, Inc. v. Georgetown Irrig. District*,[146] the Idaho Supreme Court held that IDWR did not have authority to ap-

141. *Id.* at 41, 147 P. at 1078.

142. Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064, 1067 (Colo. 1981).

143. Salt River Valley Water Users' Association v. Kovacivich, 3 Ariz. App. 28, 29, 411 P.2d 201, 202 (1966).

144. *Id.*

145. *See Beecher*, 66 Idaho at 7, 154 P.2d at 509 (the injury complained of must be real and substantial, not *de minimus*).

146. 101 Idaho 187, 610 P.2d 546 (1980).

prove changes in nature of use. The court based its holding on a statute from which the change in nature of use language had been inadvertently omitted.[147] The legislature subsequently amended the statute; however, there remained an unanswered question: could changes in nature of use be made prior to the amendment or were such changes a new appropriation? The court expressly reserved this issue in *Beker* but noted a number of other states where the right to make changes in use absent injury applied to changes in nature of use as well,[148] which is indicative of the result the Idaho court would reach if squarely faced with this issue.

XV. CHANGE IN SEASON OF USE

A change in season of use injures a junior appropriator when it makes the junior appropriator subject to a right to which he or she was not otherwise subject. Although there are no Idaho cases which offer direct support, it is consistent with the general rule that to diminish an appropriator's priority is an injury to the water right.[149]

For example, assume that an appropriator who has a natural flow right for irrigation wants to sell it to a city which intends to use the water year round for municipal use. If there are junior appropriators with seasons of use outside the irrigation season, then they would be injured by the exercise of the appropriator's irrigation right outside the irrigation season. The injury resulting from the change could be reduced or eliminated, however, by making the use of the water outside the irrigation season subordinate to junior rights outside the irrigation season that existed at the time of the change.

XVI. CHANGE FROM DIRECT FLOW TO STORAGE OR VICE VERSA

A. When is water stored

IDWR's rule-of-thumb in the past has been that if the appropriator can fill the storage facility in twenty-four hours or less using the diversion rate of the water right, then that is not storage but is merely regulation of the flow.

147. *Id.* at 191, 610 P.2d at 550.

148. *Id.* at 192, 610 P.2d 551.

149. Jenkins v. State, Dept. of Water Resources, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982).

B. Direct Flow to Storage

It is possible that, absent injury from a change in season of diversion, a change from direct flow to storage could be made. Although there are no cases on point in Idaho, there are Colorado cases which illustrate how the general rules as to injury from change in use would apply to such a change. In an early case involving a city which had purchased an irrigation water right that it wanted to store for municipal use, the Colorado Supreme Court ruled that the trial court properly rejected the proposed change from direct flow for irrigation to storage for municipal purposes.[150] The court held that the city could not enlarge its predecessor's use by changing periodic direct flow for irrigation to continuous flow for storage because such a change would increase the volume of water removed from the stream.[151] In a later case involving a state agency that purchased an irrigation right that it wanted to store for wildlife use, the Colorado Supreme Court modified its earlier holding, stating that a change from direct flow to storage could be made if it were appropriately conditioned to avoid any increase in volume of water diverted or any increase in consumptive use or decrease in return flows.[152]

C. Storage to Direct Flow

Absent injury caused by a change in season of diversion, it appears that injury would not necessarily result in a change from storage to direct flow; therefore, there is no need for a general rule that such a change will always result in injury. Again, appropriate conditions may be necessary to avoid an increase in rate or volume of diversion or volume of consumptive use.

XVII. FOREIGN WATER

A. Developed Water

Developed water is water added to a stream by the appropriator that was never previously part of the stream. This type of water has a priority independent of the stream to which it was added, although it could have a priority relative to the water system from which it came. A senior appropriator from the stream cannot require delivery of the developed water in satisfaction of the senior's water right, nor can a junior complain of injury from change in use of the developed water

150. Westminster v. Church, 167 Colo. 1, 14, 445 P.2d 52, 59 (1968).

151. *Id.*

152. Southeastern Colorado Water Conservancy District v. Ft. Lyon Canal Co., 720 P.2d 133, 146 (Colo. 1986).

because this water is not part of the stream from which the appropriations were made.[153]

In Colorado, it has further been held that, as long as the water is within the dominion of the developer, the developer has the right of reuse (subsequent use of water for the same purpose), successive use (subsequent use of water for a different purpose), and right of disposition after use (by sale, exchange or otherwise), absent an agreement to the contrary.[154] Therefore, the fact that a developer has a long standing practice of delivering water to a certain point in a stream does not give the stream appropriators a right to have such releases continue. This rule would probably apply in Idaho as well, since it is a logical extension of the rule that a stream appropriator's rights are limited to the stream and do not include additions to the stream resulting from the efforts of others.

The next question is when does the water leave the "dominion" of the developer? It is clear that dominion continues prior to the time the water is released to the natural stream. For example, in Colorado, it was held that delivery of water by a city to its customers' water taps was not a release of dominion because the water then went into the city sewage system and from there into the treatment plant of a city contractor, where dominion continued.[155]

What is not clear is whether dominion continues once the water is released to the stream. It can be argued that the developer has the right to recapture the water, even after it is released to the stream, if the developer can do so without affecting the rights of the stream appropriators to the natural stream flow. New Mexico courts have rejected this argument,[156] but Colorado courts have not addressed the issue.

Idaho courts have also been silent as to this issue. In *Rabido v. Furey*,[157] the developer used the stream to convey water from a spring that the court held was not tributary to the stream.[158] However, the stream was used to convey the water *prior* to use, not after. Idaho Code section 42-105 recognizes that "the water to which a person may be entitled . . . may be turned into the channel of another stream and mingled with its water, and then reclaimed . . . ." However, reference

153. *See* Rabido v. Furey, 33 Idaho 56, 190 P. 73 (1920).

154. Denver by Board of Water Comrs. v. Fulton Irrigating Ditch Co., 179 Colo. 47, 52, 506 P.2d 144, 147 (1972).

155. *Id.*

156. NEW MEX. STAT. ANN. § 72-5-27 (1978 & Supp. 1985).

157. 33 Idaho 56, 190 P. 73 (1920).

158. *Id.* at 61, 190 P. at 74 (the spring in the Rabido case would probably be considered tributary now).

to that statute begs the question since it does not define what water the person is entitled to.

The burden of proving that the water is in fact developed is on the claimant of the developed water right.[159] The difficulty of meeting this burden has steadily increased as knowledge of the interrelationships of water systems has increased. In the Colorado cases discussed above, determining whether the water was developed was simple because it came from the other side of the Continental Divide. However, the situation is less clear when dealing with diversions from one sub-basin to another sub-basin of the same stream system or from a spring within the basin that does not provide an obvious surface flow to the stream. In Idaho, one should probably look to the rules for determining what is a separate source. For example:

1. Diversion from tributary ground water to stream: Increasing the flow of the stream by releasing tributary ground water to the stream is not considered developed water.[160] Therefore, when a drainage district appropriates water made available by the construction of drainage works pursuant to Idaho Code section 42-2902, this is not automatically developed water free from the priorities of the stream. If the water would in natural course have reached the stream, then it is subject to the priorities of the stream.[161]

2. Diversion from stream to tributary ground water (injection wells): Just as increasing the flow of the stream by releasing tributary ground water to the stream is not considered developed water, neither should the injection of water from a stream to tributary ground water be considered developed water.

3. Diversion from one tributary to another: Diverting water from the basin of one tributary for use in the basin of another tributary should not be considered developed water because, at least as to appropriators downstream from the tributaries, both tributaries are part of the natural supply from which the downstream appropriator's rights are satisfied. However, there could be an exception where the tributary in which the water is used is deemed to be an administratively separate source.

4. Diversion from tributary spring to stream: In *Martiny v. Wells*,[162] it was held that as long as water flowing from springs would reach a creek in usable quantities, the prior appropriator of a stream

159. *See* Martiny v. Wells, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966).

160. Union Central Life Insurance Co. v. Albrethsen, 50 Idaho 196, 204, 294 P. 842, 850 (1931).

161. Sebern v. Moore, 44 Idaho 410, 418, 258 P. 176, 178 (1927).

162. 91 Idaho 215, 419 P.2d 570 (1966).

could enjoin the junior appropriator's use of the spring.[163] In *Martiny*, there were natural swales which indicated that a surface flow from the spring reached the stream at least during certain times of the year. However, where spring water reaches the stream underground, water from the spring should not be considered developed water anymore than tributary ground water is developed water. Support for this is found in *Martiny*, where the court stated that the burden of proof was on the junior appropriator to show that the spring was not tributary to the stream not merely that there was no surface flow from the spring to the stream.[164]

B. Salvaged Water

Salvaged water is water that has been "lost" from a stream—not available for satisfaction of rights from a stream, by subflow or otherwise—that is reclaimed by the efforts of the salvager.[165] The burden of proof is again on the claimant to show that the waters claimed were in fact salvaged.[166] In Idaho, it has been held that rights to salvaged water, as with rights to developed water, are prior to all other rights on the stream, and for a similar reason—that under natural conditions these waters would not be available to satisfy senior appropriators.[167] Although there are no Idaho cases that so hold, it would be a logical extension that the owner of a salvaged right would have the same rights of re-use, successive use, and disposition of the water after use as with rights to developed water, and the same question should exist as to a right to recapture the salvaged water once it is released into the stream after use. In addition, as with developed water, the burden of proof has become more difficult to meet as knowledge of the interrelationship of water systems has increased.

There is a modern trend, led by Colorado, not to treat salvaged water as a super-priority water right but as a mere appropriation from

163. *Id.* at 219, 419 P.2d, at 574.

164. *Id.* at 217, 419 P.2d at 572.

165. Hill v. Green, 47 Idaho 157, 160, 274 P. 110, 115 (1928). Salvaged water is distinguishable from conserved water in that salvaged water is water lost from the stream prior to diversion and is reclaimed, while conserved water is water lost after diversion that is reclaimed. There is a modern trend to promote conservation through the enactment of statutes that allow an appropriator who conserves water to get some of the benefit of the conserved water. This trend is led by Oregon and California. ORE. REV. STAT. §§ 537.455 - 537.500 (1988 & Supp. 1990); CAL. WATER CODE §§ 1010, 1011 (1971 & Supp. 1991).

166. *Hill*, 47 Idaho at 160, 274 P. at 115.

167. *Id.*

the stream from which the water was lost.[168] This is probably a result of the increased knowledge of the interrelationships of water systems and statutory directives for conjunctive administration of ground and surface water.[169]

C. Stored Water

With respect to the diversion of water to storage, a storage water right is just like any other water right from a stream. Therefore, a junior appropriator from a stream can complain of injury from a change in manner of diversion, such as a change in point of diversion or a change in place of storage.[170]

But with respect to use of the water once stored, it is like developed water because the water would not be available for use later in the year absent such storage. Idaho's change-in-use statute expressly provides that an appropriator of stored water may increase the number of acres irrigated with the stored water.[171] Although there are no Idaho cases so holding, it would be a logical extension of this reasoning to conclude that a junior appropriator may not complain of injury resulting from a change in manner of use of the stored water and that a user of stored water could not be required to continue to release return flows to the stream and could make re-use, subsequent use, and disposition of the water after use, the same as a user of developed water could.

Finally, where a storage water appropriator uses the natural stream to convey the stored water, he or she would still be subject to the rule that the rediversion of water cannot injure appropriators from the stream. In other words, the rediversion of stored water by the storage water appropriator cannot deprive a stream appropriator of his or her right to the natural flow of the stream.[172]

XVIII. EXCHANGE/SUBSTITUTION

It is well-established that water users may enter into voluntary agreements for exchange of water, absent injury, to other water

168. Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 187, 529 P.2d 1321, 1325 (1974).

169. *See* IDAHO CODE § 42-237a(g) (1990).

170. *See* Hallenbeck v. Granby Ditch and Reservoir Co., 160 Colo. 555, 564, 420 P.2d 419, 424 (1966).

171. IDAHO CODE § 42-222(1) (1990).

172. *Id.* § 42-105.

users.[173] For example, in *Almo*, Appropriator A had a right to eighty inches of water from the first creek but took it from the second creek; Appropriator B had a right to 350 inches from the second creek, and took eighty from the first creek.[174] The exchange avoided the loss of the 300 inches that it took to deliver water to Appropriator A from the first creek. C, an objector, argued that this was improper because it enabled B to get water when C didn't get any, despite the fact that C had a priority senior to B. The court held that C had no right to complain; the exchange did not diminish the water available to C absent the change because C did not get any water anyway.[175]

There is a strong argument that one water user may force an exchange with another water user by providing substitute water. In *Wilder*, the court upheld an exchange contract between the United States and an irrigation district against a challenge by certain district landowners.[176] The court found that the contract did not reduce the amount of water to which landowners were entitled. The court stated that a landowner entitled to 100 inches of Boise River water would get 100 inches of Payette or Salmon River water instead. In reaching its result, the court relied on the general power of an appropriator to substitute water.[177] The court did not base its finding on the general duty of the district to provide water to its consumers from any source available to the district, which would have implied that the court's decision was limited to substitution by an irrigation district to its consumers.[178] The court held that a prior case enjoining a substitution did not establish a general rule against substitutions. The court distinguished the prior case on the ground that the person proposing the change sought to divert water upstream from the objectors' point of diversion and release substitute water downstream from the objectors' point of diversion.[179]

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173. In re Wilder Irrigation District, 64 Idaho 538, 547, 136 P.2d 461, 470 (1943); Almo Water Co. v. Darrington, 95 Idaho 16, 20, 501 P.2d 700, 704 (1972). *See also* IDAHO CODE § 42-105 (1990), which provides that "water may be turned into any ditch, natural channel or waterway from reservoirs or other sources of water supply, and such water may be substituted or exchanged for an equal amount of water diverted from the stream, creek or river into which such water flows, or any tributary thereof, but in reclaiming the water so mingled, or diverting water in lieu thereof from any such stream, creek, river or tributary, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowances shall be made for loss by evaporation and seepage."

174. *Almo*, 95 Idaho at 18, 501 P.2d at 702.

175. *Id.* at 21, 501 P.2d at 705.

176. *Wilder*, 64 Idaho at 550, 136 P.2d at 466.

177. *Id.*

178. *Id.*

179. *Id.* at 549, 136 P.2d at 465-66.

The reliability of a water right pursuant to which the substitute waters are delivered is one type of injury unique to the substitution situation. In one Colorado case,[180] an appropriator proposed to change his point of diversion from a stream to tributary ground water and proposed to mitigate a five af[181] reduction in streamflow resulting from the change by making water available to stream appropriators pursuant to 5 af worth of shares in a mutual ditch company. The court reversed the water court decision approving the proposed change on the basis that the water court failed to determine whether the shares were adequate to provide the five af of substitute water.[182] Reliability of the substitute water right may also have been an issue in *Daniels*, where the court reversed a trial court decision that would have compelled the delivery of water pursuant to an asserted beneficial use right in substitution for decreed rights of the objectors.[183]

XIX. LOSS OF A WATER RIGHT

If a water right claimant seeks to change a water right that has been lost, then there is injury to other water users because the claimant has no present right to the water sought to be used. The following is a discussion of the ways in which a water right may be lost.

A. Forfeiture and Abandonment Generally

The seminal cases on forfeiture and abandonment of water rights in Idaho are *Jenkins v. State, Department of Water Resources*,[184] *Sears v. Berryman*[185] and *Gilbert v. Smith*.[186] The discussion below is based on this trilogy of cases and on Idaho's forfeiture statute.[187]

Note that with respect to both forfeiture and abandonment, there is no nonuse where the water right was used by others with the permission of the owner.[188] However, the claimant would have to show that

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180. Weibert v. Rothe Bros., Inc., 200 Colo. 310, 618 P.2d 1367 (1980).

181. Volume of water is generally measured in acre feet (af); an acre foot is enough water to cover one acre to a depth of one foot.

182. *Weibert*, 200 Colo. at 319, 618 P.2d at 1373.

183. *Daniels*, 38 Idaho at 136, 220 P. at 108-109.

184. 103 Idaho 384, 647 P.2d 1256 (1982) (IDWR had jurisdiction to determine issues of forfeiture and abandonment in a proceeding on an application for change in use of a water right; this was required as a preliminary step to performance of the statutory duty to determine whether or not a proposed transfer would injure other water rights).

185. 101 Idaho 843, 623 P.2d 455 (1981).

186. 97 Idaho 735, 552 P.2d 1220 (1976).

187. IDAHO CODE § 42-222(2) (1990).

188. Zezi v. Lightfoot, 57 Idaho 707, 714, 68 P.2d 50, 53 (1937) (use by permittee inures to benefit of owner).

this right was used by others *with permission* of the owner; it is not sufficient that all available water was used by someone else.

B. Forfeiture

Forfeiture, a statutory doctrine, occurs when there have been five years of continuous non-use. Forfeitures are disfavored by the law, so clear and convincing evidence, rather that a mere preponderance of the evidence, is required. The burden of proof is on the party alleging forfeiture. If a senior water right has been forfeited, the priority of the original appropriator is lost, and junior appropriators move up the ladder of priority.[189] Since beneficial use is the measure and limit of a water right, failure to use all of the water right may result in forfeiture of a portion of it.

1. Defenses to Forfeiture

There are a number of defenses or exceptions to forfeiture, some established by statute and some by case law. These include: 1) cropland set aside programs, 2) extensions authorized by IDWR, 3) nonuse that is involuntary or due to unlawful acts of others, 4) resumption of use, 5) nonuse by cities, and 6) water rights in a water supply bank.

Nonuse is excused by statute for water rights appurtenant to land contracted in a federal cropland set aside program during the contract period.[190] The water right holder is not required to apply to IDWR for an extension, as is described below. The forfeiture statute further provides that

> [t]he five (5) year period of nonuse shall, for forfeiture of a water right, begin to accrue upon termination of the contract if a period of nonuse did not occur prior to the effective date of the contract or shall continue to accrue if a period of nonuse occurred prior to the effective date of the contract.[191]

IDWR is authorized to grant one extension for up to five years.[192] Application for an extension must be made prior to the end of the five-year nonuse period.[193] Prior to the end of the extension period, IDWR is required to send notice to the appropriator and a form for reporting

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189. *Jenkins*, 103 Idaho at 388, 647 P.2d at 1260; *Sears*, 101 Idaho at 848, 623 P.2d at 460; *Gilbert*, 97 Idaho at 738, 552 P.2d at 1223.

190. IDAHO CODE § 42-222(2) (1990).

191. *Id.*

192. *Id.*

193. *Id.*

resumption of use.[194] The appropriator must resume the use and file the report on or before the date set for resumption of use by the extension.[195] Therefore, nonuse is excused where an extension has been granted and where the terms of the statute and the extension have been complied with.

Case law has established that nonuse may be excused where the nonuse is involuntary or due to the unlawful acts of others.[196] An example of involuntary nonuse is where there is insufficient water to satisfy the water right.[197] Another example of involuntary nonuse includes what the law calls acts of God (such as an unprecedented flood) or acts of war. Nonuse should be excused, however, only during the period during which there was interference. For example, an appropriator should be able to claim interference by an unprecedented flood only for the time of flooding and for such time thereafter as is reasonable for the appropriator to reestablish the use. In addition, lack of economic feasibility should not make the nonuse involuntary.[198]

An example of nonuse due to the unlawful acts of others is where there is insufficient water to satisfy the water right because someone else took the water out of priority before it reached the appropriator's point of diversion.[199] Another example is where there is interference with another's diversion works, such as destruction of the works. Again, the nonuse should be excused only for the period during which there was interference; an appropriator whose diversion works were destroyed by the actions of another should not be able to claim an unreasonable time to rebuild the diversion works.

According to Idaho case law, nonuse is excused where the use is resumed prior to subsequent appropriation.[200] The big question here is what is meant by "subsequent appropriation." Does the subsequent appropriation have to occur during the period of nonuse to defeat any resumption, or is the existence of any junior appropriator sufficient? The general rule that a junior appropriator has no standing to complain of actions or events prior to his or her appropriation would take

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194. *Id.*

195. *Id.*

196. Hodges v. Trail Creek Irrigation Co., 78 Idaho 10, 16, 297 P.2d 524, 527 (1956).

197. With respect to a claim to a water right based on beneficial use, this may be evidence that the water right either was never established or was never established in the full amount claimed.

198. CF & I Steel Corp. v. Purgatoire River Water Conservancy District, 183 Colo. 135, 140, 515 P.2d 456, 458 (1973).

199. If such a taking continues, it may give rise to adverse possession.

200. Zezi v. Lightfoot, 57 Idaho 707, 713, 68 P.2d 50, 52-53 (1937).

care of junior priorities after the use was resumed.[201] However, those with junior priorities prior to the period of nonuse would be subject to the same injury faced by those with priorities during the period of nonuse. Since the no-injury rule is based on the appropriator's right to maintenance of the stream conditions as of the time of the appropriation and since the court has held that an appropriator is also entitled to maintenance of the stream conditions subsequent to the time of appropriation,[202] it would seem that any junior appropriation would defeat resumption of use after five or more years of continuous nonuse.

Where the use is resumed and there is a subsequent appropriation, then the resumption defense should not be available and the original priority should be forfeited. The resumption of use should then be treated as a new water right. If the use upon resumption is not in violation of the mandatory permit statute,[203] then the priority date of the water right should be the date the use was resumed.

In *Beus v. Soda Springs*,[204] the court held that 1) the statutes which authorize municipal corporations to acquire water works and provide water to its inhabitants give the city the power to acquire water rights not only for existing needs but also for future needs, 2) that a city may purchase lands with appurtenant water rights to acquire water for its municipal needs but need not cause the land to be irrigated in order to avoid loss of the water right on a charge of abandonment, and 3) that municipal corporations are by statute authorized to provide water outside city limits.[205]

Therefore, when a municipal corporation acquires a water right, the city generally will not lose the water right due to nonuse. The possible limit of this holding is an open issue under Idaho law. Since the purpose of the exception is to allow cities reasonable opportunity to plan for future needs, there should similarly be some reasonable limitation on nonuse. One limitation that clearly applies is that the water right is still subject to challenges based on prior nonuse by the entity from which the water right is acquired, because the city would still be subject to the rule that when it purchases realty it acquires no more than the grantor had to convey.[206] In addition, the court stated that the city need not cause the land to be irrigated to avoid loss of the

201. Hall v. Blackman, 22 Idaho 539, 542, 126 P. 1045, 1047 (1912).
202. Crockett v. Jones, 47 Idaho 497, 504, 277 P. 550, 553 (1929).
203. Prior to May 20, 1971 for surface water and prior to March 25, 1963 for groundwater. *See* IDAHO CODE §§ 42-201, 42-229 (1990).
204. 62 Idaho 1, 107 P.2d 151 (1940).
205. *Id.* at 7, 107 P.2d at 154.
206. *Beecher*, 66 Idaho at 7, 154 P.2d at 509.

water right on a charge of *abandonment*.[207] In those days, the courts often failed to distinguish between forfeiture and abandonment. Since the court relied on nonuse, it seems that the court was actually talking about forfeiture. The potential remains for a city's water rights to be lost by abandonment.

The case establishing a special rule for nonuse by cities involved only municipal corporations acting pursuant to statutory authority.[208] There is no similar authority for unincorporated cities and towns or for private companies that provide water for a municipality's inhabitants.

Idaho's water supply bank was established by statute to be operated by the Idaho Water Resource Board, pursuant to rules and regulations promulgated by the board.[209] The water supply bank may purchase, lease, or otherwise acquire water rights, and the water is then rented for use within the state of Idaho. The Board may contract with lessors and lessees to act as an intermediary in facilitating the rental of water and may appoint local committees to facilitate the rental of water. The terms and conditions of the rental agreement must be approved by the director of IDWR, who may approve, reject, partially approve, or approve subject to conditions any proposed rental agreement. The standards are substantially similar to those for approval of a change in use, and the approval of the rental agreement may substitute for approval of an application for change in use. Idaho Code section 42-1764(2) further provides as follows:

> Water rights obtained by the board or by a local committee appointed by the board and credited to the water supply bank are not subject to forfeiture for nonuse pursuant to section 42-222(2), Idaho Code, while retained in or rented from the water supply bank. The five (5) year period of nonuse for forfeiture of a water right shall begin to accrue upon removal of a right from the bank by the owner of the right if a period of nonuse did not occur prior to the date of acceptance of the right into the bank. The five (5) year period of nonuse shall continue to accrue if a period of nonuse occurred prior to the effective date of acceptance of the right into the bank and the right was not beneficially used while in the bank.

Where a period of nonuse is excused for one of the reasons discussed above, does a period of nonuse occurring prior to the excused period count toward the five-year total? In other words, is this situa-

207. *Beus*, 62 Idaho at 7, 107 P.2d at 154.
208. *Id.*
209. IDAHO CODE §§ 42-1761 - 42-1764 (1990).

tion similar to the tolling of a statute of limitation, so that the clock merely stops when the excused period begins and then resumes where it left off when the excused period ends? Or is the clock restarted at the beginning when the excused period ends?

Idaho's forfeiture statute expressly provides that where the land is in a cropland set-aside program, the period of nonuse prior to the effective date of the contract counts toward the five-year total.[210] Idaho's water supply bank statute also expressly provides that a period of nonuse prior to acceptance of a water right into the water supply bank counts but only if the water right was not beneficially used when it was in the water supply bank.[211] Neither the statute nor case law addresses the judicially created excuses; therefore, they offer no insight as to how the excuses affect the five-year "clock."[212]

On one hand, it can be argued that the forfeiture statute requires continuous, excused nonuse, so where a portion of the period is excused, the five-year period begins anew after the end of the excused period. On the other hand, it can be argued that the statute merely requires continuous nonuse, not continuous unexcused nonuse. This latter argument is supported by the language regarding "tolling" with respect to the defenses to nonuse recognized by statute.

D. Abandonment

Abandonment is a common-law doctrine that predated the forfeiture statute, the elements of which are an intent to abandon concurrent with actual relinquishment of the water right. Intent to abandon must be shown by clear and unequivocal acts; nonuse alone is not sufficient, but a substantial period of nonuse gives rise to a rebuttable presumption of intent to abandon.[213] Unlike forfeiture, no defenses to abandonment have been recognized.

E. Adverse Possession

Sears and *Gilbert* provide the most recent and comprehensive discussion of the doctrine of adverse possession. Forfeiture and abandonment focus on the loss of a water right by nonuse and result in a determination of the non-existence of all or a portion of the water right. Adverse possession, on the other hand, focuses on the use of the

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210. IDAHO CODE § 42-222(2) (1990).

211. *Id.* § 42-1764(2).

212. With respect to extensions granted by IDWR, the extension must be requested prior to the end of the five year period, so the issue as to "tolling" does not arise.

213. *Jenkins*, 103 Idaho at 388, 647 P.2d at 1260; *Sears*, 101 Idaho at 847, 623 P.2d at 459; *Gilbert*, 97 Idaho at 738, 552 P.2d at 1223.

first person's water right by a second person and results in the second person owning the water right so that the second person receives all the same rights that the first person had, including the original priority date. Idaho Code section 42-607 provides, however, that "[s]o long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user."

As with forfeiture and abandonment, adverse possession must be shown by clear and convincing evidence, and the burden of proof is on the party claiming adverse possession. The elements of adverse possession are use of another's water right for a period of five years that is: 1) adverse, i.e. without permission; 2) open, such that the original appropriator would be on notice that the adverse possessor is using the original appropriator's water right; 3) hostile; 4) exclusive; 5) continuous, such that the water was used for the period normal for the nature of use and not interrupted by actions of the original appropriator; and 6) under claim of right.[214]

The element that defeats most claims based on adverse possession is exclusivity. To be exclusive, it must be shown that the adverse possessor deprived the original appropriator of water to which the original appropriator was entitled at times when the original appropriator needed it.[215] It is not sufficient to show that the party claiming adverse possession took water to which he was not entitled for a period of five years without complaint from other water users, even from a source that was fully appropriated without that party's use.[216] In other words, one cannot "adversely possess the stream;" one must adversely possess a water right.

F. Estoppel

The elements of equitable estoppel are as follows: 1) a person with full knowledge of the facts, 2) who makes a misrepresentation of fact concerning ownership or disposition of property, 3) to a person without full knowledge of the facts, 4) who reasonably relies on the first person's misrepresentation, 5) to the second person's substantial injury.[217]

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214. *Sears*, 101 Idaho at 848, 623 P.2d at 460; *Gilbert*, 97 Idaho at 740, 552 P.2d at 1225.

215. *Id.*

216. *Id.*

217. *See e.g.* Johnson v. Strong Arm Reservoir Irrig. District, 82 Idaho 478, 356 P.2d 67 (1960) (where an irrigation district, which had existed for many years, had never conducted business in accordance with state laws governing irrigation districts, but instead operated as a mutual canal company for the distribution of water. The law relating

Estoppel may operate to prevent a party from asserting a claim or may operate to prevent a party from challenging a claim asserted by another.

As noted above, an equitable estoppel arises from a misrepresentation of fact; in which case, the party is estopped from asserting a contrary fact. "Estoppel by laches" may arise from a failure to assert one's rights, along with the other elements of estoppel; in which case, the party will be estopped to assert those rights.[218] However, the Idaho Supreme Court has often stated, "Lapse of time is not alone sufficient to defeat a right on the ground of laches. It must be shown that the [claimant] has been misled, to his injury, by the failure of the [holder of the right] to assert its right earlier."[219]

Although the cases do not require a "clear and convincing" standard of proof as with adverse possession, it is clear that the courts consider this an equitable doctrine to be used only where clearly warranted to prevent injustice. Cases in which a claim to a water right or an objection to a claim are denied based on estoppel are not common, although they are not nearly as rare as cases finding adverse possession.

XX. THE PRESUMPTIONS

Idaho Code section 42-1416 sets forth three "rebuttable presumptions" that apply in general adjudications of water rights. There are a myriad of issues as to the meaning and constitutionality of this statute—so many that a comprehensive analysis of this statute merits a law review article all its own. Therefore, the following discussion will be limited to the applicability and definition of the injury standard with respect to the first and second presumptions.

A. The First Presumption

The first presumption provides: "The holders of previously adjudicated water rights shall be presumed to have validly applied all water

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to irrigation districts would not be applied in determining the rights of the district and its shareholders); 4 RESTATEMENT (SECOND) OF TORTS § 894 (1977).

218. *See e.g.* Hillcrest Irrigation District v. Brose, 57 Idaho 403, 66 P.2d 1115 (1937) (where a party with full knowledge of the facts and for more than twenty years allowed another party to incur large indebtedness on a reasonable belief in the strength of its title, the former party was estopped from questioning the latter party's title); 4 RESTATEMENT (SECOND) OF TORTS § 939 (1977).

219. Sears v. Berryman, 101 Idaho 843, 848, 623 P.2d 455, 460 (1981) (citing Mountain Home Irrigation District v. Duffy, 79 Idaho 435, 443, 319 P.2d 965, 969 (1957), which in turn cites eight other Idaho cases).

to beneficial use on the lands being irrigated at the time of basin-wide adjudication with no change in the priority dates of the original rights."[220] The apparent purpose of this provision is to allow, in a general adjudication, holders of *decreed rights* to claim *changes or increases* in *irrigated acreage* occurring prior to the general adjudication *under the original priority date*. Absent this provision, an expansion of irrigated acreage would be treated as a new appropriation based on beneficial use, with a priority as of the date of the expansion.[221]

Since the first presumption is rebuttable, the first question is what rebuts the presumption? One possibility is that the presumption is rebutted by evidence that the decreed place of use was less than or different from the current place of use. However, this could interpret the presumption out of existence, which is contrary to the general rule of statutory construction that the legislature generally intends its enactments to have *some* meaning.[222]

Another possibility is that the presumption is rebutted by evidence of injury to other water users. Historically, increases in irrigated acreage have been viewed as an enlargement that necessarily results in injury to other water users by increasing the consumptive use of the water right. A rule that an enlargement necessarily results in injury would again interpret the presumption out of existence. On the other hand, if the injury analysis is dropped entirely, then the presumption is no longer rebuttable but becomes a general rule recognizing changes and expansions in irrigated acreage of decreed rights, which is inconsistent with the express language of the statute that makes the presumption rebuttable.[223]

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220. IDAHO CODE § 42-1416(1) (1990).

221. *See* changes in place of use, *supra* notes 107-114 and accompanying text.

222. De Rousse v. Higginson, 95 Idaho 173, 176, 505 P.2d 321, 324 (1973). There are a few decrees that purport to determine a water right but do not describe a place of use. The decree could be interpreted as not adjudicating a water right. However, if the decree determines the amount, priority, and source of the water right, then IDWR generally treats the decree as ambiguous as to the place of use, and either IDWR or the claimant will obtain the records of the case or the records of the county recorder that show the land owned by that party at the time of the court action.

223. This is also the interpretation that is most likely to render the statute unconstitutional, as a violation of equal protection, because this presumption applies only to decreed rights with no apparent rational basis for the distinction between decreed rights and other rights. It may also be unconstitutional as a violation of the constitutional prior appropriation doctrine because it allows a decreed right holder to enlarge his water right pursuant to the original priority and thereby defeat the priorities of appropriators with a priority after the decreed water right holder but before the decreed right holder's expansion. A more limited interpretation of the statute may nonetheless face these constitutional hurdles as well.

B. The Second Presumption

The second presumption provides:

> Expansion of the use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.[224]

The apparent purpose of this presumption is to allow *expansions in use* of rights *other than decreed rights*, where the expansion occurred prior to the general adjudication and is in violation of the mandatory permit statute, to be claimed in a general adjudication with a *priority as of the date of the expansion*. As noted above, expansions in use are generally treated as a new appropriation based on beneficial use, but absent this rule, the claimed expansion would be disallowed based on the mandatory permit statute.[225]

In most instances, recognition of the expansion with a priority date as of the date of expansion will mitigate injury to other appropriators. As with changes in use generally, senior appropriators will be entitled to have junior uses shut off to satisfy their senior priority, and junior appropriators will have no right to complain of an expansion that occurred prior to their appropriations.[226]

Nonetheless, a new appropriation may in some circumstances result in injury to prior appropriators, and lack of such injury is one of the conditions for approval of an application for a permit under the mandatory permit statute.[227] IDWR regulations provide the following standard for when a proposed use will injure existing water rights, which should be equally applicable to expansions under the second presumption:

> 1. the proposed use will reduce the quantity of water available for existing rights;

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224. IDAHO CODE § 42-1416(2) (1990).

225. This provision may also have constitutional problems on equal protection grounds. The statute may include expansions other than expansions in irrigated acreage (such as additional purposes of use) which may not be claimed by decreed water right holders under either presumption with no apparent rational basis for the distinction between the decreed water right holders and others. And although the presumption provides some relief to those who make a new appropriation by expanding an existing right in violation of the mandatory permit statute, it provides no relief for those with an appropriation in violation of the mandatory permit statute who do not already have other valid water rights.

226. *See supra* notes 107 - 114.

227. IDAHO CODE §§ 42-103 (1990), 42-201 (1990), 42-229 (1990).

> 2. the holder of an existing right will be forced to unreasonable effort or expense to divert the existing water right; or
> 3. the quality of water available to the holder of an existing right is made unusable for the purposes of the water right, and the water cannot be restored to usable quality without unreasonable effort or expense.[228]

As with changes in use, this rule is subject to the proviso that the application may be granted if conditions can be imposed that will mitigate the injury.

XXI. CONCLUSION

The next decade will be an interesting time for Idaho water lawyers as many of the open issues in Idaho water law are raised in the SRBA. Although the judiciary is generally not considered the policy making branch of state government, resolution of these issues by the district court and the appellate courts will depend not only on traditional appropriation doctrine but also on the policy considerations and technical capabilities of the modern era. In addition, completion of the SRBA will result in a complete and accurate list of water rights for all but a small portion of the state, which will provide much of the necessary data not only for resource planning but also for policy making legislation. The SRBA may therefore be both a forum for the development and refinement of water law by the courts and a catalyst for development, refinement, and possibly modification of the appropriation doctrine by the legislative and executive branches of state government.

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228. Water Appropriations Rules and Reg., § 5,1,1.