

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

JEFFREY and CHANA DUFFIN, husband and wife;

Petitioners-Appellants,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent-Respondent,

and

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

Intervenors-Respondents.

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

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**Supreme Court No. 48769-2021**

**Bingham County Case No. CV06-20-1467**

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**INTERVENORS' RESPONSE BRIEF**

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

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**TABLE OF CONTENTS**

- I. STATEMENT OF THE CASE..... 1
  - A. Nature of the Case..... 1
  - B. Course of Proceedings..... 2
  - C. Statement of Facts..... 4
- II. ADDITIONAL ISSUE PRESENTED ON APPEAL ..... 6
- III. APPLICABLE LEGAL STANDARD ..... 6
- IV. LEGAL ARGUMENT..... 7
  - A. The Hearing Officer’s Conclusion that the Changes Proposed in Application 83160 would Result in an Enlargement of Water Right 35-7667 is Consistent with Idaho Law and is Supported by Substantial Evidence. .... 7
    - 1. A Transfer Analysis Requires IDWR to Examine all Evidence and is Not Limited to Review Solely of the Original Water Right..... 8
    - 2. Historic Use is a Component of the Enlargement Evaluation..... 10
    - 3. Water Right 35-7667 is a Supplemental, Stacked Water Right. .... 11
    - 4. Application 83160 Would Result in an Increase in Irrigated Acres, and therefore, an Enlargement of Water Right 35-7667..... 15
  - B. The Hearing Officer’s Finding that Application 83160 Would (1) Injure Other Water Rights, (2) Is Inconsistent with the Conservation of the Water Resources of Idaho, and (3) Would not be in the Local Public Interest is Supported by Substantial and Competent Evidence, Namely, Application 83160 Would Cause an Increase in the Use of Idaho’s Limited Water Resources. .... 15
    - 1. Approval of Application 83160 will Injure Existing Water Rights..... 16
    - 2. Application 83160 is Inconsistent with the Conservation of the Water Resources of Idaho.....19
    - 3. Application 83160 is not in the Local Public Interest. .... 19
  - C. The Hearing Officer’s Decision does not Prejudice Duffin’s Substantial Rights..... 22
  - D. The Court Should Award Intervenors Attorneys’ Fees and Costs on Appeal. .... 23
- V. CONCLUSION..... 26

## TABLE OF AUTHORITIES

### Cases

<i>A &amp; B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist.</i> , 141 Idaho 746, 118 P.3d 78 (2005).....	15, 17
<i>American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources</i> , 143 Idaho 862, 154 P.3d 433 (2007).....	10
<i>Barron v. Idaho Dep't of Water Res.</i> , 135 Idaho 414, 18 P.3d 219 (2001).....	passim
<i>Chisholm v. Idaho Dep't of Water Res.</i> , 142 Idaho 159, 125 P.3d 515 (2005).....	6, 20, 21
<i>City of Blackfoot v. Spackman</i> , 162 Idaho 302, 396 P.3d 1184 (2017) .....	6
<i>City of Pocatello v. State of Idaho</i> , 152 Idaho 830, 275 P.3d 845 (2012) .....	17
<i>Comer v. County of Twin Falls</i> , 130 Idaho 433, 942 P.2d 557 (1997) .....	6
<i>Erickson v. Idaho Board of Licensure of Prof. Engineers and Prof. Land Surveyors</i> , 165 Idaho 644, 450 P.3d 292 (2019).....	6
<i>Frantz v. Hawley Troxell Ennis &amp; Hawley, LLP</i> , 161 Idaho 60, 383 P.3d 1230 (2016).....	25
<i>Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.</i> , 129 Idaho 454, 926 P.2d 1301 (1996).....	8, 10, 14
<i>Howard v. Canyon County Bd. of Comm'rs</i> , 128 Idaho 479, 915 P.2d 709 (1996).....	6
<i>Hungate v. Bonner County</i> , 166 Idaho 388, 458 P.3d 966 (2020).....	7, 23
<i>Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.</i> , 160 Idaho 119, 369 P.3d 897 (2016).....	10
<i>Jenkins v. State, Dep't of Water Res.</i> , 103 Idaho 384, 647 P.2d 1256 (1982) .....	8
<i>Mullinix v. Killgore's Salmon River Fruit Co.</i> , 158 Idaho 269, 346 P.3d 286 (2015) .....	22
<i>Noble v. Kootenai Cty. ex rel. Kootenai Cty. Bd. of Comm'rs</i> , 148 Idaho 937, 231 P.3d 1034 (2010).....	22
<i>Price v. Payette County Bd. of Comm'rs</i> , 131 Idaho 426, 958 P.2d 583 (1998).....	6, 22
<i>Rangen, Inc. v. IDWR</i> , 159 Idaho 798, 367 P.3d 193 (2016) .....	23, 24, 25
<i>Shokal v. Dunn</i> , 109 Idaho 330, 707 P.2d 441 (1985) .....	20
<i>Young Elec. Sign Co. v. State ex rel. Winder</i> , 135 Idaho 804, 25 P.3d 117 (2001).....	6

### Statutes

Idaho Code § 12-117.....	25, 26
Idaho Code § 12-117(1).....	23
Idaho Code § 12-121.....	25, 26
Idaho Code § 42-117(1) .....	23
Idaho Code § 42-202B .....	7
Idaho Code § 42-202B(1) .....	10
Idaho Code § 42-202B(3) .....	19
Idaho Code § 42-222.....	1, 7, 9
Idaho Code § 42-222(1) .....	passim
Idaho Code § 42-231.....	21
Idaho Code § 67-5246.....	4
Idaho Code § 67-5279.....	22
Idaho Code § 67-5279(1).....	16
Idaho Code § 67-5279(3).....	6
Idaho Code § 67-5279(4).....	7, 22

**Other Authorities**

Idaho Department of Water’s *Transfer Processing Policies and Procedures No. 24*, dated December 21, 2009 ..... 11, 12, 19  
Idaho Supreme Court’s December 9, 2009 *Administrative Order* ..... 4  
*Memorandum Decision and Order on Petition for Judicial Review (Permit No. 35-8359, John B. & Diane K. Kugler)* (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV2011-15672, May 23, 2012)..... 18, 19

**Rules**

I.A.R. 41 ..... 23

**Constitutional Provisions**

Idaho Const. art XV ..... 10

Intervenors-Respondents A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir #2, and Minidoka Irrigation District (hereinafter collectively, “Intervenors,” “Surface Water Coalition,” or “SWC”), by and through their attorneys of record, Barker Rosholt & Simpson LLP and Fletcher Law Office, hereby submit the following *Intervenors’ Response Brief*.

## I. STATEMENT OF THE CASE

### A. Nature of the Case.

Appellants Jeffrey and Chana Duffin (“Duffin”) initiated this appeal to review the Idaho Department of Water Resources’ (“Department” or “IDWR”) denial of Duffin’s application to transfer and amend certain elements of a ground water right, pursuant to Idaho Code § 42-222. Specifically, Duffin filed Application for Transfer No. 83160 (“Application 83160”) to amend the place of use and point of diversion of Water Right No. 35-7667 (“35-7667”). *See* A.R. at 286-340.<sup>1</sup>

Application 83160 sought to transfer a supplemental ground water right to a new place of use, without a corresponding reduction in the irrigated area of use at the original place of use. The Department analyzed Application 83160 pursuant to statutory dictates and prior agency guidance. If approved, the result would have allowed irrigation of twice as much acreage, thus enlarging the use of the original water right. Such an increase in irrigated acres would injure other existing water rights, would be inconsistent with the conservation of water resources, and would not be in the local public interest. Accordingly, and appropriately, the Department denied Application 83610.

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<sup>1</sup> The record on appeal in this matter contains two sets of documents: (1) the Clerk’s Record on Appeal; and, (2) Settled Agency Record. The Clerk’s Record shall be cited to as “C.R.” and the Agency Record shall be cited to as “A.R.”

Duffin’s appeal specifically challenges the Hearing Officer’s conclusion that Application 83610 would result in an enlargement and that the Hearing Officer should have only considered the elements contained in the four-corners of water right 35-7667 itself, while not considering the historic use of water, nor all of the evidence and criteria required by the transfer statute.

**B. Course of Proceedings.**

This matter began with the filing of Application 83610 by Duffin on April 2, 2019. Duffin requested to change the place of use and point of diversion for water right 35-7667. *See* A.R. 286-340. Both the existing and proposed places of use and points of diversion for Application 83610 are located within the Eastern Snake River Plain Aquifer (“ESPA”) which is currently under a moratorium order preventing the processing of new applications for ground water use permits. *See* A.R. 5-11. On May 20, 2019, the Surface Water Coalition (“SWC” or “Intervenors”)<sup>2</sup> filed a protest to Application 83160 on the grounds that: (1) the transfer would result in the expansion of water use; (2) the applicant failed to demonstrate that the transfer would not injure other water rights; and (3) that the applicant failed to provide mitigation for impacts resulting from the transfer. *See* A.R. 347-50. SWC also argued that Application 83160 failed to meet the transfer criteria of Idaho Code § 42-222. *Id.*

On May 26, 2020, the Hearing Officer issued a *Request for Briefs* to address the question: given the Stipulated Statement of Facts, the documents from the Department's water right records identified by the Hearing Officer, and any relevant previous decisions of the Department and/or the Idaho courts, does Application 83160 satisfy the transfer review criteria set forth in Idaho Code § 42-222(1)? *See* A.R. 384-422. On July 17, 2020 both parties filed briefs in response to the

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<sup>2</sup> The SWC is comprised of the following irrigation entities located in southern Idaho: A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir #2, and Minidoka Irrigation District.

Hearing Officer's question, with Duffin filing *Applicant's Argument Brief*, A.R. 423-57, and SWC filing *Surface Water Coalition's Brief on Questions of Law*, A.R. 574-89.

The Hearing Officer issued a *Preliminary Order Denying Transfer* on July 24, 2020. See A.R. 590-601. The Hearing Officer found that approval of Application 83160 would result in the irrigation of 107.8 acres where previously Duffin only irrigated 53.9 acres. A.R. 594. The *Preliminary Order* denied Application 83610 because the proposed changes: (1) would result in an enlargement of water right 35-7667; (2) would injure other water rights; (3) were not consistent with the conservation of water resources in the State of Idaho; and, (4) were not in the local public interest. A.R. 590-598.

On August 7, 2020, Duffin filed *Applicant's Petition for Reconsideration*, asking to reconsider the denial on four grounds: (1) that the Hearing Officer failed to make a determination as to whether water right 35-7667 was a supplemental or primary right; (2) that the Hearing Officer read limitations into water right 35-7667 that were not contained on the face of the license; (3) that the Hearing Officer erred in considering consumptive use; and, (4) the Hearing Officer erred in relying on *Barron v. Idaho Dep't of Water Res.*, 125 Idaho 415, 18 P.3d 219 (2001). See A.R. 603-630.

On August 12, 2020, the Hearing Officer issued an *Amended Preliminary Order Denying Transfer*, A.R. 656-72, in which he concluded:

The changes proposed in Application 83160 will result in an enlargement of water right 35-7667. As a result of the enlargement of water rights, the changes proposed in Application 83160 will injure other water rights, are not consistent with the conservation of water resources in the state of Idaho, and are not in the local public interest. Therefore, Application 83160 must be denied.

A.R. 669. The Hearing Officer reaffirmed the denial of Application 83610 on the same bases as the *Preliminary Order Denying Transfer*. A.R. 656-72. The *Amended Preliminary Order Denying*



*Transfer* became IDWR’s final action on the transfer application, for purposes of judicial review, on August 26, 2020.<sup>3</sup> See Idaho Code § 67-5246; A.R. 670-72.

Duffin timely appealed the *Final Order* to the District Court on September 22, 2020 seeking judicial review of the Department’s decision. See C.R. 5-10. The matter was reassigned to Judge Eric Wildman pursuant to the Idaho Supreme Court’s December 9, 2009 *Administrative Order* which requires “all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from [IDWR] be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District.” See C.R. 11-16. Judge Wildman issued his *Memorandum Decision and Order* and corresponding *Judgment* on February 22, 2021, affirming the Department’s *Final Order*. See C.R. 226-236. On April 1, 2021, Duffin appealed to this Court. See C.R. 218-225. Duffin filed its opening brief on appeal (“*App. Br.*”) with the Court on August 10, 2021.

### **C. Statement of Facts.**

Duffin filed Application 83610 on April 2, 2019, requesting a change to the place of use and point of diversion for water right 35-7667 to a new, separate parcel of property. See A.R. 286-340. Water right 35-7667 is a licensed ground water right for the irrigation of 53.9 acres in Bingham County, with a June 11, 1992 priority date. See generally A.R. 12-91.

Vern Duffin filed the original application for water right 35-7667 on February 2, 1977 to develop 1.2 cfs of ground water for irrigation with a proposed place of use of 60 acres. A.R. 371 at ¶ 5.<sup>4</sup> The original application for water right 35-7667 required a listing of “any other water rights

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<sup>3</sup> The *Amended Preliminary Order Denying Transfer*, A.R. 656-72, will hereinafter be referred to as “*Final Order*.”

<sup>4</sup> The underlying facts associated with water right 35-7667 and Application 83160 are undisputed and have been agreed to in the *Stipulated Statement of Facts* on May 22, 2020. The *Stipulated Statement of Facts* is located at A.R. 370-83.

used for the same purposes as described.” A.R. 374 at ¶ 7. Vern Duffin failed to make such a listing, instead writing “none” into that section of the application. *Id.* At the time Vern Duffin made application for water right 35-7667, however, the same lands for which he sought a ground water right were irrigated with surface water pursuant to 60 shares of Aberdeen-Springfield Canal Company (“ASCC”) stock. A.R. 370 at ¶ 3. Those 60 shares were appurtenant to the same land as the ground water application, and those 60 shares were issued to Vern Duffin on April 24, 1970, nearly 7 years before the ground water application was first made. A.R. 370-71 at ¶¶ 2-3. Those 60 shares of ASCC stock were conveyed to Chana and Jeffrey Duffin on December 31, 2011. A.R. 371 at ¶ 4.

The overlap review for water right 35-7667 indicated there were no other water rights associated with the place of use or point of diversion, A.R. 374 at ¶ 14, but the field exam notes observed the presence of the 60 ASCC shares at the same place of use, A.R. 374 at ¶ 15. The field exam also documented the development of 55 acres of irrigation, rather than the 60 described in the application. A.R. 375 at ¶ 16. Water right 35-7667 was eventually licensed by IDWR on December 24, 2001. A.R. 376 at ¶ 20. On August 7, 2015, IDWR approved Transfer Application 80188 resulting in a split of water right 35-7667, with water right 35-7667 now authorized for the irrigation of 53.9 acres. A.R. 377 at ¶ 23.

In 2017 Duffin converted the irrigation at the place of use from exclusively ground water under water right 35-7667 to exclusively surface water with the ASCC shares. A.R. 377-78 at ¶ 24. When Duffin filed Transfer Application 83160 on April 2, 2019, the application confirmed that the current place of use for water right 35-7667 is irrigated with the ASCC shares. A.R. 380 at ¶ 29.

## II. ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Whether Intervenor's are entitled to attorneys' fees and costs on Appeal.

## III. APPLICABLE LEGAL STANDARD

In an appeal from the decision of a district court acting in its appellate capacity under the Idaho Administrative Procedure Act (“IAPA” or “Idaho APA”), this Court reviews the agency record independently of the district court's decision. *See City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017); *Comer v. County of Twin Falls*, 130 Idaho 433, 437, 942 P.2d 557, 561 (1997); *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996). The standard of review “asks simply whether the Hearing Officer's findings and conclusions are supported by substantial and competent evidence.” *Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 165, 125 P.3d 515, 521 (2005). “A strong presumption of validity favors an agency's actions.” *Erickson v. Idaho Board of Licensure of Prof. Engineers and Prof. Land Surveyors*, 165 Idaho 644, 647, 450 P.3d 292, 295 (2019); *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117, 120 (2001). Under the Idaho APA, IDWR's decision may only be overturned where its findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3).

The party challenging the Department's decision must first illustrate that the agency erred in a manner specified in Idaho Code § 67-5279(3), and then establish that a substantial right has been prejudiced. *See Price v. Payette County Bd. of Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998). Further, a court may even affirm solely on the grounds that the petitioner or appellant

has not shown prejudice to a substantial right. *See* Idaho Code § 67-5279(4); *Hungate v. Bonner County*, 166 Idaho 388, 458 P.3d 966 (2020). Under the applicable standard of review Duffin’s appeal fails and should be denied.

#### IV. LEGAL ARGUMENT

Water right transfers are governed by Idaho Code § 42-222, which requires that “any person who desires to change the point of diversion or the place, period, or nature of use of the water must apply to the IDWR for approval.” *Barron*, 135 Idaho at 417, 18 P.3d at 222. The law requires that:

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....

Idaho Code § 42-222(1) (emphasis added).

The Hearing Officer found that the proposed transfer would (1) result in an enlargement of the ground water right, (2) injure other water rights, (3) be inconsistent with the conservation of water resources within the state, and (4) be contrary to the local public interest. A.R. 659-69. Because the Hearing Officer’s findings are consistent with Idaho law, and are supported by substantial evidence, the Department’s denial of Application 83160 should be affirmed.

##### **A. The Hearing Officer’s Conclusion that the Changes Proposed in Application 83160 would Result in an Enlargement of Water Right 35-7667 is Consistent with Idaho Law and is Supported by Substantial Evidence.**

In review of a transfer application, one criterion the Hearing Officer must consider is whether a transfer will result in “an enlargement in use of the original right.” Idaho Code § 42-222(1). Enlargement is “used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means,” and includes, “such

events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.” *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1205 (1996) (emphasis added).

Duffin alleges IDWR erred because the water right is not conditioned in a particular manner despite the undisputed fact it was developed with ASCC surface water rights appurtenant to the same place of use. *See App. Br.* at 14. Duffin claims it was wrong for the Hearing Officer to consider this seminal fact, or evidence, despite the plain language of the statute. As described below, Duffin’s argument fails and IDWR’s decision should be affirmed.

1. A Transfer Analysis Requires IDWR to Examine all Evidence and is Not Limited to Review Solely of the Original Water Right.

The language in the statute governing review of water right transfers, Idaho Code § 42-222(1), clearly and unambiguously requires that the “director of the department of water resources shall examine all the evidence and available information.” (emphasis added). This Court, recognizing the plain language, has also adopted this approach:

[T]he director, in deciding whether to approve the transfer, is statutorily required to examine all the available evidence and information. *See* I.C. § 42-222(1). Essentially, Barron’s argument is that the Department is required to accept his evidence as a *prima facie* showing, and, if no protest is lodged, grant the transfer without further consideration. But it is based upon the examination of the information and evidence in the record—including the information applicant provides, the Department’s investigation and records, and the watermaster’s recommendation—that the director makes the determination of whether the proposed transfer should be endorsed.

*Barron*, 135 Idaho at 421, 18 P.3d at 226 (emphasis added); *see also Jenkins v. State, Dep’t of Water Res.*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (“The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right”) (emphasis added).

The first step in the Department’s examination of a transfer application is to examine the application itself, “Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same.” *See* Idaho Code § 42-222(1). IDWR’s transfer application forms require, *inter alia*: (1) information regarding the name of the applicant and relevant ownership documentation; (2) information about the purpose of the transfer; (3) a description of rights after the requested changes; (4) information about the elements of the water right(s) after the proposed transfer, including place of use, nature of use, source, amount and point of diversion; (5) a description of the effect on the land now irrigated if the place or purpose of use is changed pursuant to this transfer; and, (6) description of the use of any other water right(s) for the same purpose or land, or the same diversion system as right(s) proposed to be transferred at both the existing and proposed point(s) of diversion and place(s) use. *See e.g.*, A.R. 286-92. These elements of the transfer application clearly show that the Director is tasked with reviewing more information than just the water right itself, and that consideration of the existing place of use and interplay with other related water rights are as important as the review of the terms of the water right itself.

Simply put, the plain language of Idaho Code § 42-222(1) *requires* that the Department *examine all evidence*, beginning with the transfer application itself, and including factors such as the use of other water rights used at the existing place of use. Following the directive of Idaho Code § 42-222, the Hearing Officer reviewed *all available evidence* and properly considered the presence of an existing, overlapping, senior surface water right used at the same existing place of use as water right 35-7667. Duffin’s argument that this gives IDWR “unchecked authority” to consider anything in its evaluation is misplaced and simply wrong. *See App. Br.* at 12.

2. Historic Use is a Component of the Enlargement Evaluation.

The Hearing Officer correctly interpreted Idaho Code § 42-222(1) and Idaho Supreme Court precedence by considering the historic use of water right 35-7667 in determining that approval of Application 83160 would result in an enlargement. *See* A.R. 659-62. The language in Idaho Code § 42-222(1) expressly provides: “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 rights.”

Consumptive use, as defined in Idaho Code § 42-202B(1), refers to water that is diverted that is not otherwise returned to the waters of the State. Beneficial use, in contrast, has been used in a broader sense to refer to water diverted and applied to the designated use of a water right, which may include some non-consumptive use. *See Barron*, 135 Idaho at 420, 18 P.3d at 225 (discussing historic beneficial use as water diverted or consumed to accomplish beneficial use); *Fremont-Madison*, 129 Idaho at 458, 926 P.2d at 1305 (stating that beneficial use enlargements include an increase in the number of acres irrigated, an increase in the rate of diversion, or an increase in the duration of diversion). As noted, Idaho Code § 42-222 explicitly recognizes that “enlargement in use” is not limited to beneficial use, but also may consider consumptive use, “the director may consider consumptive use... as a factor in determining whether a proposed change would constitute an enlargement in use of the original water rights.” Idaho Code § 42-222(1).

The Hearing Officer’s consideration of historic beneficial use is not a relitigation of the water right 35-7667, but is instead an application of the beneficial use limitation set forth in the Idaho Constitution and other Idaho law. *See* Idaho Const. art XV, § 3; *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 876, 154 P.3d 433, 447 (2007); *see also Idaho Ground Water Assoc. v. Idaho Dep’t of Water Res.*, 160 Idaho 119, 131, 369 P.3d 897,

909 (2016) (summarizing decisions discussing the beneficial use limitation on the prior appropriation doctrine). The Idaho Legislature has specifically provided in Idaho Code § 42-222(1) that an application for transfer shall not be approved if it would result in an enlargement in the use of water. A comparison of the historic use of water to the proposed use is, therefore, in line with constitutional and statutory provisions, and is necessary to meet the Legislature's express directive. The Hearing Officer properly evaluated all the evidence and the fact that the ground water right was developed on property that had appurtenant surface water at the time. The Hearing Officer was correct to acknowledge this fact and the consequences of authorizing a transfer that would result in increased irrigation.

In short, the legislative directive in Idaho Code § 42-222(1) is clear. In order to approve an application for transfer, IDWR must determine that approval would not result in an enlargement in use of the water right. The Hearing Officer correctly applied this directive by considering whether the proposed changes in the Application would result in an enlargement of water right 35-7667 above its historic beneficial use.

3. Water Right 35-7667 is a Supplemental, Stacked Water Right.

The existing place of use for water right 35-7667 is 53.9 acres in Bingham County. A.R. 377 at ¶ 23. Those same acres are also served by surface water under 60 shares of Aberdeen-Springfield Canal Company (“ASCC”) stock, owned by Duffin and originally issued to that place of use on April 24, 1970.<sup>5</sup> A.R. 370-71 at ¶¶ 2-3. These two water supplies are overlapping, or stacked water rights. The agency’s *Transfer Memo*<sup>6</sup> offers guidance on both the definition of a

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<sup>5</sup> ASCC holds water rights 01-23B and 01-297, which permit it to divert surface water from the Snake River for the irrigation of 61,772.6 acres. A.R. 657. Duffin receives water pursuant to these surface water rights through the 60 ASCC shares, as well as storage water in certain reservoirs in the Upper Snake River Basin.

<sup>6</sup> The Idaho Department of Water’s *Transfer Processing Policies and Procedures No. 24*, dated December 21, 2009, is located at A.R. 127-63 and will be referred to hereafter as “*Transfer Memo*.”



“stacked” water right, and the treatment of transfer applications seeking to “unstack” those water rights.

Water rights overlap, or are stacked, when two or more water rights are used for the same use and overlie the same place of use. *See* A.R. 154. Generally, stacked water rights are of different priorities, and from different sources. *Id.* Water rights are not stacked if “the water rights in total provide for irrigating up to the maximum acreage authorized within a permissible place of use.” *Id.* (emphasis added). Here, water right 35-7667 and the 60 ASCC shares have both the same irrigation use and the same place of use. Additionally, the maximum acreage authorized at the place of use is 53.9 acres, each water right, independently, provides enough water to fully irrigate those 53.9 acres, the two rights have never been used simultaneously, nor in conjunction with one another to irrigate the place of use. As such, water right 35-7667 and the 60 ASCC shares are stacked water rights.

A supplemental water 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.R. 155. Here, the ASCC shares were appurtenant to the place of use as early as 1919, and well before water right 35-7667 was applied for in 1977. *See* A.R. 264-82. Since the surface water rights (represented by ASCC shares) were appurtenant to the property first, they therefore constitute the primary water right on the property. The secondary application for a ground water right would only be to make up for any deficiency in the 60 shares to cover the place of use, thereby making water right 35-7667 a supplemental ground water right.

The supplemental nature of water right 35-7667 has been recognized by IDWR before. Condition 13 of *Water Supply Bank Lease Contract No. 632*, A.R. 264-282, which leased the full water right 35-7667 for 2017, states “**This right may only be rented for use as a supplemental**

**right in conjunction with a primary surface water right.”** A.R. 268 (emphasis added). Despite being presented with the data from 1997 to 2016, the Water Supply Bank (“WSB”) remained unconvinced that the ground water right was primary and restricted its rental capacity to only supplemental uses.

Furthermore, in a letter from Steve Howser (ASCC’s General Manger), produced for the state WSB application, Mr. Howser stated that the canal company does deliver water to the parcel in the WSB lease application. A.R. 280. Mr. Howser stated that ASCC has records of shares being appurtenant to the parcel since December 19, 1919, not just 1970 (which still pre-dates the application for permit for water right 35-7667). Mr. Howser stated that water delivery was provided via the “Company’s Head Gates M-56-5, M-57-8 and [their] ‘N lateral spill ditch.” *Id.*

Importantly for this case, Mr. Howser stated that “as this spill ditch often has spill flow, shareholders need to order water only when there is no spill water present. What’s more, water intentionally let into this ditch for delivery is often charged to another head gate owned by the recipient to facilitate delivery recording, as seems to be the case for this parcel.” *Id.* (emphasis added). Therefore, Mr. Howser was unable to “provide daily delivery records for this parcel.” *Id.* He did, however, state that Mr. Duffin’s head gate showed an increase of 80 miner’s inches over normal for a week in July of 2016 which Mr. Howser states “would correspond to the amount [he] suspect[s] is necessary to deliver 55 miner’s inches to the pump in the N lateral spill, and would also correspond to a period of little or no operational spill at N lateral.” *Id.* Therefore, there is *no* information concerning the specific amount of water diverted under the ASCC shares.<sup>7</sup> Instead, there is merely WMIS data for ground water diversions. *See* A.R. 378-79 at ¶ 26. Without the

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<sup>7</sup> “Insufficient data will be grounds to reject the application because the department will not be able to ascertain if the right will be enlarged.” A.R. 155.

corresponding surface water diversion data, it would be premature at best to elevate water right 35-7667 to a primary water right. This information was sufficient for the Water Supply Bank to conclude in 2016 that water right 35-7667 was a supplemental water right and condition it appropriately.

The supplemental nature of the water right is further corroborated by a previous transfer: Transfer No. 80538. In that transfer, the Applicants Jeffrey and Chana Duffin proposed to move a portion of water right 35-7667 to a new place of use and add a new point of diversion. A.R. 186. Through that transfer, the Applicants only moved 0.2 cfs and 40 acre-feet, to irrigate 10 acres. A.R. 197. The proposed place of use, unlike the property in this case, “also receive[d] water from the Aberdeen-Springfield Canal Company.” A.R. 198.<sup>8</sup> The Applicants considered water right 35-7667 to be a supplemental water right by ensuring that the proposed place of use was served by a similar surface water right to avoid an enlargement of the ground water right. It is only now that the Applicants are claiming that the ground water right is primary and does not need to be restricted to a supplemental use on property already serviced by surface water.

Again, the current position is contrary to the history of the water right’s actual development, the previous conditioning of the WSB, and how the Applicants themselves have treated the same water right in the past. All of these facts demonstrate that water right 35-7667 is clearly supplemental to the ASCC shares and the surface water rights appurtenant to the property.

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<sup>8</sup> “[T]he place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right at a different place of use without, by definition, enlarging the original right or the supplemental right proposed for transfer, so long as the primary rights at the original and proposed places of use provide comparable water supplies.” A.R. 154.

4. Application 83160 Would Result in an Increase in Irrigated Acres, and therefore, an Enlargement of Water Right 35-7667.

Allowing the water right 35-7667 to be transferred off the current place of use to then be used for irrigation of new lands without appurtenant water constitutes an unlawful enlargement of the supplemental right. *See Fremont-Madison*, 129 Idaho at 458, 926 P.2d at 1305; *Barron*, 135 Idaho at 419, 18 P.3d at 224. “An enlargement may include such events as an increase in the number of acres irrigated under an original water right.” *A & B Irrigation Dist. v. Aberdeen-Am. Falls Ground Water Dist.*, 141 Idaho 746, 751, 118 P.3d 78, 83 (2005). Under the original water rights—the primary 60 ASCC shares, and the secondary ground water right 35-7667—only 60-acres were authorized for irrigation. If Application 83160 is approved, the current 60-acres will be irrigated with the 60 ASCC shares, and an additional 53.9 acres will be irrigated under the proposed place of use with ground water, nearly doubling the number of irrigated acres than was previously irrigated. This enlargement would clearly place an additional stress on the area’s water resources and enlarge the consumptive use beyond what was provided for when the water right was originally appropriated.

As such, the Hearing Officer’s decision to deny Application 83160 as it would result in an enlargement is consistent with Idaho law and is supported by substantial evidence.

**B. The Hearing Officer’s Finding that Application 83160 Would (1) Injure Other Water Rights, (2) Is Inconsistent with the Conservation of the Water Resources of Idaho, and (3) Would not be in the Local Public Interest is Supported by Substantial and Competent Evidence, Namely, Application 83160 Would Cause an Increase in the Use of Idaho’s Limited Water Resources.**

In reviewing an application to transfer a water right, the director must determine “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....” Idaho Code

§ 42-222(1). The transfer applicant, in this case Duffin, carries the burden to “produce sufficient evidence to enable the director to approve his proposed transfer” including “sufficient evidence of non-injury, no enlargement, and favorable public interest...” *Barron*, 135 Idaho at 420-21, 18 P.3d at 225-26. “The Court will not substitute its judgment for that of the agency as to the weight of the evidence presented.” *Id.* 135 Idaho at 417, 18 P.3d at 222 (citing Idaho Code § 67-5279(1)).

Even though these considerations are central to the Director’s transfer analysis, and the burden rests with Duffin to demonstrate the proposed transfer meets these factors, Duffin responds to the Hearing Officer’s conclusions on injury, conservation of water resources and the local public interest by insisting they should be “reconsidered” because they are based on an invalid “holding” of enlargement. *See App. Br.* at 41-42. More specifically, Duffin asserts that the Hearing Officer’s “‘single, combined beneficial use of water’ serves as the basis for the remainder of the *Final Order*’s conclusions....” *Id.* SWC counters that not only is the Hearing Officer’s enlargement analysis and conclusion solidly based in law and precedent, his conclusions relative to injury, conservation of water, and local public interest properly considered important factors relating to Idaho’s water resources. Those factors include the ESPA moratorium, the Comprehensive Aquifer Management Plan (CAMP) and the State Water Plan. For reasons explained in more detail below, the Hearing Officer’s conclusions as to injury, conservation of water resources and the local public interest are accurate, entitled to deference, and should be affirmed on appeal.

1. Approval of Application 83160 will Injure Existing Water Rights.

The Hearing Officer did not err in concluding that the changes proposed in Transfer 83160 would result in injury to other water rights. Having already determined that Application 83160 would result in an enlargement, the Hearing Officer further determined that Application 83160 would injure other existing water rights. Specifically, given the stacked nature of the water rights—

water right 35-7667 and the ASCC shares—if Duffin irrigates the existing place of use with the ASCC shares, “the irrigation of the proposed place of use with water right 35-7667 would be a new depletion to the ESPA that would not occur if the rights were to remain stacked.” A.R. 668. Approval of Transfer 83160 would result in the irrigation of an additional 53.9 acres, doubling the number of irrigated acres currently irrigated and resulting in an enlargement. “An enlargement may include such events as an increase in the number of acres irrigated under an original water right.” *A&B Irrigation Dist.*, 141 Idaho at 751, 118 P.3d at 83.

Idaho law presumes an enlargement will injure other water rights. *City of Pocatello v. State of Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (“Likewise, there is per se injury to junior water rights holders anytime an enlargement receives priority.”) (quoting *A&B Irrigation Dist.*, 141 Idaho at 753, 118 P.3d at 85)). Because approval of 83160 would result in the unstacking of two water rights resulting in a doubling of acres irrigated, it will result in an enlargement and, under Idaho law, injury.

Not only will 83160 result in per se injury, the Hearing Officer was right to acknowledge the “Upper Snake is fully appropriated during most of the irrigation season” resulting in curtailments of junior water rights every summer (including ASCC’s). A.R. 667. Therefore “[a]ny increase in demand in the ASCC system” which would undoubtedly occur with the approval of 83160 “would result in less water available to fill junior water rights on the Snake River.” *Id.* Since the transfer approval would place a greater demand upon the Snake River than has historically been realized, the injury to junior surface water rights was a criterion that Duffin failed to overcome.

Finally, as stated by the Hearing Officer in the orders denying the transfer, the proposed transfer is in a moratorium area:

On April 30, 1993, the Department issued an Amended Moratorium Order (“1993 Moratorium”), prohibiting the processing of applications for consumptive uses from ground water over a large portion of the Eastern Snake Plain Aquifer (“ESPA”). The 1993 Moratorium was the result of declining aquifer levels in and spring discharges from the ESPA. 1993 Moratorium at 1-2. The proposed point of diversion is within the designated moratorium area.

A.R. 667.

Duffin failed to identify or offer any mitigation to offset the injury caused by this new consumptive use as required by the 1993 Moratorium. *See* A.R. 9. Such a new unmitigated consumptive use would be contrary to the moratorium. Moreover, the additional strain on the aquifer would counter the very purpose of the moratorium. Notably, IDWR, and the district court on review, previously recognized the tenuous state of this particular area’s ground water resources in Basin 35 in an order prohibiting further processing of a ground water permit that was issued in 1990.<sup>9</sup> In his *Memorandum Decision and Order on Petition for Judicial Review (Permit No. 35-8359, John B. & Diane K. Kugler)* (Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV2011-15672, May 23, 2012, Judge Wildman found:

The Director’s findings of injury to existing senior water rights and jeopardy to the ability to maintain minimum stream flows are supported by the evidence in the record. With respect to injury to senior rights, the *IDWR Staff Memorandum* contained in the record establishes the impacts of diversions under permit no. 35-8359 on Snake River flows using versions 1.1 of the ESPA Model. R., 148-155. The Model results reveal that at steady state diversions under the permit would deplete flows in the Snake River above Milner Dam in the amount of .68 cfs and/or 490.47 acre-feet per year and deplete flows below Milner Dam in the amount of .07 cfs and/or 49.37 acre-feet per year. R., 149. Testimony supporting the Model results was likewise presented before the Director at the June 14, 2011, hearing. Tr., 39-45. Based on this substantial evidence, which was uncontroverted in the record, and given various delivery calls then pending before the Department that resulted in curtailment orders against junior ground water pumpers in the ESPA, the Director determined that Kugler’s proposed diversion of ground water would reduce the quantity of water available to Snake River surface water right holders entitled to divert Snake River water above Milner Dam resulting in injury.

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<sup>9</sup> The place of use for the Kugler permit is only located about 14 miles west of the current Duffin place of use in Basin 35.

*Memorandum Decision* at 11 (emphasis added).

The same reasoning applies and supports the Hearing Officer’s decision in this case, as curtailment orders on the ESPA exist, and increasing the impact on the aquifer will deplete the quantity of water available to Snake River surface water right holders, including rights held by the SWC, resulting in injury. Consequently, the Hearing Officer’s decision is correct and should be upheld.

2. Application 83160 is Inconsistent with the Conservation of the Water Resources of Idaho.

The Hearing Officer correctly found the Transfer Application contrary to the conservation of water resources because a “proposal to double the amount of water delivered under the combined water rights (water right 35-7667 and the ASCC shares) and double the beneficial use occurring under the combined rights is antithetical to the concept of water conservation.” A.R. 668 (emphasis added). Doubling irrigation within a moratorium area and depleting flows to the Snake River where water rights are curtailed every year does not support the conservation of water resources within the state.

The *Transfer Memo* requires the Department to consider whether the proposed transfer would be compatible with the objectives and policies of the State Water Plan. Duffin’s proposal to double the total irrigated acres through Application 83160 would result in the increased consumptive use of water, which contradicts the objectives of the State Water Plan, the *Transfer Memo*, and the policies of water conservation in the state of Idaho.

3. Application 83160 is not in the Local Public Interest.

Idaho Code defines “local public interest” to be “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3). “This Court determined that by adopting the general phrase



‘local public interest,’ the legislature ‘intended to include any locally important factor impacted by the proposed appropriations.’” *Shokal v. Dunn*, 109 Idaho 330, 338–39, 707 P.2d 441, 449–50 (1985). “Factors of the local public interest carry different weight depending on the specific circumstances and interests involved, and both the benefits and detriments must be considered.” *Chisholm*, 142 Idaho at 164, 125 P.3d at 520 (internal citations omitted). This Court has held “the local public interest has many elements and the determination of which local public interests are impacted and balancing those impacts is left to the sound discretion of IDWR.” *Id.*

The Hearing Officer, in balancing the impacts that Application 83160 would have on the local public interest, properly concluded that 83160 is not in the local public interest. Under the broad interpretation of local public interest, a transfer application that results in an enlargement and does not conserve the water resources of the state of Idaho is contrary to the local public interest in sustaining the ESPA and conserving Idaho’s water resources. Application 83160 seeks to double the number of acres irrigated under the Duffin’s current water rights. The resulting increase in the consumptive use of water within the Eastern Snake River Plain would violate the local public interest.

The Hearing Officer identified concerns that the point of diversion is in a moratorium area and that approval of the transfer would violate the CAMP goal to “reduce the withdrawals from the aquifer.” A.R. 668-67 (quoting CAMP for the ESPA, at 7). The 1993 Moratorium was issued because of chronic drought conditions and depletion of ground water throughout the ESPA. Through that order, the Director issued a moratorium on issuance of permits to divert and use ground water from the ESPA and tributary drainages in order to “protect existing water rights.” A.R. 9. The practical impact of Transfer 83160 would be to double the consumptive use under the

current water rights without providing mitigation to offset the additional stress on the ESPA, an action that directly conflicts with the plain language of the 1993 Moratorium.

Applying the broad interpretation of the local public interest, this increase in depletion to the over-appropriated ESPA is contrary to an order from the Director of IDWR and cannot be allowed. The Director has a statutory duty to “control the appropriation and use of the ground water of this state... and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources.” Idaho Code § 42-231. Application 83160 would undoubtedly increase the volume of water used under the current water rights, thereby violating the 1993 Moratorium and furthering the harm the moratorium seeks to prevent. Consequently, it is not in the local public interest and the Hearing Officer’s denial of the transfer application should be upheld.

The Hearing Officer properly found Application 83160 is not in the local public interest because the proposed transfer is in an area subject to a delivery call and IDWR has already issued curtailment orders. The result is that any increase in consumptive use from either the ESPA or the Snake River “will exacerbate the conditions giving rise to the delivery call filed by the [SWC].” A.R. 669. Finally, the Hearing Officer was correct that any proposal to unstack water rights resulting in the doubling of a beneficial use is not in the local public interest. *Id.*

“[T]he local public interest has many elements and the determination of which local public interests are impacted and balancing those impacts is left to the sound discretion of IDWR.” *Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho at 164, 125 P.3d at 520. The Hearing Officer properly considered the evidence before him and correctly determined that the local public interest criteria were not satisfied. Duffin offered nothing in *Appellant’s Brief* to overcome the Hearing

Officer's decision. As this decision is left to the "sound discretion of IDWR," the Hearing Officer's decision must stand and Application 83160 remain denied.

**C. The Hearing Officer's Decision does not Prejudice Duffin's Substantial Rights.**

In order to prevail on the challenge to the Hearing Officer's decision, Duffin also "must show that the decision prejudiced a substantial right." *Noble v. Kootenai Cty. ex rel. Kootenai Cty. Bd. of Comm'rs*, 148 Idaho 937, 943, 231 P.3d 1034, 1040 (2010) (citing Idaho Code § 67-5279(4); *Price*, 131 Idaho at 429, 958 P.2d at 586). In accordance with Idaho Code § 67-5279, even if the Hearing Officer reached his decision upon unlawful procedure, his decision shall still be affirmed unless Duffin's substantial rights have been prejudiced by that decision. *Id*

The SWC agrees with Duffin that water rights are "substantial" property right interests. *App. Br.* at 43; *see also Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015). In *Barron* however, this Court found "Barron obtained water right 37-02801 as it currently exists, i.e., as a water right for which there is a supplemental appropriation. Because the licensed place of use historically has been irrigated to some extent by groundwater right 37-07295, Barron took the surface right, 37-02801, subject to the groundwater right's utilization." *Barron*, 135 Idaho at 420, 18 P.3d at 225.

Similarly in this case, Duffin "obtained water right [35-7667] as it currently exists," meaning Duffin's property interest in water right 35-7667 is limited by the combined beneficial use limitation it shares with the ASCC surface water rights. Since Duffin appropriated water right 35-7667 as a supplemental supply to lands that already had appurtenant ASCC shares, Duffin's property right interest is not prejudiced by the agency's denial of the transfer. Stated another way, Duffin has no right to expand water right 35-7667 into something for which it was not historically used, in this case water use separate and apart from irrigation on lands combined with ASCC

shares. Therefore, the Court should find that the Hearing Officer’s decision has not prejudiced a substantial right of Duffin and affirm the denial of the transfer accordingly.

Moreover, as the Idaho Supreme Court found in *Hungate v. Bonner County*, 166 Idaho 388, 458 P.3d 966 (2020), even if IDWR erred in some way, the Court can affirm if the appellant fails to show prejudice to a substantial right. In the context of land use decisions, this Court noted that a substantial right can be violated when property values are impacted or a decision interferes with the use and enjoyment of property. *Hungate*, 166 Idaho at 394, 458 P.3d at 972. Assuming the standard applies to decisions by IDWR it is clear that Duffin has not shown any impact on property values or interference with the use of the ground water right. Afterall, Duffin is free to use the ground water on the land as it has been appropriated, and the denial of the transfer does not affect that water use in any way. Consequently, without harm to any substantial right, the Court can affirm IDWR’s denial of the transfer accordingly.

**D. The Court Should Award Intervenors Attorneys’ Fees and Costs on Appeal.**

Duffin takes up this appeal in order to “receive answers and analysis to these unaddressed arguments,” even if this Court ultimately confirms the decision of the District Court and the Hearing Officer. *See App. Br.* at 6. The continued pursuit of this matter is unreasonable under the circumstances, and as such, fees should be awarded on appeal. *See I.A.R.* 41.

Idaho Code § 12-117(1) provides the following:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency ... and a person ... 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.

In *Rangen, Inc. v. IDWR*, 159 Idaho 798, 367 P.3d 193 (2016), this Court addressed the reasonableness standard of section 42-117(1) as follows:

In an appeal where the prevailing party sought attorney fees under section 12–117, the Court granted fees where the nonprevailing party

*continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision. Although the [nonprevailing parties] may have had a good faith basis to bring the original suit based on their interpretation of Idaho law, [they] were very clearly aware of the statutory procedures, failed to appeal separate appraisals when they had a right to appeal, and were clearly advised on the applicable law in an articulate and well reasoned written decision from the district court. Nevertheless, [they] chose to further appeal that decision to this Court, even though they failed to add any new analysis or authority to the issues raised below. Accordingly, it was frivolous and unreasonable to make a continued argument, and [the prevailing party] is awarded its reasonable attorney fees.*

*Id.* (Emphasis added).

In *Rangen*, the Department prevailed on appeal. There, *Rangen* had challenged decisions before the Department (through a petition for reconsideration before the Director), before the District Court (through a petition for judicial review of the Director’s decision) and before this Court on appeal. *Rangen*, 159 Idaho at 503, 367 P.3d at 198. *Rangen* did not prevail in any of those challenges. *Id.* In granting the Department’s request for fees, this Court determined: “*Rangen* asserted substantially the same arguments on appeal as it did before the district court on judicial review and failed to add significant new analysis or authority to support its arguments.” *Id.*, 159 Idaho at 512, 367 P.3d at 207.

The same analysis applies here and compels an award of attorneys’ fees. Indeed, a review of the briefing shows that Duffin has advanced ostensibly the same, failed arguments at every turn. *See* A.R. 423-57 (*Applicant’s Argument Brief*); A.R. 603-30 (*Applicant’s Petition for Reconsideration*); C.R. 55-103 (*Petitioners’ Opening Brief*); and *App. Br.* Duffin has not added any “significant new analysis or authority to support its arguments” – rather, Duffin relies on the same cases and arguments as in prior briefing. Duffin has failed to show how the Hearing Officer or District Court erred in the

legal analysis in their decisions. Since Duffin has not advanced any new arguments or analysis, the Court should award Intervenors attorneys' fees on appeal under Idaho Code § 12-117.

In addition, Idaho Code § 12-121 further provides the judiciary with discretion to “award reasonable attorney’s fees to the prevailing party or parties.” Like the situation in *Rangen*, here Duffin is simply asking the Court to improperly “second-guess” the District Court and the Hearing Officer, and their well-reasoned analysis. The Court recently rebuked such an attempt in *Frantz v. Hawley Troxell Ennis & Hawley, LLP*, and found that attorneys’ fees were warranted under Idaho Code § 12-121. *See Frantz v. Hawley Troxell Ennis & Hawley, LLP*, 161 Idaho 60, 383 P.3d 1230 (2016).

In *Frantz*, the Court noted:

Section 12-121 allows an award of attorney fees to a prevailing party where “the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.” *Idaho Military Historical Soc’y v. Maslem*, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014). “Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law.” *Snider v. Arnold*, 153 Idaho 641, 645-646, 289 P.3d 43, 47-48 (2012). Further attorney fees on appeal have been awarded under Section 12-121 when appellants “failed to add any new analysis or authority to the issues raised below’ that were resolved by the district court’s well-reasoned authority.” *Wagner v. Wagner*, 160 Idaho 294, 302, 371 P.3d 807, 815 (2016) (quoting *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005)).

*Frantz*, 161 Idaho at 66, 383 P. 3d at 1236 (emphasis added).

Like the appellant in *Frantz*, Duffin has failed to show that the District Court or the Hearing Officer incorrectly applied well-established law. Further, Duffin has not added “any new analysis or authority” to issues that were raised before the District Court or the Hearing Officer and resolved by its well-reasoned authority. The circumstances further warrant an award of fees to the Intervenors under Idaho Code § 12-121.

In sum, Duffin’s continued appeal is unreasonable and without a legal foundation. The District Court and the Hearing Officer applied well-established law and analysis in its decision. The Court should enter an order awarding attorneys’ fees to the Intervenors under either Idaho Code §§ 12-117 or 12-121.

**V. CONCLUSION**

Duffin’s appeal should be denied. Application 83160 would result in an enlargement of water right 35-7667, would injure existing water right, is inconsistent with the conservation of Idaho’s waters, and is not in the local public interest. For these reasons, and those more fully set forth above, this Court should uphold the District Court’s affirmation of the *Final Order* and should further affirm the Department’s *Final Order* denying Application 83160.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of September, 2021.

**BARKER ROSHOLT & SIMPSON LLP**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 21<sup>st</sup> day of September, 2021, I served true and correct copies of the foregoing upon the following by the method indicated:

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Clerk of the Court of Appeals	<input type="checkbox"/>	Hand Delivered
P.O. Box 83720	<input type="checkbox"/>	Overnight Mail
Boise, ID 83720-0101	<input checked="" type="checkbox"/>	iCourt
	<input type="checkbox"/>	E-mail

Snake River Basin Adjudication	<input type="checkbox"/>	U. S. Mail
Clerk of the Court	<input type="checkbox"/>	Hand Delivered
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<a href="mailto:michael.orr@ag.idaho.gov">michael.orr@ag.idaho.gov</a>		
<a href="mailto:shantel.knowlton@ag.idaho.gov">shantel.knowlton@ag.idaho.gov</a>		

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