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

JEFFREY AND CHANA DUFFIN, husband and wife,

Petitioners-Appellants,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent,

v.

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

Intervenors.

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

Supreme Court Docket No. 48769-2021

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

APPELLANTS' REPLY BRIEF

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

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Appellants Jeffrey Duffin and Chana Duffin (collectively "Appellants" or "Duffin"), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Appellants' Reply Brief*. This reply addresses arguments contained in *Respondent's Brief of the Idaho Department of Water Resources* ("*IDWR Response*") and the *Intervenors' Response Brief* ("*Intervenors' Response*") both of which were filed on September 21, 2021. These response briefs responded to *Appellants' Brief* filed on August 10, 2021.

For the sake of clarity and brevity, Duffin will use terms as defined in *Appellants' Brief*. To the extent any arguments in the responses are not specifically addressed herein, Duffin maintains the positions initially set forth in *Appellants' Opening Brief*. As previously described, this appeal seeks judicial review of the *Amended Preliminary Order Denying Transfer* issued on August 12, 2020, that became final (the "*Final Order*") fourteen days later. A.R. 0656-0669. The *Final Order* was issued by James Cefalo, the appointed contested case hearing officer (the "Hearing Officer") from the Idaho Department of Water Resources ("IDWR" or "Department").

I. LEGAL ARGUMENT

It is evident from the contents of the response briefs that there is disagreement over how this case, and the legal issues it raises, are properly framed and analyzed and what legal authority and legal principles controls over other authorities and principles. There are also new or refined arguments in support of its position on appeal that were not previously asserted before the district court. As a general matter, most of the issues raised by IDWR and the Intervenors overlap.

The overarching issue in this appeal is whether the Hearing Officer's determination that 83160 proposes an enlargement is correct. More specifically, the main issue on appeal is whether mere overlapping places of use of two water entitlements, without a recorded reference to the overlap in either water entitlement, constitutes a "single combined beneficial use" water right

element and is captured within the lawful scope of an enlargement analysis, particularly when neither "single combined beneficial use" nor inclusion of overlapping places of use is described as an enlargement example in the *Transfer Memo* (an agency interpretation of Idaho law). The parties disagree not only on the answer to this question, but also how to analyze it. Accordingly, this reply refines Duffin's arguments made in their opening brief in response to the arguments raised by IDWR and the Intervenors.

The resolution of the issues raised in this appeal are important because it will provide clear answers for the regulated community and the attorneys and consultants that represent them. The issues on appeal implicate issues of property rights, water right interpretation, water right description standards, whether combined uses must be included in the description of the right, statutory interpretation, interpretation and application of administrative agency guidance documents that interpret relevant statutes and define relevant terms, and the scope of discretion afforded to IDWR and/or its hearing officers in transfer proceedings. As described below, Duffin's approach to these issues comports with Idaho law, and the *Final Order* should be reversed as a result.

A. IDWR's definition of enlargement is unavailing. Idaho law provides that an enlargement in use of a water right is an increase in the amount of water diverted in excess of the diversion limits recorded on the water right at issue.

35-7667 is a ground water right and the only water right proposed for amendment under 83160. This entire case centers around the enlargement analysis of this water right, and whether approving the proposed change in place of use and point of diversion—the only changes sought under 83160—would result in an enlargement of 35-7667. Accordingly, it makes sense to first define what an enlargement is, and then apply it to a transfer situation. This definition is informed by the plain language of Idaho statutes, language from Idaho cases, and language from written

IDWR guidance (particularly the *Transfer Memo*).[1] An interrelated component of this definition is the scope, or extent, of an enlargement (*i.e.*, whether it covers other water entitlements). Both the definition and scope components were addressed together in *Appellants' Brief*, but in response to the arguments asserted in response, it is beneficial to separate the discussion of these components. The scope of enlargement question is addressed in a separate section below.

Idaho Code § 42-222—the transfer statute—provides that a transfer application is required if a proposed change is to the (1) point of diversion, (2) the place of use, (3) the period of use, or (4) the nature of use elements of an established water right. Based on this, it is a correct statement of Idaho law to state that a transfer of a water right refers to a change to one of its "elements." The term "enlargement" is contained in Idaho Code § 42-222, but there is no applicable formal definition of this term in either section 42-222 itself, Idaho Code § 42-202B (a definition statute within Title 42), or elsewhere in the Idaho Code. Further, there is no definition of water right enlargement in any of IDWR's formal administrative rules (IDAPA 37.01.01 through 37.03.12) and no administrative rules have been specifically promulgated for water right transfers.

A fundamental premise of the phrase "enlargement of a water right" is that there must be something for the water right to enlarge upon, and we submit that the "something" is a recorded element of a water right. In formulating an enlargement definition, it is important to recognize that an enlargement can occur even outside the context of a transfer, only in that other context, the enlarged use is an illegal diversion of water as described in Idaho Code § 42-351, which provides: "It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, **or to divert or use water not in conformance with a valid water right**." Idaho Code § 42-351(1) (emphasis added). The

[1] The legal effect of the *Transfer Memo* is discussed below.

phrase "[c]onformance with a valid water right" is a clear reference to the elements of a water right.

IDWR's enlargement definition contains no reference, neither implicit nor explicit, to recorded elements of a water right. Both the Hearing Officer and the *IDWR Response* define enlargement to merely be "an increase in the number of acres irrigated," A.R. 0662,[2] and/or "[a]n increase in the amount of water diverted or used is also an enlargement." *IDWR Response* at 11; *see also Id.* at 30-31 (arguing that the lack of a license condition expressly combining water right 35-7667 with Duffin's ASCC shares is irrelevant).

The correct statement of what constitutes an enlargement is when there is an increase in use of water that *exceeds a described element of a water right* (for example, irrigating more acres than authorized under the water right). In the context of evaluating a transfer for enlargement, it is whether there is a *proposal* to increase use of water that *exceeds a described element of a water right*.

IDWR should follow its own guidance document (discussed below) to formulate its definition of enlargement on this appeal.[3] It is *not* an enlargement if there is an increase in the number of acres irrigated by a water right owner—it is *only* an enlargement if there is an increase in the number of acres in excess of the recorded acreage limit described on the water right. It is *not* an enlargement if there is an increase in the amount of water diverted—it is *only* an enlargement if there is an increase in the number diversion rate and/or diversion volume in excess of the recorded limits described on the water right. As described above, an enlargement can occur

[2] The Hearing Officer preceded this portion of his decision with a discussion of *Barron*, which is discussed below.

[3] Where the *Transfer Memo* is an interpretation of Idaho Code section 42-222, its statutory interpretation is entitled to "considerable weight" because IDWR meets all the prongs of the four-prong test applied to determine the appropriate level of deference to be given to agency construction of a statute. This was addressed in *Appellants' Brief* and was not addressed by IDWR or the Intervenors in their responses. This is discussed below.

even outside the context of a transfer application. *See* Idaho Code § 42-351(1) ("It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, **or to divert or use water not in conformance with a valid water right**." (emphasis added)). If IDWR's enlargement definition is taken to its logical end, a water right owner, for example, would be guilty of an enlargement if they increased their water diversion amount over the prior year's diversion amount, even if the prior year's lower diversion amount was the result of weather conditions where not as much diverted water was necessary. Or if a water user decided to irrigate a pivot corner that was not irrigated the prior year, even though the water right authorizes the irrigation of enough acres to cover the pivot corner. These real world scenarios demonstrate that IDWR's definition leads to an absurd result, which this Court should reject. *See State v. Heath*, ___ Idaho ___, ___, 485 P.3d 1121, 1124 (2021); *State v. Doe*, 167 Idaho 249, 253, 469 P.3d 36, 40 (Ct. App. 2020 (The Court will not interpret a rule or statute to create an absurd result.).

IDWR's enlargement definition is based, in part, on language from *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996). *See* A.R. 0662. In the *Appellants' Brief*, Duffin also quotes from the *Fremont-Madison* definition to support its contention that an enlargement must be from a recorded element of a water right, as well as what the proper scope of what is considered an enlargement (the scope question is addressed below). However, IDWR relies upon *Fremont-Madison* to support its contention that enlargement occurs simply when there is an increase in total water use and/or irrigated acres, and that the water right elements or the right subject to the transfer are irrelevant. *IDWR Response* at 9, 11 ("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)."; . . . "[a]n increase in the amount of water diverted or used is also an enlargement." (also relying upon *Fremont-Madison*)). IDWR also relies upon a case that came out the SRBA, *City of Pocatello v. State (In re SRBA Case No. 39576)*, 152 Idaho 830 (2012), to support its definition. While IDWR's too-narrow definition is erroneous for several reasons, we begin with discussion of these cases.

The *Fremont-Madison* and *Pocatello* cases relied upon by the Hearing Officer and IDWR on this appeal discuss certain aspects and principles of enlargement, but their discussion is not within the context of Idaho Code § 42-222. Instead, these cases center on issues associated with certain adjudication statutes, Idaho Code §§ 42-1425, 42-1426, and 42-1427 (the so-called "amnesty statutes" adopted soon after commencement of the SRBA), that, among other things, allow for the decree of "enlargement water rights." IDWR admits this on page 16 of its response brief, but still cites to *Fremont-Madison* as a legal basis for its enlargement definition on page 11 of its brief that an increase in the amount of water diverted or used is also an enlargement under Idaho Code § 42-222. Idaho Code § 42-1426 allows for the decree of enlargement water rights to authorize what was initially illegal water use where the enlarged water use occurred in violation of mandatory water right permittubg requirements. Despite this context, the Hearing Officer relied upon the enlargement discussion from the *Fremont-Madison* case as follows:

> The term "enlargement" includes "any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means." *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (citation omitted). "An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion." *Id.*

A.R. 0662. However, the "citation omitted" parenthetical in this quote omits this Court's citation to Idaho Code § 42-1426(1)(a), which is important to understand the context of the *Fremont-*

Madison case.[4]

The context is important because Idaho Code § 42-1426 authorized the decree of a separate "enlargement" water right in an adjudication, which enlargement right was paired with the "original" or "base" water right through express recorded conditions in both rights. This authorized a form of amnesty for illegal uses of water that turned out to be a significant problem when taking claims in the SRBA. This statute retroactively waived the mandatory permit requirements of Idaho's water code and provides that "a new water right may be decreed for the enlarged use." Idaho Code § 42-1426(2). To protect existing water rights, these "enlargement rights" were decreed with a priority date of April 12, 1994 (the effective date of Idaho Code § 42-1426). *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist. (In re SRBA Case No. 39576)*, 141 Idaho 746, 752-53, 118 P.3d 78, 84-85 (2005) ("Treating the water as ground water, the enlargements are subordinate to those priority rights established before April 12, 1994, the date I.C. § 42-1426 was enacted.")

Importantly, the analysis associated with Idaho Code § 42-1426 was the type of enlarged uses that could be authorized by decree of a separate water right. In the SRBA, most often the enlargement water right allowed for irrigation of acres illegally expanded on to by the base water right, but by statute, it did not allow for inclusion of additional diversion rate associated with the new acres in excess of the described base right diversion rate. Idaho Code § 42-1426(a) ("Thus, the legislature further finds and declares that it is in the public interest to waive the mandatory

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[4] Here is the complete quote from the *Fremont-Madison* case:

> The term "enlargement" has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. ***See* I.C. § 42–1426(1)(a)**. An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.

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

permit requirements for these enlargements in use prior to the commencement of a general adjudication, as long as such enlargements in use **did not increase the rate of diversion of the original water right** or exceed the rate of diversion for irrigation provided in section 42-202, Idaho Code, after the enlargement of use, and the enlargement of use did not reduce the quantity of water available to other water rights existing on the date of the enlargement in use." (emphasis added)); *see also A & B Irrigation Dist.*, 141 Idaho at 753, 118 P.3d at 85 ("I.C. § 42-1426 grants amnesty for enlargements so long as there is no additional diversion of the original water right and full mitigation of injury to junior water rights takes place.").

Thus, the *Fremont-Madison* language was specific to Idaho Code § 42-1426 and what enlargements could be recorded through issuance of a *separate* water right—a decreed enlargement water right. There are certainly principles that can be gleaned from this decision that inform a general enlargement definition, which Duffin agrees are applicable. However, both the Hearing Officer and IDWR on appeal have overstated language from this decision as a basis to deny 83160. It is clear, however, that *Fremont-Madison* did not address enlargement in the context of a transfer application, or generally even address enlargement associated with overlapping water entitlements. Rather, it addressed an increase of water use in excess of recorded elements of a water right that would warrant issuance of a separate water right—an enlargement right—without making the water user go through the water right permitting process. Understood in this context, *Fremont-Madison* supports and informs Duffin's enlargement definition, which is when there is an increase in use of water that exceeds a described element of a water right that, in an adjudication, warrants issuance of a separate water right. It is not merely in increased use of water that warrants issuance of a separate enlargement water right.

Additionally, *City of Pocatello v. State (In re SRBA Case No. 39576)*, 152 Idaho 830 (2012) case cited to in the *IDWR Response* (but not discussed in any detail) is not a case that involved a transfer proceeding, and likewise does not support IDWR's position.[5]

In sum, diversion or use of more water by a water **user**, in the abstract, is simply not an enlargement. It is only the diversion or use of water that exceeds a recorded or described element of a water **right**, *i.e.*, diverting water "not in conformance with a valid water right" that is an enlargement. This leads us to the next component of defining enlargement, which is what the recorded elements of a water right are under Idaho law.

B. Idaho law describes what the recorded elements of a water right are, and they serve as a basis upon which an enlargement determination can be based.

As described above, a transfer is an administrative process to change one or more of four elements of a water right (the (1) point of diversion, (2) the place of use, (3) the period of use, or (4) the nature of use of an established water right). Idaho Code § 42-222. It is important to note here that the transfer statute does not state with absolute clarity that a proposal to change *conditions* related to these elements are also subject to review when a transfer is filed. However, the *Transfer*

[5] The facts of that SRBA case are also not present on this appeal. That case involved several issues related to Pocatello's appeal from the SRBA Court of certain conditions associated with the "accomplished transfer" of Pocatello's water rights, including whether the accomplished transfer statute allowed for changes in source, and whether a condition associated with alternative points of diversion (providing "To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from Pocatello well [description] in the amount of ___ cfs.") was warranted. The Idaho Supreme Court upheld the SRBA Court's decision on these matters, holding that "if Pocatello could have each well be an alternate point of diversion for each water right without the attached condition, as stated by IDWR in its supplemental *Director's Report*, 'the City would be allowed to withdraw water under its most senior priority water right from any well location.' Recognizing the transfers without the attached condition would injure junior water rights holders by diminishing their priorities, the district court did not err in upholding the attached condition. *City of Pocatello*, 152 Idaho at 836, 275 P.3d at 851. Thus, under the SRBA decrees, Pocatello could divert any of its water rights from any of its wells, but if a delivery call was filed, the amount of water from each well would be limited to the diversion rate of the water right that was used to develop the well in the first place. Without such a condition, in the context of priority administration, the increased volume of water pumped would be an enlargement of the type not allowed under Idaho Code § 42-1425 without mitigating conditions like the one that was challenged on that appeal.

Memo clearly addresses this:

> Conditions or other provisions of a water right may further define or limit a **recorded element** of a water right; an application for transfer is required of a proposed change that could **alter such a condition**.

A.R. 128 (emphasis added). Accordingly, these authorities provide that it is the recorded elements of a water right that are implicated in an enlargement.

What recorded elements make up a water right? We know because of Idaho statutes. "Water rights are defined by elements. Idaho Code §§ 42-1411(2) and 42-1411(3) comprise a list of elements that define a water right. Under Idaho Code § 42-1412(6), a water decree 'shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable.'" *City of Blackfoot v. Spackman*, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017) (internal citations omitted). Idaho Code § 42-1411(2)'s list of water right elements is:

> (a) The name and address of the claimant;
> (b) The source of water;
> (c) The quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
> (d) The date of priority; provided that for stockwater use on federal land, the director shall accept the date of the first grazing permit issued on the federal grazing allotment, pursuant to federal grazing authorizations, including but not limited to the Taylor grazing act, as prima facie evidence of the date of priority, unless the claimant produces evidence of earlier stockwater use on the federal land, which shall then establish the date of priority;
> (e) The legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
> (f) The purpose of use;
> (g) The period of the year when water is used for such purposes;
> (h) A legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except that the place of use may be described using a general description in the manner provided under section 42-219, Idaho Code, which may consist of a digital boundary as defined in section 42-202B, Idaho Code, if the

> irrigation project would qualify to be so described under section 42-219, Idaho Code; provided that for stockwater use on federal land, there shall be a rebuttable presumption that the claimant's base property relates back to the base property when the first grazing permit was issued on the federal grazing land or when water was first applied to beneficial use on the federal land;
> **(i) Conditions on the exercise of any water right included in any decree, license, or approved transfer application; and**
> **(j) Such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.**

Idaho Code § 42-1411(2) (emphasis added). The bolded items—*conditions* on the exercise of a right and other remarks necessary for the *definition* of a right—*are* elements of a water right by statute. Accordingly, a proposal to alter a recorded element of a water right requires a transfer, as the *Transfer Memo* provides. Conditions are recorded in writing, and there is nothing in this list, Idaho Code § 42-222, or anywhere in the Idaho Code that provides for unrecorded elements of a water right.

Indeed, the idea behind describing water rights either through adjudication or water right licensing is to memorialize the parameters of the water right, and it is upon those recorded parameters that administration of the water right is based. The recorded elements of a water right tell the water user what they have that serves as the basis for water right administration (*i.e.*, the allocation, measurement, and delivery of water to water users under IDWR supervision (Idaho Code § 42-602 *et seq*.)). And a water user can get in trouble if they "divert or use water not in conformance with a valid water right." Idaho Code §§ 42-351(1); 42-1701B (statute granting the Director authority to commence enforcement actions for water use violations.). As supported by these authorities, the entire concept of an "enlargement" under Idaho Code § 42-222 is based upon the enlarged use of a *recorded element* of a water right. Consequently, an enlargement analysis surely *must* begin with an analysis of the recorded elements of a water right.

Based on the foregoing, our position in this matter is simply that the Hearing Officer should

have asked whether the place of use of 35-7667 (a ground water right) is combined with the place of use of a surface water entitlement (ASCC shares) by recorded condition. The plain language of Idaho Code § 42-1411 requires such a combined place of use condition to be express—it is clearly the very type of matter that would require a (1) "condition[] on the exercise of any water right"; or, at a minimum, (2) "remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." It is clearly the very type of situation that requires a condition for at least two reasons.

First, it is the type of condition or remark that is contemplated by the plain language of Idaho Code § 42-1411(2). A combined use condition could have easily been added at licensing if it was, in fact, a limitation on the exercise of this right. Second, in practice, IDWR recommended—and the SRBA Court decreed—water rights in the SRBA with conditions that did combine places of use of water rights, provide that a one right is supplemental to another, restricted seasons of use, etc., or otherwise further defined or limited recorded elements of a water right. *See* A.R. 0443. Once water rights are described by decree of license, administration of water rights is based on the recorded language of the water right elements themselves. Upon entry of a decree, the Director of IDWR must administer the water rights by distributing water in accordance with the decree. Idaho Code § 42-1413(2); *Sylte v. Idaho Dep't of Water Res.*, 165 Idaho 238, 244, 443 P.3d 252, 258 (2019). There would be no point to include *any* conditions on water rights by adjudication or licensing if IDWR could simply infer water right elements in a water right based on overlapping places of use (or other items for that matter).

The fact that Idaho law requires inclusion of conditions as an element of a water right are legally important. If the court IDWR's position, this will cloak IDWR with authority to delineate the parameters of a property right by implying conditions based on changing positions within the

Department, potentially based on personal interpretation or pursuit of changing policy positions (such as limiting diversion of ground water on the ESPA, a public policy argument asserted by IDWR and the Coalition as basis in support of its position on this appeal). That is antithetical to the very purpose of defining water rights—which are real property rights (*i.e.*, Idaho Code § 55-101)—through adjudication or licensing, which is to avoid "collateral attacks because of their ability to create uncertainty and to undermine water adjudications." *McInturff v. Shippy (In re CSRBA Case No. 49576)*, 165 Idaho 489, 495, 447 P.3d 937, 943 (2019). Decrees entered in a general adjudication are conclusive as to the nature and extent of all water rights in the adjudicated water system. Idaho Code § 42–1420(1); *City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017). The Idaho Supreme Court has expressed this in no uncertain terms, stating that it is the Director's "clear legal duty to distribute water according to decreed water rights." *Id*. at 309, 396 P.3d at 1191 (quotations omitted).

Where a transfer involves amendment of certain water right elements, ascertaining what those elements are in the first place is the starting point. At a minimum, it is a fair question to have this court rule upon, despite IDWR's contentions otherwise. Remember that the Hearing Officer's basis for his enlargement determination in this case was based on the overlapping place of use description of ground water right 35-7667 within the place of use boundary of ASCC's water rights:

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

A.R. 662-663. The problem with this holding is that the combination of places of use of a water right with a separate water entitlement was not recorded on 35-7667 upon which an enlargement

can occur, and it is the very type of condition or remark that should, and has historically been, included in the description of the elements of a water right through adjudication and licensing. For these reasons, in addition to others set forth herein, the *Final Order* should be reversed.

C. The Final Order bases its finding of enlargement on an implied element of a water right, despite IDWR's contention that it is merely an "interpretation" of the place of use and purpose of use elements of 35-7667.

Despite the above legal authorities, IDWR asserts that reliance upon them is "misplaced" because the *Final Order* is "consistent with the plain language of the license for water right 35-7667," and that the Hearing Officer did not imply any water right elements. *IDWR Response* at 23. This conclusion is apparently based upon the fact that, like all water rights, 35-7667 has a recorded place of use and purpose of use and the Hearing Officer's conclusions were based upon an "interpretation" of those provisions:

> 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" [] This conclusion was based on the existing elements of the water rights [] **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.**"

IDWR Response at 23 (underlining in original; internal quotes to *Final Order* omitted; bolding added).

IDWR's "interpretation" argument is without merit. All water rights contain a place of use and purpose of use, and it is unavailing to assert that the "interpretation" of these recorded elements grants authority for IDWR to assert that implied limitations or conditions exist. Further, *even if* IDWR truly has authority to "interpret" these elements to find implied limitations or conditions, its interpretation is unreasonable and unlawful because it is inconsistent with the plain language of

these documents. There is nothing about the words "53.9 acres" and "irrigation" that serves as a basis to combine 35-7667 with a separate surface water entitlement. As this Court has explained:

> As we recently stated in *Rangen, Inc.*, "[a]ny interpretation of [the] partial decree [ ] that is inconsistent with the [ ] plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself." 159 Idaho at 806, 367 P.3d at 201. Here, no such request was made.

City of Blackfoot, 162 Idaho at 308, 396 P.3d at 1190 (emphasis added; brackets in original). By reading in aspects of 35-7667 that are not expressly written, this no doubt impermissibly impacts the certainty and finality of the water right license for 35-7667.

Further, if IDWR interpretation authority includes the ability to insert implied conditions in a water right, then what was is the point of Idaho Code § 42-1411(i)-(j) (providing for recorded conditions and remarks as discussed above) if the water right elements remain always subject to IDWR interpretation? Such interpretation would necessarily mean that the licenses and decrees are not conclusive and final and would open the door to allow already-decreed or licensed water rights to be relitigated, a prospect not viewed favorably by this Court:

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

> expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures. *See* Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 56 (2016).

In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532, 163 Idaho 144, 155, 408 P.3d 899, 910 (2018) (emphasis added). Recorded elements of water rights should not be relitigated in court or through administrative processes through imposition of unwritten conditions (which are elements of a water right) or by otherwise interpreting the plain language of an element to include an implied condition affecting its exercise.

In accordance with the foregoing Idaho law, the starting place for 83160 is the plain language of the current written 35-7667 license description. There is no element of 35-7667 indicating it is supplemental or otherwise limited in consumptive use or combined with the water allocated to Duffin's ASCC shares associated with the same property covered by the place of use of 35-7667. Without any such language, there can be no ambiguity contained within 35-7667. This should end the inquiry as to whether there is any combined limit or connection with surface water allocated to Duffin's ASCC shares. If there are no words combining these rights (the water right elements, conditions, or other language in the water right), then no combination exists and no good faith argument for an ambiguity can exist.

Without a condition on the exercise of 35-7667 combining it with the ASCC water entitlement, there is no recorded element of this right to enlarge upon. Oddly enough, IDWR acknowledges this important principle in its brief: "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." *IDWR Response* at 29. We completely agree, and without an express combined use condition—which is part of the plain language of a water right license or decree—there is no element to enlarge upon. For all these reasons, the *Final Order* is inconsistent

with the elements described with plain language on the license for water right 35-7667. IDWR's "interpretation" argument is without merit.

D. The scope of an enlargement review is limited to the "original right"—the water right subject to the transfer—based on the plain language of Idaho Code § 42-222 and other Idaho law.

Having established that an enlargement is an increase in use of water that *exceeds a described element of a water right*, what those water right elements are, and that conditions cannot be implied into a water right under Idaho law, the next question becomes whether there is anything under the transfer statute—Idaho Code § 42-222—that either changes this definition or vests IDWR with new or additional authority to wrap a separate source of water into its enlargement review to find a "single, combined beneficial use." IDWR believes Idaho Code § 42-222 does grant them such new or additional authority: "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." *IDWR Response* at 25. As described below, the plain language does not grant IDWR such authority. The plain language provides the opposite.

35-7667—a ground water right—is the **only** water right subject to the proposed changes under 83160. This right is owned by Duffin. The ASCC water rights and other ASCC water entitlements[6] that yield water to Duffin's shares are *not* owned by Duffin. As an ASCC stockholder, Duffin is only entitled to a proportionate share of the available ASCC water and is obliged to pay a proportionate share of the operating company's maintenance costs, "regardless of whether such water is used or not . . . ." Idaho Code § 42-2201. As a mere shareholder, Duffin is not authorized to amend ASCC's water rights and/or water entitlements without ASCC's consent.

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

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

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

(emphasis added).

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

> **The remainder of the statute lists specific powers and duties of the guardian and always refers to the guardian in the <u>singular</u>. There is no reference to multiple guardians or co-guardians**. Specifically, section 15-5-209(3) begins, "*The guardian* is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice." (Emphasis added.) It would be inconsistent with the provisions of Idaho Code section 15-5-209 to hold that multiple co-guardians can be appointed, with each having the powers and duties of *a parent* or with all of them together having the powers and duties of *a parent*.

Doe v. Doe, 160 Idaho 311, 314, 372 P.3d 366, 369 (2016) (emphasis added). Additionally, *Fremont-Madison* is also persuasive authority in defining the scope of an enlargement review: "The term 'enlargement' has been used to refer to any increase in the beneficial use to which **<u>an existing water right</u>** has been applied, through water conservation and other means. *See* I.C. § 42–1426(1)(a)." *Fremont-Madison Irr. Dist.*, 129 Idaho at 458, 926 P.2d 1301 at 1305 (emphasis added).

Both the plain language of Idaho Code § 42-222 and the language from the *Fremont-Madison* case support the conclusion that the scope of enlargement as specific to the elements of a singular water right ("the original water right"), not other water entitlements (such as water from canal company shares) that may be associated with the same property that are not subject to the transfer application and/or are not described by condition. Stated another way, these legal authorities limit the enlargement evaluation to the water right or water rights listed on the transfer application. Both the Hearing Officer and district court ignored the plain language of these authorities, and instead fixated on the result that 53.9 acres would be irrigated under 35-7667 and 53.9 acres could be irrigated under the 60 ASCC shares if 83160 was approved. C.R. 0210; A.R. 0662 ("[t]he proposed change to water right 35-7667 will result in an increase in the number of acres irrigated, which is an enlargement, as noted above [in *Fremont-Madison*].").

These holdings are incorrect because they are based on conclusions that are contrary to the plain language of Idaho Code § 42-222. Duffin has not proposed to amend any element of ASCC's water rights, nor could he without authorization from ASCC. As explained in *Appellants' Brief*, ownership of canal company shares does not vest legal title of the canal company water rights in the shareholder. *Appellants' Brief* at 9-10.

The Hearing Officer incorrectly overstated the language from the *Fremont-Madison* case concerning irrigation of additional acres to also apply to *all* water entitlements associated with the place of use of the original right, even those not owned by Duffin (in this case, those owned by ASCC). This is legal error. The scope of the enlargement analysis spoken of under Idaho Code § 42-222 should only be directed at 35-7667.

In its response, IDWR does not address the "original right" language. Instead, IDWR focuses on the "all the evidence and available information" language in Idaho Code § 42-222 to

define the scope of an enlargement review. IDWR asserts that "[t]he 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." *IDWR Response* at 24. The difference in Duffin's position and IDWR's position on appeal on this issue is perhaps best demonstrated by the emphasis placed on the following language from Idaho Code § 42-222 quoted in the *IDWR Response* with IDWR's emphasis in italics and underline, and here, with Duffin's emphasis in bold:

> 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** . . . .

Id. (quoting Idaho Code § 42-222(1) (underlining and italics in original quote; bolding added). After this block quote, IDWR continues with "[t]he 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." *IDWR Response* at 25.

As an initial matter, this conclusion is directly contrary to the legal authority described in the preceding sections. But relative to the plain language of Idaho Code § 42-222, it is also clear that IDWR believes that language from Idaho Code § 42-222 informs the scope of an enlargement, which is examination consisting of "all evidence and available information" concerning "an enlargement in use," period. However, this legal position clearly ignores the important qualifying language expressly contained in the statute, which is "of the original right" expressly stated after the "in use" language. IDWR cannot simply excise this language out of the statute because it would make the words "of the original right" void and superfluous. Doing so is contrary to Idaho law:

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in

> the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. **It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant**. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

Hayes v. Medioli (In re Name Change of Doe), ___ Idaho ____, ____, 484 P.3d 195, 200 (Idaho 2021) (emphasis added) (quoting *Nelson v. Evans*, 166 Idaho 815, 820, 464 P.3d 301, 306 (2020)); *see also* Idaho Code § 73-113(1) ("The literal words of a statute are the best guide to determining legislative intent."). Even courts cannot "ignore or re-write the plain language of a statute simply to reach a more desirable result." *Berrett v. Clark Cnty. Sch. Dist. No. 161*, 165 Idaho 913, 928, 454 P.3d 555, 570 (2019).

Furthermore, IDWR's view that the "all the evidence and available information" expands the scope of an enlargement review, in contravention of the plain language of Idaho Code § 42-222 and other Idaho law, is without merit. IDWR's position before the district court, which was adopted by the district court, is that this "all" language grants IDWR discretion to consider all other information, without any sideboards. C.R. 213. There was no qualifying scope language for this authority articulated by IDWR or the district court. Without any qualifying language, we are obligated on appeal to presume that IDWR and the district court meant what they said. Accordingly, we understand this language to mean that IDWR's authority is unchecked. *Appellants' Brief* at 10.

In its response, IDWR calls Duffin's argument "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." *IDWR Response* at 26. We disagree that this argument

is hyperbole, a strawman argument, or a mischaracterization. After stating the "all the evidence and available information" language, the district court said: "In this case, **that evidence and information includes** the fact that the existing place of use is served by an overlapping water right." C.R. 213 (emphasis added). IDWR left this bolded language out of its quote. The district court did not simply state that the overlapping water right was something that IDWR could consider; rather, it stated "that evidence and information includes" the overlapping water entitlements. There was no expressly described limits to IDWR's discretion in the district court's language, which is why it was argued the way it was. IDWR's accusations of hyperbole and mischaracterization are unfounded. Indeed, the issue was important to raise because IDWR now concedes on appeal that it agrees with Duffin—the "all" language does not literally mean everything. *IDWR Response* at 26 ("The Department agrees, and notes that Idaho Code § 42-222(1) contemplates that the evidence and information must be 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.").

Nevertheless, despite IDWR's agreement that the "all" language at least has limits related to other components associated with Idaho Code § 42-222, IDWR maintains that the Hearing Officer did not exceed those limits. Just because an issue involves water, like a transfer, that does not mean IDWR has authority to consider all things water as part of its enlargement review. The statutory language is controlling, and IDWR has undoubtedly exceeded its authority in this case. When considering the scope of authority granted to a governmental agency via statute, the United States Supreme Court very recently explained that statutes, and portions of statutes, must be read

and interpreted in context and not in isolation to properly determine the amount of authority an agency has been granted. *See Ala. Ass'n of Realtors v. HHS*, 210 L.Ed.2d 856, 860-61 (U.S. 2021). In *Alabama Ass'n of Realtors*, several realtor associations sued the Department of Health and Human Services regarding the Center for Disease Control and Prevention's eviction moratorium imposed to combat the COVID-19 pandemic. *Id.* There, the Government argued that the CDC had essentially limitless and unchecked authority granted to by statute to impose the moratorium. *Id.* The United States Supreme Court disagreed. It said that "[e]ven if the text were ambiguous, the sheer scope of the CDC's claimed authority under [the statute] would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" *Id.* The Court later reasoned that "the Government's read of [the statute] would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in [the statute] beyond the requirement that the CDC deem a measure 'necessary.'" *Id*. at 861.

Like the CDC, IDWR has claimed authority to determine enlargement of a water right regardless of what authority is granted to it by statute and regardless of what is included on the face of the water right. If upheld on appeal, the result would likewise give IDWR a "breathtaking amount of authority" as part of its enlargement determination, even if such a determination implies a new water right element such as a "single combined beneficial use." Such a result would undeniably deprive the public from confidently relying up on the language of its water right decree or license.

Based on the foregoing, the scope of the *Final Order*'s enlargement determination is not supported by the plain language of Idaho Code § 42-222 and other applicable law. Remember that

an enlargement can occur even outside of the transfer context, and there is nothing in Idaho Code § 42-222 that provides or even suggests that a "transfer enlargement" is defined differently than an enlargement in other contexts, or that it requires a different analysis. In all situations, an enlargement occurs if there is use in excess of what is described on the elements of the original right. *See, e.g.*, Idaho Code § 42-351. It is not merely a global increase "in use." Under IDWR's view, an enlargement would occur even increase production under an already authorized beneficial use which would presumably require a transfer to make it legal.[7] IDWR's overall attempt to excise or ignore the phrase "the original right" from the plain language of Idaho Code § 42-222 and interpretation of the "all" language granting it breathtaking authority should be rejected. The *Final Order* and the district court's decision to affirm must be reversed.

E. The *Transfer Memo*, which is an agency interpretation of Idaho Code § 42-222, is entitled to deference and it does not support a finding of enlargement in this matter as it does not contain reference to the concept of a "single combined beneficial use" or the Barron decision.

Statutory language cannot address all possible situations that may arise within the general context of the matter a statute addresses. Otherwise, the Idaho Code would be significantly more voluminous than it is now. As a result, administrative agencies, including IDWR, produce guidance documents to provide additional information and guidance to IDWR staff and the regulated public on a particular statutory topic. The *Transfer Memo* is one of many of these guidance documents. *See* https://idwr.idaho.gov/legal-actions/guidance-documents. The opening sentence of the *Transfer Memo* provides that "[t]he purpose of this memorandum is to provide policy guidance for processing applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, and other applicable law." A.R. 0127.

[7] This is directly contrary to an express provision of the *Transfer Memo* entitled "Intensified Use of Water," which is discussed in the following section.

One of the issues raised in this appeal is whether the District Court erred by affirming the hearing officer and by not performing the proper deference analysis to IDWR's interpretation and application of Idaho Code § 42-222 contained in IDWR's *Transfer Memo* which IDWR requires water users to follow. C.R. 221. Duffin directly addressed this issue in *Appellants' Brief* at 22-27. Neither IDWR nor the Intervenors responded to the question of deference in their respective response briefs, and consequently, the issue does not appear to be in dispute. Accordingly, there is no dispute that (1) the *Transfer Memo* is an agency interpretation of Idaho Code § 42-222; and (2) that it is entitled to "considerable weight" under Idaho law.[8] *See, e.g.*, *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 571, 21 P.3d 890, 893 (2001).

Nevertheless, neither the Hearing Officer nor the district court discussed this document in their respective decisions. IDWR's position on appeal is that the *Final Order* is consistent with the *Transfer Memo*, as well as the Jeff Peppersack deposition testimony, and they are both consistent with *Barron*. *IDWR Response* at 22. We disagree.

First, remember that it is IDWR's position that the enlargement does not have to relate to the elements of a water right. *See IDWR Response* at 25 ("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."). The *Transfer Memo* is contrary to this position under several of these provisions:

> Intensified Use of Water. An application for transfer is not required to increase production under an authorized use of water, **unless the proposed change would also result in a change to one or more elements of the water right(s) as licensed or decreed**. For example, an application for transfer is not required to increase the number or volume of raceways in a fish propagation facility, increase the number of cows at a dairy, change irrigation to a more water consumptive crop, or increase

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

> the generating capacity of hydroelectric generators, **so long as none of the elements of the associated water rights are changed**.
> . . .
> Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use (except for nonconsumptive rights), exceeds the amounts or beneficial use **authorized under the water right(s) prior to the proposed transfer**.
> . . .
> The authorized diversion rate, annual diversion volume (ground water rights only and certain surface water rights), and number of acres authorized for irrigation (if applicable), **as licensed or decreed for the water right**, shall not be increased.

A.R. 0133 (Section 2 entitled "When a Transfer is not Required."; A.R. 0154 (Section 5, entitled "Enlargement of Use") (emphasis added).

In response to Duffin's position that there must be an element of a water right to enlarge upon, and the *Transfer Memo*'s repeated acknowledgment of this, IDWR pivots from this question and instead argues "[t]he *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." *IDWR Response* at 20. However, this ignores other language from the *Transfer Memo* concerning water right elements quoted in the preceding paragraph of this brief. As for IDWR's enlargement definition—that it is merely an increase in water use or irrigated acres or consumptive use—consider these *Transfer Memo* provisions that are under the heading "When a Transfer is not Required":

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

> Intensified Use of Water. **An application for transfer is not required to increase production under an authorized use of water, unless the proposed change would also result in a change to one or more elements of the water right(s) as licensed or decreed**. For example, an application for transfer is not required to increase the number or volume of raceways in a fish propagation facility, increase the number of cows at a dairy, change irrigation to a more water consumptive crop, or increase the generating capacity of hydroelectric generators, so long as none of the elements of the associated water rights are changed.

A.R. 130, 133 (emphasis added). There are several important points from these provisions, which again, provide for an IDWR interpretation of Idaho Code § 42-222.

First, these provisions are contrary to IDWR's enlargement definition that an enlargement occurs if there is merely an increase in water diverted. The "changes in water use" language in the second sentenced of the "Changes in Consumptive Use" provision includes increasing the amount of water diverted and it is not an enlargement unless an element of the water right is exceeded by the change in water use as this second sentence expressly states, "provided no element of a water right is changed."

Second, an increase in consumptive use alone does not require a transfer, and therefore, an increase in consumptive use alone is not an enlargement. A water user can increase the intensity of his water use—for example, irrigating grain one year and then alfalfa the next—without there being an enlargement under Idaho law. It logically follows that if there is a proposal to only change the place of use of a water right to a new location that requires a transfer (with no attempt to change the nature of use from irrigation), the mere change in location of the consumptive use is not an enlargement. These principles are contrary to the contents of the *Final Order*.

In its response, IDWR also argues that "[t]he 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." *IDWR Response* at 32. This is incorrect. The discussion of the *principles* associated with the transfer of supplemental water

rights is further legal authority that is contrary to IDWR's position in this matter because the *Transfer Memo*'s treatment of even supplemental water rights belies the Hearing Officer's "single combined beneficial use" element that arises when there are overlapping places of use. As described in *Appellants' Brief* at 24-27, the Hearing Officer's rationale is directly contrary to what Mr. Peppersack explained about enlargement and IDWR's position at the time on this issue: "So, if it's demonstrated that they really weren't, **even though they might reside on the same place of use**, **then we might decide that it's not an enlargement because they haven't been used together** to, you know, provide a full water supply for the place of use." A.R. 0470 (emphasis added).

The *Transfer Memo* provides that even a supplemental water right can be converted to a primary right without enlargement, provided that the "applicant can clearly demonstrate, using historic diversion records for the supplemental right as described in (5) below, or other convincing water use information, that there would be no enlargement of the water right being changed or other related water rights." A.R. 0155. The "(5)" referred to is a section on historic beneficial use information, which generally provides that data from the most recent five consecutive years is presumed to be sufficient information. A.R. 0155-0156. Under the principles contained in the *Final Order* defended by IDWR on this appeal, this type of transfer would *also* not be approvable, despite the *Transfer Memo*.

In response to these arguments, IDWR claims the Appellants "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.' The *Transfer Memo* expressly recognizes that 'historical consumptive use' is considered in 'certain other circumstances' as well." *IDWR Response* at 20. However, the disjoined quote from the *Transfer Memo* is incomplete—the

complete quote provides "and for certain other circumstances **as described herein**, historical consumptive use is considered." A.R. at 0130. IDWR's only citation to another section of the *Transfer Memo* is to Section 5d. where, once again, IDWR selectively quotes: "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." *IDWR Response* at 21. The ellipses in this quote document omission of the important words "the total diversion rate, annual diversion volume, or". As discussed herein, these omitted words support Duffin's arguments above that enlargement concerns a recorded element of a water right, and any question about the need for an enlargement to involve a recorded element of a water right is made clear under subsection (1) of Section 5d.:

> The authorized diversion rate, annual diversion volume (ground water rights only and certain surface water rights), and number of acres authorized for irrigation (if applicable), **as licensed or decreed for the water right**, shall not be increased.

A.R. 154. Perhaps most critically, however, there is no language in the *Transfer Memo* which provides that consumptive use is considered in the transfer of an irrigation right to another location to also be used for irrigation, which is all that 83160 provides for.

In the *Final Order*, the Hearing Officer states that "Duffin's arguments related to the *Transfer Memo* are meaningless because Duffin is alleging a conflict where there is none." A.R. 664. On appeal, IDWR agrees, *IDWR Response* at 21. As described herein, we strongly disagree. Specific to the *Transfer Memo*, there is no discussion in the *Transfer Memo* or elsewhere of an implied "single, combined beneficial use" element of a water right, nor does the Hearing Officer acknowledge—as the *Transfer Memo* does—that even a supplemental water right (which 35-7667 is not) can become an independent primary water right based on historic use despite the fact that a supplemental right shares a place of use with a primary right.

There is simply no specific discussion in the *Transfer Memo* or elsewhere of a "single, combined beneficial use." Nor is there a mention of the *Barron* decision where the *Transfer Memo*'s self-described purpose "to provide policy guidance for processing applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, **and other applicable law**." A.R. 0127 (emphasis added). If *Barron* was applicable and clearly part of "other applicable law" in Idaho, then why is there no mention in the *Transfer Memo* of *Barron*, nor its purported "single combined beneficial use" holding, or even the concept of a "single combined beneficial use"? Similar to enactment of statues relative to the common law, promulgation of guidance documents that purport to provide guidance on a statute "and other applicable law," this Court should construe the *Transfer Memo* under the assumption that IDWR knew of all legal precedent at the time the guidance document was adopted. *See Twin Lakes Canal Co. v. Choules*, 151 Idaho 214, 218, 254 P.3d 1210, 1214 (2011). The conclusion that logically follows is that the component of *Barron* decision relied upon by the Hearing Officer was not binding upon IDWR and/or was superseded by the consumptive use statutory change in 2004 to Idaho Code § 42-202B(1). However, despite its heavy reliance on *Barron* in the *Final Order*, neither IDWR nor the Intervenors expressly state that the *Transfer Memo* does not accurately summarize Idaho or that it is wrong. These parties cannot have it both ways.

As an agency interpretation of Idaho Code § 42-222 and other applicable Idaho law, the *Transfer Memo* is entitled to deference by this Court. Neither IDWR nor the Intervenors dispute that it is entitled to deference. Duffin's reply to IDWR's and the Intervenor's arguments in response relative to the *Barron* decision is discussed below, but for purposes of concluding this section of our reply brief, Duffin's position is that the *Transfer Memo* is entitled to deference, that it supports Duffin's definition of enlargement, and is contrary to IDWR's definition of enlargement

on this appeal. For these additional reasons, the *Final Order* and the district court's decision to affirm should be reversed.

F. The portion of the Barron relied upon by the Hearing Officer and the District Court is judicial dicta, and because all transfers include a water right forfeiture evaluation by statute, Barron is a forfeiture case.

Notwithstanding the foregoing legal authority, *Barron* is clearly the primary basis for the *Final Order*'s ultimate finding of enlargement, the district court's decision to affirm (C.R. 210-212), and IDWR's defense on appeal. There is no specific test, set of factors, or other specific guidance articulated by the Idaho Supreme Court on how to clearly identify dicta other than the overall principle that dicta is a portion of an opinion "that is not essential to the decision and therefore not binding even if it may later be accorded some weight." BLACK'S LAW DICTIONARY 569 (11th ed. 2019) (definition of "judicial dictum"). Unsurprisingly, the parties disagree on whether the portion of *Barron* relied upon by the Hearing Officer is dicta, but the answer to this question is for the Idaho Supreme Court to decide. And it is an important one, which is one of the primary reasons for this appeal. Duffin's position remains that the portion of the *Barron* opinion relied upon by the Hearing officer and defended on appeal by IDWR, is judicial dicta and there is nothing in the opposition's responses that changes that position. Accordingly, there is no need to repeat Duffin's position contained in *Appellants' Brief* at 28-35, which is incorporated herein by reference. In addition to the foregoing, however, there are a few specific arguments from IDWR relative to *Barron* that warrant a reply.

First, IDWR asserts that "[a]dopting the Appellants' theory of enlargement, therefore, would require this Court to overrule *Barron*." *IDWR Response* at 38. We disagree. The *Barron* Court reached the correct result there, which is to affirm IDWR's administrative decision to deny the transfer because *Barron* did not provide any evidence of use of the water rights proposed for

transfer even after five requests from IDWR. *Barron v. Idaho Dep't of Water Resources*, 19 P.3d 219, 135 Idaho 415 (2001). Accordingly reversing on this appeal would not require this Court to overrule *Barron*. As previously explained in *Appellants' Brief*, finding dicta in response to arguments asserted on appeal is relatively common, even in recent decisions from this Court. In the cases cited, however, none of them were overruled. *See In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 158, 408 P.3d 899, 913 (2018); *E. Side Highway Dist. v. Delavan*, 167 Idaho 325, 470 P.3d 1134, 1150 (2019); *Shubert v. Ada County*, 166 Idaho 458, 461 P.3d 740 (2020); *Phillips v. Eastern Idaho Health Services, Inc.*, 166 Idaho 731, 463 P.3d 365 (2020). A finding of dicta for a portion of a reported decision from this Court does not mean that the overall decision must be overruled. IDWR's contention has no merit.

This Court should hold that the portion of the *Barron* decision relied upon by the Hearing Officer is dicta, and even if it is not dicta, that the language from this opinion has been superseded by the amendment to Idaho Code § 42-202B(1) in 2004[9] which expressly provides that "[c]onsumptive use is not an element of a water right" and "[c]hanges in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." Idaho Code § 42-202B(1); *see also* 2004 Idaho Sess. Laws 258 (the addition of language that consumptive use is not an element of a water right was made in 2004). As described above, enlargement is use in excess of a recorded element of a water right, and where consumptive use is not a recorded element of 35-7667, and there is no proposal to change the nature of use of 35-7667 (where consumptive use would be considered as described in the *Transfer Memo*), there cannot be an enlargement.

[9] IDWR claims that Duffin argued on pages 8-10 of its opening brief that "[o]ne of the decision of this Court that the Appellants point to as "superseding" *Barron* is the *Fremont-Madison* decision," even though *Barron* was decided after *Fremont-Madison*. *IDWR Response* at 16. This is demonstrably false. Nothing on pages 8-10 make such an argument.

In response to Duffin's position concerning this 2004 statutory amendment, IDWR argues that "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." *IDWR Response* at 19. We disagree. There remains a place for consideration of consumptive use in a transfer. The plain language of this statute provides that the Director can consider consumptive use "as a factor" in an enlargement determination. The *Transfer Memo*, which is an agency interpretation of Idaho Code § 42-222, describes the circumstances when it is a factor, and that is when the right being transferred concerns either changes in nature (purpose) of use or, in rare cases, when there is a consumptive use condition on a water right that is proposed for amendment. A.R. 0130. In circumstances other than these, however, the *Transfer Memo* is clear: "Consumptive use of water under a water right is not, by itself, an element of a water right subject to the requirements to file an application for transfer." *Id*.

In the context of *Barron*, in an apparent response to the forfeiture discussion of the rights at issue in *Barron* and the subsequent decree of such rights as forfeited in the SRBA, IDWR claims that questions of forfeiture are "pointless" and asserts the following:

> 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.

IDWR Response at 23. These arguments are simply incorrect for at least two reasons. First, it does not matter if there were no express allegations of forfeiture. IDWR has an affirmative duty to evaluate the transfer criteria under Idaho Code § 42-222, and water right forfeiture is a component of the injury evaluation even if the transfer is not protested. *See Jenkins v. Dep't of*

Water Res., 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). In fact, the basis for forfeiture under Idaho law is not the Idaho Constitution, rather, it is the transfer statute itself, Idaho Code § 42-222:

> 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;

Idaho Code § 42-222(2); see also *Jenkins*, 103 Idaho at 387, 647 P.2d at 1259 (Director has jurisdiction in a transfer proceeding to determine the question of forfeiture.). Accordingly, by statute, all transfer proceedings, including *Barron*, necessarily involve questions of water right forfeiture.

Second, the purpose of discussing the eventual decree of the water rights at issue in *Barron* is not for the Court to determine on this appeal if there was a forfeiture in *Barron*. Rather, it is persuasive authority against the Hearing Officer's determination of enlargement based on the common place of use theory. If the Hearing Officer's principles were employed in the SRBA, then water right 37-2801B should not have been decreed forfeited in the SRBA because its associated combined consumptive use right, water right 37-7295, was valid and did receive a partial decree in the SRBA affirming this right **on the very same day** that water right 37-2801B was disallowed. A.R. 0652. If the full "single combined beneficial use" is provided for by irrigation under one right, then the exercise of the other right is not necessary, and the unused right should not be forfeited. Because that is not what happened, this supports Duffin's position on this appeal that water rights which share a common place of use without combination conditions are not joined together by a "single combined beneficial use"—they are independent rights to be analyzed independently of one another. The result of this analysis of both independent and uncombined water sources is that either water supply may be used to irrigate Duffin's property

independent of one another and 35-7667 can be moved off the property while Duffin continues to irrigate with water allocated to his ASCC shares.

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

G. IDWR's position that even if only 35-7667 is considered in an enlargement review there will be a significant increase over its historic diversion and use is not correct and is not supported by the record.

In its response, IDWR argues that "[e]ven if only water right 35-7667 is considered, approving the Application would lead to a significant increase over its historic diversions and use." *IDWR Response* at 12. This is based on the argument "that in the last five years no ground water has been pumped under water right 35-7667." *Id.* at 13 (underling and italics in original). This is the first time this argument has been raised and it is not a refined legal argument on appeal. It should not be considered. *See Bedard & Musser v. City of Boise*, 162 Idaho 688, 691, 403 P.3d 632, 635 (2017). Furthermore, this argument is not supported by citation to propositions of law or legal authority. "We will not consider issues cited on appeal that are not supported by propositions of law, authority, or argument." *Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 165, 219 P.3d 804, 812 (2009). Additionally, however, this argument is without merit.

83160 was filed in April of 2019. A.R. 0286-0340. If the argument asserts that no ground water was diverted under 35-7667 between 2015 and 2019, that is simply not true. The WMIS data contained in the *Stipulated Facts* confirms that 143.77 acre-feet was diverted in 2015, 50.42 acre-feet in 2016, and 0 acre-feet in 2017 at 35-7667's described well location (in 2017, 35-7667 was placed in the Idaho Water Supply Bank). A.R. 0380; 0264-0269. Accordingly, there is a track record of ground water use under 35-7667 five years prior to when it was filed.

As described above, IDWR provides no legal authority to support its contention that in order for a transfer such as 83160 to be approved, ground water has to be pumped within the most recent past five years for there to be recognized historic use, even when a matter is pending on appeal. Accordingly, it is not possible to fully respond to such as assertion. Because we are now in 2021, with this matter on appeal, it appears as though IDWR seeks to take advantage of the time it takes for a transfer that was filed in April of 2019 to be filed, processed, and appealed through the judicial system to receive a definitive answer on the nature and extent of 35-7667. This sort of gamesmanship should be rejected. Duffins's rights should be measured at the time his application was filed in April of 2019. *See, e.g., Citizens Against Linscott v. Bonner Cty. Bd. of Comm'rs*, 486 P.3d 515, 527 (Idaho 2021) ("The Respondents are correct that Idaho has adopted the minority position that a land-use applicant's rights are 'measured under the law in effect at the time of the application.'" (quoting *S. Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty.*, 117 Idaho 857, 861, 792 P.2d 882, 886 (1990) (citations omitted)).[10] IDWR's position should be rejected.

H. Duffin's arguments regarding rentals, leases, and temporary transfers specifically relate to the basis for IDWR's enlargement definition, are final orders of the IDWR which constitute additional legal authority, and/or present refined legal arguments on appeal.

IDWR contends that Duffin's arguments regarding rentals, leases, and temporary transfers have been waived and lack merit because, it claims, that "these arguments were not raised or developed before the hearing officer or the district court" and that there is "nothing in the record that supports these arguments, or any ruling that remotely supports raising them for the first time

[10] Briefly, to the extent IDWR is making a forfeiture-like argument against 35-7667 based on the five-year reference, this is likewise without merit given the provisions of Idaho Code § 42-223(5) as 35-7667 was placed in the Idaho Water Supply Bank in 2017, which stops, or tolls, the forfeiture clock during that year, and no five-year period has run for non-use of 35-7667. And, under Idaho Code § 42-223(6), another statutory defense to forfeiture, the time for processing this appeal is beyond Duffin's control. Further, IDWR would have the burden of proving forfeiture by "clear and convincing evidence." Idaho Code § 42-222(2).

on appeal." *IDWR Response* at 34–35. To support this contention, IDWR argues "[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." *IDWR Response* at 35 (quoting *Izaguirre v. R & L Carriers Shared Servs., LLC*, 155 Idaho 229, 233, 308 P.3d 929, 933 (2013)). This contention is without merit for at least two reasons.

First, the temporary transfer decisions, attached for the convenience of the Court as Attachment 1, are final orders of the Department issued only a week before *Appellant's Brief* in this matter was due, and they contain additional legal authority just like new caselaw.[11] *See* IDAPA 37.01.01.740 (final orders include preliminary orders that have become final under Rule 730). This administrative precedent directly bears on the issues raised in this appeal. A party even has the right to submit additional authority to augment briefs for this Court's consideration "at any time before issuance of an opinion" under Idaho Appellate Rule 34(e). This authority has been provided well in advance of the Court's issuance of an opinion in this matter. IDWR's position is therefore unavailing.

Second, there is a distinction between new *issues* on appeal and *new analysis or authority* on appeal. IDWR appears to have conflated these terms. Idaho law does not prevent an appellant

[11] Temporary transfers are governed by Idaho Code § 42-222A, which allow one-year amendments to water rights in drought years without going through Idaho Code § 42-222 and its advertisement provisions. They are issued after "a determination by the director of the department of water resources that . . . there is no information that the change will injure any other water right." Idaho Code § 42-222A(3). Like regular transfers, there is a guidance memo on temporary transfers. Administrator's Memorandum, Amended Transfer Processing No. 18, May 14, 2014, Idaho Code § 42-222A – Temporary Changes to Water Rights During Drought Conditions, *available at* https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/guidance/Transfer-Processing-Memo-18.pdf. Importantly, this memo provides that it is allowed to temporarily transfer a water right from an existing place of use where the crop irrigation has finished for the irrigation season (such as a grain crop) to a different place of use to finish another crop. *Id*. at 2. This is antithetical to the Hearing Officer's single combined beneficial use concept and is additional persuasive authority in support of Duffin's position on appeal.

from raising new analysis or authority or refining its legal arguments on appeal. As recently as September 27, 2021, this Court has said:

> We have often reiterated that we will not consider **issues** not raised in the trial court on appeal. **Refined issues** on appeal are acceptable so long as the substantive issue and the party's position on that issue remain the same. **This Court can hear refined legal arguments** regarding an issue heard and decided by the court below, but in fairness to the district court and the opposing party, we cannot usurp the district court's role by deciding new legal issues in the first instance.

State v. Wilson, No. 48693, 2021 Ida. LEXIS 153, at *12 (Sep. 27, 2021) (emphasis added).

Duffin's argument regarding Idaho water supply bank leases and a temporary transfers of water rights pursuant to Idaho Code § 42-222A being at risk of being combined with the lessor's water rights is not a new issue, but new analysis and authority to support Duffin's original position on the underlying issue of enlargement. Remember that the Hearing Officer's enlargement determination was made because there was a shared place of use—a "single, combined beneficial use"—even though two water entitlements separately authorized the irrigation of these acres. If this reasoning was applied in other contexts, and these administrative decisions show that it was, it raises significant issues because it allows IDWR to impose implied limitations on water rights in other contexts. Indeed, IDWR's response proves this point as it points to legal authorities establishing why the overlapping place of use principles are not applicable to Idaho water supply bank rentals and temporary transfers. *IDWR Response* at 35-36. These legal authorities were ignored by Department employee James Cefalo's decisions on these temporary transfers which precisely underscore the danger of allowing IDWR to impose unwritten elements on water right or water entitlements and why this Court should not condone actions that undermine the finality of water rights and are contrary to Idaho law.

Moreover, not only are refined issues and legal arguments acceptable for this Court to hear, an appellant ***must*** add significant new analysis or authority to its arguments on appeal or the

appellant runs the risk of an award of fees on appeal. *See e.g., Rangen, Inc. v. Idaho Dep't of Water Res. (In re Distribution of Water to Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc.) IDWR Docket CM-DC-2011-004),* 159 Idaho 798, 812, 367 P.3d 193, 207 (2016) (stating that because 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, Rangen acted without a reasonable basis in fact or law in bringing the appeal); *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005) (holding that the Castrignos 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); *Fuquay v. Low*, 162 Idaho 373, 379, 397 P.3d 1132, 1138 (2017) (explaining that because the Fuquays did nothing more than assert the same arguments that failed before the district court, without adding significant analysis or authority and that the Fuquays opening brief was almost a word-for-word copy of their motion for reconsideration, the respondents were entitled to attorneys' fees).

Finally, on questions of raising issues for the first time on appeal, IDWR argues that 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. The first problem is that this argument raises a question outside the scope of this appeal." *IDWR Response* at 36. First, it is not outside the scope of this appeal—it was addressed at oral argument in response to a question from the district court. Second, it is an incorrect summary of Duffin's argument. The court's question highlighted the fundamental problem of combining water supplies that do not have combined use conditions as there would be no enlargement determination if Duffin proposed the reverse of what he is attempting to do in this matter, which would be to instead move the ASCC shares for use on

different property and to use ground water under 35-7667 at its current place of use. IDWR's enlargement principle would have application statewide for all canal companies who may or may not have policies concerning the associated transfer of ground water rights along with canal shares to new property.[12] Finding an enlargement in this context—and enlargements can occur outside of the transfer context—is a further legal basis to reverse the *Final Order*.

Based on the foregoing, IDWR's contention that certain arguments asserted by Duffin were raised for the first time on appeal is unavailing. This Court should consider these important legal authorities in its evaluation on appeal.

I. IDWR's argument that accepting Duffin's arguments would necessarily mean that all possible water right administration scenarios must also be listed on the water right is without merit.

In response to Duffin's position that enlargement must be based on recorded elements—a rather unremarkable assertion given the contents of the *Transfer Memo*—IDWR asserts the absurd position that this must mean that on water administration matters, "all the possible scenarios in which the use of the water right might be restricted or limited in the future" have to be listed on the water right. *IDWR Response* at 44. Generally speaking, those that have presented at Water Law CLEs will often break down water law into four general categories that all start with the letter "A." They are (1) Appropriation; (2) Adjudication; (3) Administration (*i.e*, water distribution); and (4) Amendment (transfer). Duffin's appeal does not involve a dispute over water right administration.

Describing the elements of a water right comes first, and then the water right is administered based on the description of those elements. Decrees entered in a general adjudication

[12] IDWR's cites to ASCC's internal policies concerning transfer of shares in support of its argument. IDWR Response at 36-37. However, that policy, and whether it is lawful, is not before the Court, and even so, are subject to change. The district court's question discussed herein was one of general applicability of IDWR's enlargement position given the precedent this case will establish.

are conclusive as to the nature and extent of all water rights in the adjudicated water system. Idaho Code § 42–1420(1); *City of Blackfoot*, 162 Idaho at 308, 396 P.3d at 1190. Once the baseline elements are established, the Idaho Supreme Court has expressed this in no uncertain terms, it is the Director's "clear legal duty to **distribute water according to decreed water rights**." *Id*. at 309, 396 P.3d at 1191 (quotations omitted) (emphasis added). This appeal necessarily raises questions about what elements the decreed right must contain, and whether that generally includes conditions that combine water entitlements or whether a Hearing Officer can infer the existence of an unrecorded water right element. When it comes to *administering* water, and how water rights interact with other water rights distributed from the same water system, Duffin has not asserted that all nuances of water right administration must be included in the decree. Nor do Duffin's arguments on appeal implicate this issue. The fact that Idaho Code § 42-1411(2)(j) provides for the inclusion of remarks necessary for "administration of the right by the director" suggests that only unusual administration matters need to be noted with a remark (which is not a condition/element of a water right). General water right administration principles do not need to be described. IDWR's arguments are wholly without merit and should be rejected.

J. The District Court erred by concluding that the "duty of water" may be utilized as a basis to expressly combine water supplies.

As previously explained, the *Final Order*'s finding of enlargement was not based on the "duty of water" doctrine or the sole condition contained on 35-7667 that embodies the duty of water doctrine. Instead, on appeal before the district court, the Department's counsel asserted the argument for the first time. C.R. 124. Further, the Department did not defend the overlapping place of use rationale in its briefing on appeal, but turned to the license condition in 35-7667 to defend the Hearing Officer's findings and conclusions. The district court adopted the

Department's position, finding that the "use" component of the duty of water is a basis to combine the water sources and limit the number of acres that can be irrigated from those water supplies.

On appeal, however, IDWR has now agreed with Duffin that the duty of water does not expressly combine water supplies: "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." *IDWR Response* at 33.[13] Further, the Intervenors do not address the duty of water issue in their brief. Nevertheless, it should still be addressed by this Court.

The district court should be reversed on this issue. The "duty of water" serves as a limitation on the land application, or use, of water for irrigation purposes to prevent waste of water. It simply limits the rate of diversion of water for irrigation and all the water entailments on the same land to application of 0.02 cfs for each acre of land. It is not a condition which combines water rights or limits the water rights or entitlements that can be obtained and made avaialble to irrigate the property.

K. Public policy arguments that approving 83160 will open the door to additional ground water diversions is a red herring.

This appeal involves questions of water right interpretation and statutory interpretation. A significant portion of IDWR's response is devoted to an overall concern that approval of 83160 will lead to increased pumping on the ESPA. *IDWR Response* at 1-2. The Hearing Officer likewise included this as a basis for his decision. However, this issue is a red herring. This Court cannot "ignore or re-write the plain language of a statute simply to reach a more desirable result."

[13] IDWR also argues "[a]ll 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." *IDWR Response* at 33. Duffin's response to this argument has already been addressed in its briefing and will not be restated here.

Berrett v. Clark Cnty. Sch. Dist. No. 161, 165 Idaho 913, 928, 454 P.3d 555, 570 (2019). And if public policy can serve as an overarching basis for to ignore statutory language and Idaho law, it would give administrative agencies such as IDWR a breathtaking amount of authority, arguments in support of which the United States Supreme Court rejected in *Alabama Ass'n of Realtors* even when faced with significant COVID-19 pandemic issues that no one would assert did not involve substantial public policy issues. If the Idaho Legislature wants to grant IDWR such sweeping authority, it must enact the statutes to provide it with that authority. Based on the plain language of Idaho Code § 42-222 and other Idaho law discussed above, that authority simply is not there.

This appeal seeks a determination of what Duffin has with 35-7667. It is, in effect, an action to define his real property right. And if he has a right to lawfully exercise it, he can do so, even if others may be impacted by the exercise of 35-7667:

> Generally, "every man may regulate, improve, and control his own property, may make such erections as his own judgment, taste, or interest may suggest, and be master of his own without dictation or interference by his neighbors, so long as the use to which he devotes his property is not in violation of the rights of others, however much damage they may sustain therefrom."

McVicars v. Christensen, 156 Idaho 58, 62, 320 P.3d 948, 952 (2014), as corrected (Feb. 20, 2014) (quoting *White v. Bernhart*, 41 Idaho 665, 669–70, 241 P. 367, 368 (1925)).

Furthermore, Duffin's exercise of 35-7667 will not change what has historically been diverted from the ESPA as it was used as the primary source of water on his property until 2017. His use of this water has been fully mitigated under an approved mitigation plan under the conjunctive management rules which means he is subject to his proportionate amount of pumping reductions and he pays assessments to the Bingham Ground Water District for 35-7667 based on the cfs amount (1.08 cfs). For 2020, he paid $968.53, and those yearly payments will continue. A.R. 0638. IDWR's public policy arguments in this matter are a distraction and are unavailing.

L. The Intervenor's new issue that 35-7667 is a supplemental water right, a conclusion that was not reached by the Hearing Officer nor the district court, was not raised as an issue on appeal, and therefore, should not be considered. Additionally, it is without merit.

Unlike IDWR, the Coalition asserts that 35-7667 is a "supplemental, stacked water right." *Intervenors' Response* at 11-14.[14] This argument is based, in part, on Idaho water supply bank documents from 2017 where a water supply bank lease agreement was executed by Duffin and the Idaho Water Resource Board, the entity that oversees the water bank. However, the issue of whether 35-7667 is supplemental is not an issue that the Hearing Officer or district court ruled upon that can serve as a basis for an adverse ruling that forms the basis of an assignment of error.

The Hearing Officer did not find that 35-7667 is supplemental, rather, he held that "[i]n their respective briefs, the parties provided extensive argument about whether water right 35-7667 should be considered a primary water right or a supplemental (secondary) water right. The enlargement analysis would be identical in either case." A.R. 0662. This issue was not raised on appeal by Duffin, it was not raised by the Intervenors through filing of a cross-appeal, and it was not listed in the *Intervenors' Response* as an additional issue on appeal. *See Intervenors' Response* at 6. Consequently, it is an issue not decided below where it could serve as a basis for an adverse ruling raised below and should not be considered because "[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." *Izaguirre v. R & L Carriers Shared Servs., LLC*, 155 Idaho 229, 233, 308 P.3d 929, 933 (2013).

Even if this issue is considered, however, it is without merit. 35-7667 is not a supplemental water right. This question was briefed in detail before the Hearing Officer, (A.R. at 0433-0447),

[14] IDWR's position is that whether 35-667 is supplemental is "irrelevant in this case." *IDWR Response* at 32.

and we incorporate by reference these arguments rather than repeating them entirely here, but repeat a few important points. First, 35-7667 is not supplemental because there are no express conditions on 35-7667 (either in the original license or the subsequent modification to 35-7667 because of Transfer 80188) that make it supplemental. A.R. 0376-0377. There are a dozen (as of 2017) iterations of supplemental conditions historically or currently used by the Department, such as:

> The right holder shall make full beneficial use of all surface water available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right for land with an appurtenant surface water right(s) to those times when the surface water supply is not available or reasonably sufficient to irrigate the place of use authorized under this right.

A.R. 0443. This type of condition is not present on 35-7667. If the exercise of 35-7667 was truly supposed to be limited to times when ASCC water was unavailable, then a condition could have been easily added when 35-7667 was licensed.

Second, as described in the *Transfer Memo*, as a result of being stacked, IDWR may analyze historical water use and determine whether such historic use makes the exercise of one right supplemental in practice to the other as a basis to evaluate enlargement when such water rights are the subject of a transfer application. The actual water use and development of 35-7667 demonstrates that there has never been a time when ground water and surface water have been used for irrigation at the same time. A.R. at 0378. Under this situation, 35-7667 is a not a supplemental water right, and the Intervenors' arguments otherwise are unavailing.

Furthermore, the Idaho water supply bank documents are not determinative or even persuasive on this question. The Idaho water supply bank is not operated by IDWR, but by the Idaho Water Resource Board (the "IWRB") pursuant to promulgated administrative rules found at IDAPA 37.02.03. Whether IWRB accepts water rights into the water supply bank is made in the

IWRB's sole discretion, and if there are any possible concerns, the IWRB will either reject the application or set the conditions of accepting water rights into the water supply bank. In other words, their acceptance of water rights is voluntary, and the IWRB does not make legal determinations concerning the validity of the water right. This was explained previously in an email exchange between counsel and Remington Buyer, the water supply bank coordinator, in response to concerns IWRB raised about forfeiture of a water right being offered for rental into the water supply bank:[15]

Rob,

The Idaho Water Resource Board may purchase, lease, or otherwise obtain decreed, licensed or permitted water rights to be credited to the water supply bank (IC 42-1762). There are enough questions raised in relation to the proposed lease of water right 27-7003 that the Bank has elected not to enter into a lease agreement to bring the right into the Bank.

Neither the Bank nor the Board has made a determination of forfeiture of the water right in question, nor has the authority to do so. The Bank has simply elected not to enter into a voluntary agreement to lease the proposed water right into Bank.

Remington Buyer
Water Supply Bank Coordinator
Idaho Department of Water Resources
322 East Front Street, Boise, ID, 83720
T: (208) 287-4918 | **F:** (208) 287-6700

Accordingly, the supplemental condition on the rental agreement has no legal significance, as it was merely included as a condition of acceptance by the IWRB. A water supply bank lease agreement is voluntary and IWRB sets the terms of its leases on a take-it-or-leave-it basis. Consequently, the Intervenors' arguments are without merit.

M. Duffin's substantial rights have been prejudiced.

Intervenors argue that Duffin's substantial rights have not been prejudiced. *Intervenors' Response* at 22-23. IDWR does not make a similar argument. We disagree with the Intervenors.

[15] A copy of the email of this email exchange is attached hereto as Attachment 2. It is provided here for the first time in response to the Intervenors' raising of this new issue on appeal in order to fully respond.

As explained previously, the *Final Order* has impacted a substantial right of Duffin because the Hearing Officer has imposed a condition on Duffin's property right that is not contained anywhere on the express description of 35-7667 and is inconsistent with Idaho law as described above. Duffin's property value associated with 35-7667 and his ability to transfer this right have been unlawfully impacted because he cannot transfer 35-7667 to a new location which prejudices his substantial rights.

N. Both IDWR's request for attorney's fees and the Intervenors' requests for attorney's fees should be denied.

On appeal, IDWR has requested an award of attorney fees under Idaho Code § 12-117(1). *IDWR Response* at 46. IDWR asserts that Duffin's arguments do not have a reasonable basis in fact or law for filing this appeal. *Id*. The Intervenors also seek an award of fees under Idaho Code § 12-117(1) and Idaho Code § 12-121. *Intervenors' Response* at 23, 25.

Relative to Idaho Code § 12-121, the Idaho Supreme Court has held that "[a]ttorney's fees are not available under Idaho Code § 12-121 on petitions for judicial review . . ." *Travelers Ins. Co. v. Ultimate Logistics, LLC (In re Idaho Workers Comp. Bd.)*, 167 Idaho 13, 24, 467 P.3d 377, 388 (2020). The Coalition already knows this. *Memorandum Decision and Order*, In the Matter of Designating the Eastern Snake Plain Aquifer Ground Water Management Area, at 18 (November 6, 2020) (the "ESPA GWMA Decision") *available at* http://www.srba.state.id.us/Images/2020-11/0080063xx00105.pdf (denying a virtually identical request for attorney fees by the Coalition under Idaho Code § 12-121 based on the *Travelers Ins. Co.* case). Accordingly, the Coalition's request for fees under Idaho Code § 12-121 should be denied.

Under Idaho Code § 12-117(1), the Court should only award attorneys' fees and expenses in any proceeding involving a state agency and a person if the Court finds the "nonprevailing party

acted without a reasonable basis in fact or law." Idaho Code § 12-117(1); *see also Hoffman v. Board of the Local Improvement District No. 1101*, 163 Idaho 464, 473, 415 P.3d 322, 341 (2017). The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012); ESPA GWMA Decision at 18. Additionally, this Court has not awarded fees on issues that have not been addressed before. *Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 165-66, 219 P.3d 804, 812-13 (2009) (declining to award fees under Idaho Code § 12-121 on an issue that had not been addressed before by the Court). Additionally, fees should not be awarded if new analysis and authority is provided on appeal. See *infra* at 38-39.

The issues presented in this appeal present legitimate questions for this Court to address. The resolution of the issues raised in this appeal are important because it will provide clear answers for the regulated community and the attorneys and consultants that represent them. The issues on appeal implicate issues of property rights, water right interpretation, water right description standards, whether combined uses must be included in the description of the right, statutory interpretation, interpretation and application of administrative agency guidance documents that interpret relevant statutes and define relevant terms, and the scope of discretion accorded to IDWR and/or its hearing officers in transfer proceedings. Further, while IDWR argues that Duffin has not raised an issue of first impression, *IDWR Response* at 48, such an argument ignores the fact that this is the first time IDWR has described the "single combined beneficial use" concept, which is an issue this Court has not addressed before, despite this concept being contrary to principles found in the plain language of IDWR's own *Transfer Memo* (which makes no mention of the *Barron* decision). Further, the legal effect of the 2004 addition of Idaho Code § 42-202B(1) on

the *Barron* decision and whether a portion of that opinion is dicta has not been addressed before. In all the recent dicta cases described herein, there had to be a case that first challenged the language as dicta brought to make that determination, and that is simply what Duffin has done here. Finally, Duffin has presented new analysis and authority on appeal for the Court's consideration, including a refined analysis in support of Duffin's enlargement definition and IDWR precedent from temporary transfer proceedings describing the dangers of combining water entitlements merely because they share a place of use. Ironically, it is this very new analysis and authority that IDWR seeks to have this court not consider under its conflated view that this new authority and argument is the same as a new issue on appeal. We understand IDWR's concern with this precedent and refined analysis, and it should be concerned, but that is not a legitimate basis to have it excluded from consideration.

Given all these factors, the Court should "not find that this appeal is so lacking in merit that attorney fees should be awarded under [Idaho Code § 12-117]." *Nelson*, 148 Idaho at 166, 219 P.3d at 813 (2009). Accordingly, both requests for attorney's fees should be denied.

II. CONCLUSION

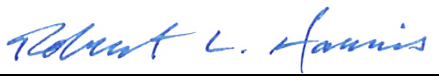
For the reasons set forth above, this Court should reverse the *Final Order* and the district court's decision to affirm. Otherwise, the implied "single combined beneficial use" element will become the first exception to this Court's prior strong endorsement of interpreting water rights based on their recorded elements, which will impact the certainty and finality of SRBA judgments and licenses issued under Idaho law. Applying the correct definition of enlargement to 83160 and the only water right subject to this transfer (35-7667), there is nothing under 83160 which proposes to increase water use at the proposed new place of use and point of diversion in excess of 35-7667's recorded elements, nor any proposed change to eliminate the sole condition on the exercise

of 35-7667 (the duty of water condition). Duffin's position is not a new theory of enlargements, as asserted by IDWR. *IDWR Response* at 1. Rather, it is the correct existing analysis based squarely on Idaho statutes, cases, administrative law, and the *Transfer Memo*.

In short, there is no proposal to change 35-7667's authorized diversion rate (1.08 cfs), maximum diversion volume (215.6 acre-feet), or irrigation of 53.9 acres with *ground water* that is authorized under 35-7667. The historic ground water diversion amounts will be virtually identical at the proposed new place of use, subject to yearly variations in the volume pumped based on weather, but in all cases less than the 215.6 acre-feet volume limit recorded on 35-7667. Accordingly, there is no proposed enlargement to 35-7667. The proper application of these principles in this appeal leads to reversal of the *Final Order*.

Because there is no enlargement of 35-7667 and no violation of the remaining Idaho Code § 42-222 transfer review criteria, this Court should remand the matter back to the Hearing Officer with instructions to approve 83160.

Respectfully submitted this 26th day of October, 2021.



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2021, one true and correct electronic copy of *Appellant's Brief* was served via iCourt electronic service, pursuant to the Idaho Rules for Electronic Filing and Service, and email on the following:

Clerk of the District Court
SNAKE RIVER BASIN ADJUDICATION
jconell@idcourts.net

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Robert L. Harris

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

ATTACHMENT 1

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF TEMPORARY CHANGE APPLICATION TC-34-198 IN THE NAME OF JARED & JENNA TELFORD	))))	**PRELIMINARY ORDER DENYING APPLICATION**

On July 26, 2021, Jared and Jenna Telford ("Telford") filed Temporary Change Application TC-34-198 ("Application TC-34-198") with the Idaho Department of Water Resources ("Department"), proposing to change the point of diversion and place of use for a 52.5-acre portion of ten ground water irrigation rights[1] ("TL Rights"). The proposed point of diversion is an existing ground water well. The proposed place of use is located in the NW1/4 of Section 15, T05N, R26E and is covered by water rights 34-13741 and 34-13743.

Water right 34-13741 bears a priority date of November 11, 1912 and authorizes the diversion of 0.32 cfs from the Big Lost River for the irrigation of 72 acres. Water right 34-13743 bears a priority date of June 30, 1886 and authorizes the diversion of 1.42 cfs from the Big Lost River for the irrigation of 72 acres. Water rights 34-13741 and 34-13743, in combination, are limited to the irrigation of 72 acres.

Telford provided the following information on Application TC-34-198:

Question: Describe the proposed change(s) and explain the reason(s) they are needed:

Telford Response: Because of the drought, Applicant's surface water rights are not available. This application will move portions of ground water rights owned by Telford Lands, LLC to the proposed place of use.

Question: Describe the effect on the land now irrigated if the change is approved pursuant to this application:

Telford Response: It will not be irrigated with the water rights that are subject to this Application.[2]

The 52.5-acre portion of the TL Rights proposed to be changed through Application TC-34-198 are currently described under a Water Supply Bank ("WSB") rental agreement. On December 13, 2016, Telford Lands LLC filed an application to rent water from the WSB with the Idaho Water Resource Board ("IWRB"). Telford Lands LLC proposed to rent 276.7 acres of the TL Rights for irrigation use in Sections 15 and 16, T03N, R26E. The WSB rental application included the following statements from Telford Lands LLC:

---

[1] 34-2330B, 34-7077, 34-7080B, 34-7092, 34-7121A, 34-7121B, 34-7179, 34-12376, 34-13840 and 34-13842.

[2] Telford's attorney, Luke Marchant, confirmed through email correspondence that the current authorized place of use for the 52.5 acres to be changed will continue to be irrigated.

Water will be used to supplement the current water rights used on the "Isom Farm" which authorize the irrigation of 1980 acres. No new acres will be irrigated under this rental.

Water rights already appurtenant to the [proposed] place of use (WR Nos. 34-2459, 34-2460, 34-2461, 34-2462, 34-10925, 34-7037, and 34-7138). Existing rights at [proposed] POU not enough, and shrink losses in canals are why H2O is required.

On May 5, 2017, IWRB approved WSB Rental Agreement No. 143, which changed the place of use for a 276.7-acre portion of the TL Rights. The 276.7-acre portion of the TL rights rented through the WSB was used to cover existing irrigated acres under water rights 34-2401A, 34-4015, 34-2459, 34-2460, 34-2461, 34-2462, 34-10925, 34-7037, and 34-7138 ("Isom Rights").

Rental Agreement No. 143 extends to December 31, 2021. During the time period that Rental Agreement No. 143 is in effect, the 276.7 acres of the TL rights are combined with a 276.7-acre portion of the Isom Rights to irrigate 276.7 acres. Application TC-34-198 proposes to separate 52.5 acres of the rented TL Rights from the Isom Rights. The 52.5-acre portion of the TL Rights to be changed would be used to irrigate acres in Section 15, T05N, R26E. Telford Lands, LLC would continue to irrigate the existing 276.7 acres with the Isom Rights.

Idaho Code § 42-222A(6) states: "Temporary changes may not be approved to provide water for new projects or to allow expansion of the use of water under existing water rights." Currently, the water rights described in Rental Agreement No. 143 in combination with a 276.7-acre portion of the Isom Rights are used to irrigate 276.7 acres in Sections 15 and 16, T03N, R26E. If Application TC-34-198 were approved, these rights would be used to irrigate an additional 52.5 acres in Section 15, T05N, R26E. This constitutes an expansion of the use of water under existing water rights and cannot be approved. Therefore Application TC-34-198 should be denied.

ORDER

IT IS HEREBY ORDERED that Temporary Change Application TC-34-198 is DENIED.

Dated this 3rd day of August 2021.

James Cefalo
Regional Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed, to the following:

Document Served: Preliminary Order Denying Application

LUKE MARCHANT
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405-0130

JARED AND JENNA TELFORD
3198 W 2200 N
ARCO, ID 83213

Courtesy copy sent by regular mail to:

LUCAS YOCKEY
WATER DISTRICT 34
211 E CUSTER RD, STE B
MACKAY, ID 83251

Christina Henman
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF TEMPORARY CHANGE APPLICATION TC-34-199 IN THE NAME OF MARK TELFORD	))))	**PRELIMINARY ORDER DENYING APPLICATION**

On July 26, 2021, Mark Telford ("Telford") filed Temporary Change Application TC-34-199 ("Application TC-34-199") with the Idaho Department of Water Resources ("Department"), proposing to change the point of diversion and place of use for a 24-acre portion of ten ground water irrigation rights[1] ("TL Rights"). The proposed point of diversion is an existing ground water well. The proposed place of use is located in Section 3, T04N, R26E and is covered by water rights 34-50D and 34-52B.

Water right 34-50D bears a priority date of June 1, 1884 and authorizes the diversion of 1.28 cfs from the Big Lost River for the irrigation of 64 acres. Water right 34-52B bears a priority date of May 15, 1885 and authorizes the diversion of 2.34 cfs from the Big Lost River for the irrigation of 95 acres. Water rights 34-50D and 34-52B, in combination, are limited to the irrigation of 95 acres.

Telford provided the following information on Application TC-34-199:

Question: Describe the proposed change(s) and explain the reason(s) they are needed:

Telford Response: Because of the drought, Applicant's surface water rights are not available. This application will move portions of ground water rights owned by Telford Lands, LLC to the proposed place of use.

Question: Describe the effect on the land now irrigated if the change is approved pursuant to this application:

Telford Response: It will not be irrigated with the water rights that are subject to this Application.[2]

The 24-acre portion of the TL Rights proposed to be changed through Application TC-34-199 are currently described under a Water Supply Bank ("WSB") rental agreement. On December 13, 2016, Telford Lands LLC filed an application to rent water from the WSB with the Idaho Water Resource Board ("IWRB"). Telford Lands LLC proposed to rent 276.7 acres of the TL Rights for irrigation use in Sections 15 and 16, T03N, R26E. The WSB rental application included the following statements from Telford Lands LLC:

---

[1] 34-2330B, 34-7077, 34-7080B, 34-7092, 34-7121A, 34-7121B, 34-7179, 34-12376, 34-13840 and 34-13842.

[2] Telford's attorney, Luke Marchant, confirmed through email correspondence that the current authorized place of use for the 24 acres to be changed will continue to be irrigated.

Water will be used to supplement the current water rights used on the "Isom Farm" which authorize the irrigation of 1980 acres. No new acres will be irrigated under this rental.

Water rights already appurtenant to the [proposed] place of use (WR Nos. 34-2459, 34-2460, 34-2461, 34-2462, 34-10925, 34-7037, and 34-7138). Existing rights at [proposed] POU not enough, and shrink losses in canals are why H2O is required.

On May 5, 2017, IWRB approved WSB Rental Agreement No. 143, which changed the place of use for a 276.7-acre portion of the TL Rights. The 276.7-acre portion of the TL rights rented through the WSB was used to cover existing irrigated acres under water rights 34-2401A, 34-4015, 34-2459, 34-2460, 34-2461, 34-2462, 34-10925, 34-7037, and 34-7138 ("Isom Rights").

Rental Agreement No. 143 extends to December 31, 2021. During the time period that Rental Agreement No. 143 is in effect, the 276.7 acres of the TL rights are combined with a 276.7-acre portion of the Isom Rights to irrigate 276.7 acres. Application TC-34-199 proposes to separate 24 acres of the rented TL Rights from the Isom Rights. The 24-acre portion of the TL Rights to be changed would be used to irrigate acres in Section 3, T04N, R26E. Telford Lands, LLC would continue to irrigate the existing 276.7 acres with the Isom Rights.

Idaho Code § 42-222A(6) states: "Temporary changes may not be approved to provide water for new projects or to allow expansion of the use of water under existing water rights." Currently, the water rights described in Rental Agreement No. 143 in combination with a 276.7-acre portion of the Isom Rights are used to irrigate 276.7 acres in Sections 15 and 16, T03N, R26E. If Application TC-34-199 were approved, these rights would be used to irrigate an additional 24 acres in Section 3, T04N, R26E. This constitutes an expansion of the use of water under existing water rights and cannot be approved. Therefore Application TC-34-199 should be denied.

ORDER

IT IS HEREBY ORDERED that Temporary Change Application TC-34-199 is DENIED.

Dated this 3rd day of August 2021.

James Cefalo
Regional Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of August 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed, to the following:

Document Served: Preliminary Order Denying Application

LUKE MARCHANT
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405-0130

MARK TELFORD
PO BOX 511
ARCO, ID 83213

Courtesy copy sent by regular mail to:

LUCAS YOCKEY
WATER DISTRICT 34
211 E CUSTER RD, STE B
MACKAY, ID 83251

Christina Henman
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

ATTACHMENT 2

Rob Harris

From: Buyer, Remington <Remington.Buyer@idwr.idaho.gov>
Sent: Friday, October 24, 2014 1:27 PM
To: Rob Harris
Cc: Homan, John; Whitney, Rob; Cefalo, James; Luke Marchant; Patton, Brian
Subject: RE: Lease-Rental Proposal for Tanner Lane

Rob,

The Idaho Water Resource Board may purchase, lease, or otherwise obtain decreed, licensed or permitted water rights to be credited to the water supply bank (IC 42-1762). There are enough questions raised in relation to the proposed lease of water right 27-7003 that the Bank has elected not to enter into a lease agreement to bring the right into the Bank.

Neither the Bank nor the Board has made a determination of forfeiture of the water right in question, nor has the authority to do so. The Bank has simply elected not to enter into a voluntary agreement to lease the proposed water right into Bank.

Remington Buyer
Water Supply Bank Coordinator
Idaho Department of Water Resources
322 East Front Street, Boise, ID, 83720
T: (208) 287-4918 | **F:** (208) 287-6700

From: Rob Harris [mailto:rharris@holdenlegal.com]
Sent: Thursday, October 23, 2014 4:01 PM
To: Buyer, Remington
Cc: Homan, John; Whitney, Rob; Cefalo, James; Luke Marchant
Subject: RE: Lease-Rental Proposal for Tanner Lane

Remington:

I am disappointed in your response and do not believe that you have given proper deference to Idaho law on forfeiture and viewed it in its proper evidentiary standard, which is that forfeiture must be shown by "clear and convincing evidence":

> "Forfeiture of water rights is governed by Idaho Code section 42-222(2), which provides that water rights may be lost if they are not applied to the beneficial use for which the rights were appropriated for five continuous years. I.C. § 42-222(2). However, this Court has often repeated its position that forfeiture of water rights is not favored in Idaho. Aberdeen-Springfield Canal Co. v. Peiper, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999). Because of its disfavor for water right forfeiture, Idaho law requires that such actions be proved by the heightened evidentiary standard of clear and convincing evidence. Id."

McCray v. Rosenkrance, 135 Idaho 509, 20 P.3d 693 (2001).

Your letter shifts the burden to us to disprove to you that it is has been forfeited, and this is not how it should be done. You indicate that we have to "overcome" your forfeiture concerns. You have it backwards. If you are going to make a finding of forfeiture, you need the evidence to back it up, rather than simply indicate to us that you have a

concern and we have to overcome it in response. Taking a real property right is serious business. Consider this description of the "clear and convincing evidence" standard:

> In ordinary civil actions a fact in issue normally is sufficiently proved by a preponderance of the evidence.[FN1] However, clear-and-convincing proof is required in civil cases where the wisdom of experience has demonstrated the need for greater certainty.[FN2] Clear-and-convincing evidence is an intermediate standard of proof that is more than the "preponderance of the evidence" standard used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.[FN3] The "clear-and-convincing evidence standard of proof" reflects a heightened standard of proof that indicates that the thing to be proved is highly probable or reasonably certain; this standard places a heavier burden on one party to prove its case to a reasonable certainty.[FN4]
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> Under the clear-and-convincing standard of proof, evidence is "clear" if it is certain, unambiguous, and plain to the understanding, and it is "convincing" if it is reasonable and persuasive enough to cause the trier of facts to believe it.[FN5] Evidence is clear and convincing if it places in the factfinder an abiding conviction that the truth of the factual contentions is highly probable,[FN6] or if it produces in the factfinder a firm belief or conviction as to the allegation sought to be established.[FN7] Clear-and-convincing evidence is that which leaves no reasonable doubt in the mind of the trier of fact as to the truth of the proposition in question.[FN8]

C.J.S. Evidence section 1624.

Furthermore, In Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952), the Idaho Supreme Court said that "[f]orfeitures are abhorrent and all intendments are to be indulged against a forfeiture." With that heightened standard, as well as this language that "all" arguments against forfeiture should be considered against a finding of forfeiture, I do not see how you do not consider full irrigation from a surface water right of the property—where there is no need to divert the ground water right—to effect forfeiture of the ground water right. Mr. Fielding developed the right to cover all of his bases and ensure he had it available if his surface supply from the Idaho Irrigation District failed. This same concept is in Idaho Code 42-223(3), where a right is not lost or forfeited if it is not needed to maintain full beneficial use because of land application of waste water. We also think forfeiture should be particularly abhorrent to the Department when you consider that there are more and more exceptions to forfeiture—hand-picked winners and losers depending on political clout in most cases—under this statute. Mr. Fielding's land is at the end of the Idaho Canal. It is a good thing that he has not needed to use the ground water, not one that should result in him losing a property right.

In addition, over the past few years, James Cefalo has previously visited with the Fieldings, Del Kohtz, and myself concerning this right, and informed them that there are not any forfeiture issues with the right. It was on this basis that we decided to use the right as a piece of the puzzle to resolve the notice of violation issues against Mr. Drakos. I believed that I only had to provide the modeling to comply with the agreement, not defend the validity of the right. Had I known that the Department was going to do that, the agreement may not have happened or its provisions may have been different. Therefore, I can only conclude that with your denial, the Department has breached the implied covenant of good faith and fair dealing which is part of every contract under Idaho law.

We invite you to reconsider your position on forfeiture and approval the rental. I will look at modeling the other rights as you suggested simply to keep the options open, but many of them are from miles and miles away and will not work without significant mitigation. This is why Rob Whitney, James Cefalo, and myself thought the Fielding right would work the best and subject only to modeling results, agreed that submission of water bank applications with this right was acceptable.

Please notify me of your reconsideration decision by email or letter. I will let you know if we think the modeling of the existing rights may work by early next week, and therefore, request that you keep the rental request of Mr. Drakos open until October 31st. However, in the event the modeling does not work and you hold to your position that the right has been forfeited, then because the rental was necessary to resolve the NOV and we relied upon that in good faith, we will not pay the remaining amount under the Consent Agreement because of the Department's breach. This

will allow us to then address the Department's relaxed approach to forfeiture before the court if the Department sues us under the Consent Agreement. I suppose this is an issue that needs to be raised at some point as this issue is being raised more and more by the water bank.

If you would like to discuss these issues or more detail, or have any questions regarding the above information, let me know.

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From: Buyer, Remington [mailto:Remington.Buyer@idwr.idaho.gov]
Sent: Wednesday, October 22, 2014 4:43 PM
To: Rob Harris
Cc: Homan, John
Subject: Lease-Rental Proposal for Tanner Lane

Rob,

I've denied the lease proposal for Mr. Fielding. Attached is a copy of the letter that will be going out tomorrow.

I looked in the Bank for water rights that might satisfy a rental for Mr. Drakos and I've attached the groundwater modeling for a portfolio of rights that might suffice. An initial model run of these rights to Mr. Drakos' property suggests that depletions in the Shelley to Near Blackfoot Reach will exceed 2 AF/trimester and that depletions in the reach will exceed 10% of total depletions to all reaches above Milner. You may be able to find a combination of these rights that model sufficient to be acceptable for a rental.

Please let me know if you will attempt to model a transfer to Mr. Drakos' property, I will keep Mr. Drakos' rental request open until I hear from you, or until October 31.

Remington Buyer
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