IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

JEFFREY AND CHANA DUFFIN, husband and wife, Petitioners, 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.	Case No. CV-0620-0001467 **PETITIONERS' OPENING BRIEF**
IN THE MATTER OF APPLICATION FOR PERMIT NO. 74-16187 IN THE NAMEOF KURT W. BIRD OR JANET E. BIRD	

PETITIONERS' OPENING BRIEF

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

Robert L. Harris (ISB No. 7018)
Luke H. Marchant (ISB No. 9944)
**HOLDEN, KIDWELL,
HAHN & CRAPO, P.L.L.C.**
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone: (208)523-0620
Facsimile: (208) 523-9518
Email: rharris@holdenlegal.com
lmarchant@holdenlegal.com

Attorneys for Jeffrey and Chana Duffin

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Sarah W. Higer, ISB #8012
BARKER ROSHOLT & SIMPSON LLP
163 2nd Avenue West
Twin Falls, ID 83301
Telephone: (208) 733-0700
Facsimile: (208) 735-2444
Email: jks@idahowaters.com
tlt@idahowaters.com
swh@idahowaters.com

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

Lawrence G. Wasden
ATTORNEY GENERAL
Brian Kane
ASSISTANT CHIEF DEPUTY
Garrick L. Baxter (ISB No. 6301)
Sean H. Costello (ISB No. 8743)
DEPUTY ATTORNEYS GENERAL
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 287-4800
Facsimile: (208) 208-6700
Email: garrick.baxter@idwr.idaho.gov
sean.costello@idwr.idaho.gov

*Attorneys for Respondent
Idaho Department of Water Resources*

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P. O. Box 248
Burley, ID 83318
Telephone: (208-678-3250
Facsimile: (208) 878-2548
Email: wkf@pmt.org

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

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

I. STATEMENT OF THE CASE

A. Nature of the Case.

This appeal concerns a case where a hearing officer in an administrative contested case (1) failed to engage in any interpretation analysis of a licensed water right; and (2) introduced a new, implied, water right element into Idaho water law referred to as the "single, combined beneficial use" element, despite no express language describing this element on the face of the water right license. Duffin seeks judicial review of the *Amended Preliminary Order Denying Transfer* issued on August 12, 2020, that became final (the "*Final Order*") fourteen days later. 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").

The contested transfer at issue, Transfer No. 83160 ("83160"), was filed by Duffin in an effort to amend the place of use and point of diversion of water right 35-7667 ("35-7667"). R. 0286-0340. As set forth below, the Hearing Officer failed to engage in any interpretation of the written elements of 35-7667. Rather, after avoiding the interpretation issue, the Hearing Officer proceeded to deny the transfer based on the enlargement criterion contained in Idaho Code § 42-222. As addressed below, the Hearing Officer's conclusion was based upon an incorrect interpretation of *Barron v. Idaho Dep't of Water Resources*, 19 P.3d 219, 135 Idaho 415 (2001), where he elevated dicta from this opinion to support a finding of enlargement in spite of more recent Idaho Supreme Court cases describing the proper standards for interpreting a water right, current IDWR transfer principles described in a written policy memorandum, and a 2004 statutory amendment which expressly provides consumptive use is not an element of a water right

B. Course of Proceedings.

The application for 83160 was submitted on April 2, 2019. It was protested by the Surface Water Coalition (the "Coalition").[1] The Coalition intervened in this appeal. Duffin and the Coalition eventually determined that the underlying contested case could proceed to a decision based on stipulated facts rather than proceeding with a formal contested case hearing to accept evidence into the administrative record. R. 0656. On May 22, 2020, the parties submitted a *Stipulated Statement of Facts* (the "*Facts*"), R. 0370-0383, which the Hearing Officer adopted into the evidentiary record for the contested case. *Id.* Four days later, the Hearing Officer gave the parties the opportunity to file briefs addressing the following question:

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

Id. Briefs were submitted by Duffin and the Coalition on July 17, 2020. On July 24, 2020, the Hearing Officer issued a *Preliminary Order Denying Transfer*. R. 0590-0601. Duffin thereafter filed a petition for reconsideration on August 7, 2020. R. 0603-0630. The Hearing Officer granted the petition for reconsideration to address arguments raised by Duffin, but he still denied the transfer in the *Final Order*.

C. Statement of Facts.

The underlying facts associated with 35-7667 and 83160 are undisputed as they were stipulated to. While not fully restated here, the Court should carefully review the *Facts* as though they were set forth here in full. In the *Facts*, of particular importance are consideration of the

[1] The Coalition is made up of A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, and Minidoka Irrigation District.

original water right license document for 35-7667 and the current description document for 35-7667 (after approval of a separate water right transfer), both of which are set forth here:

State of Idaho
Department of Water Resources

Water Right License

WATER RIGHT NO. 35-07667

Priority: June 11,1992

Maximum Diversion Rate: 1.10 CFS
Maximum Diversion Volume: 220.0 AF

It is hereby certified that VERN R DUFFIN
2142 S 2800 W
ABERDEEN ID 83210 has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated February 02, 1977; and has submitted Proof of Beneficial Use on June 11, 1992. An examination indicates that the works have a diversion capacity of 1.16 cfs of water from:

SOURCE
GROUND WATER

and a water right has been established as follows:

BENEFICIAL USE	PERIOD OF USE	DIVERSION RATE	ANNUAL DIVERSION VOLUME
IRRIGATION	04/01 to 10/31	1.10 CFS	220.0 AF

LOCATION OF POINT OF DIVERSION:
GROUND WATER SW¼SW¼NE¼ Sec. 20, Twp 06S, Rge 31E, B.M., BINGHAM County

PLACE OF USE: IRRIGATION

Twp Rge Sec	NE				NW				SW				SE				
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06S 31E 20			20.0	16.0				19.0									55.0

Total Acres: 55

CONDITIONS OF APPROVAL

1. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 24TH day of DECEMBER, 2001.

Acting for KARL J. DREHER
Director

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WATER RIGHT NO. 35-7667

As Modified by Transfer No. 80188

In accordance with the approval of Transfer No. 80188, Water Right No. 35-7667 is now described as follows:

Right Holder: JEFFREY DUFFIN AND
CHANA DUFFIN
PO BOX 525
ABERDEEN, ID 83210

Priority Date: 6/11/1992

Source: GROUND WATER

BENEFICIAL USE	From		To	Diversion Rate	Diversion Volume
IRRIGATION	04/01	to	10/31	1.080 cfs	215.6 af
				1.080 cfs	215.6 af

LOCATION OF POINT(S) OF DIVERSION

GROUND WATER SWSWNE Sec 20 Twp 06S Rge 31E BINGHAM County

PLACE OF USE: IRRIGATION

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06S	31E	20			20.0	14.9				19.0									53.9

POU Total Acres: 53.9

CONDITIONS OF APPROVAL

1. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above.

Transfer No. 80188

R. 0376-0377.

II. ISSUES PRESENTED ON APPEAL

1. Whether the hearing officer erred by concluding that the changes proposed in Transfer No. 83160 will result in an enlargement of the water right subject to the transfer (WR 35-7667).

2. Whether the hearing officer erred by failing to interpret the plain language of the license for WR 35-7667 and/or whether the hearing officer erred by concluding as he did where there is no language combining WR 35-7667 with any other water rights or water entitlements.

3. Whether the hearing officer erred in finding that “combined beneficial use” is an element and/or component of a water right, and whether “combined beneficial use” is merely

another term for "consumptive use" (which is not an element of a water right) in violation of Idaho Code § 42-202B(1) and other applicable Idaho law.

4. Whether the hearing officer erred by concluding that the changes proposed in Transfer No. 83160 will result in injury to other water rights.

5. Whether the hearing officer erred by concluding that the changes proposed in Transfer No. 83160 are not consistent with the conservation of water resources in the state of Idaho.

6. Whether the hearing officer erred by concluding that the changes proposed in Transfer No. 83160 are not in the local public interest.

7. Whether the hearing officer's actions prejudiced a substantial right of the Petitioners.

III. APPLICABLE LEGAL STANDARD

The applicable standard of review before this Court has previously been well explained by the Idaho Supreme Court:

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

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

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

IV. LEGAL ARGUMENT

A. The Hearing Officer erred by concluding that approval of 83160 will result in an enlargement.

The Hearing Officer concluded that 83160, if approved, would result in an enlargement because an approval would violate the implied "single, combined beneficial use" element of a water right first described in the initial *Preliminary Order Denying Transfer*. R. 0594. The name of this new element was shortened in the *Final Order* to simply "combined beneficial use." R. 0662. In our view, the term "single, combined beneficial use" more correctly embodies what this new element is, and for that reason, will be used in this brief.[2]

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

[2] Language from the *Final Order* also supports this conclusion with inclusion of the word "combination" in the sentence introducing this new water law element into Idaho law: "These two water rights, in combination, represent a single beneficial use of water at the existing place of use." R. 0662.

> 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.

R. 0662-0663.

This determination by the Hearing Officer does not comport with Idaho law. Water rights are defined by elements. This matter is straightforwardly determined by engaging in a water right interpretation analysis of the express water right elements as described in recent Idaho cases. The Hearing Officer based his determination on several overlapping legal bases, but he ignored directly applicable legal authority, all of which is in error and must be reversed on appeal.

1. The Hearing Officer was legally obligated to engage in an interpretation analysis of the water right license document for 35-7667.

The Hearing Officer's primary legal basis for the *Final Order* is the case of *Barron v. Idaho Dep't of Water Resources*, 19 P.3d 219, 135 Idaho 415 (2001). *See* R. 0649 (". . . *Barron* is central to the outcome of this case."). Focused on this 2001 Idaho Supreme Court opinion, the Hearing Officer sidestepped more recent cases addressing water right interpretation and post-2001 statutory amendments addressing consumptive use. As a result, the interpretation question was not addressed in the *Final Order*. For that reason, many of the arguments on appeal provided by Duffin are similar to arguments raised below, but they are raised in full again on appeal because they were not properly addressed by the Hearing Officer. This legal authority cannot be disregarded and must be addressed by this Court on appeal. Interpretation law controls in this case, but Duffin will also address the *Barron* decision later in this brief.

Duffin is the described owner of 35-7667, a ground water right, which is a recognized property right in Idaho. "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law." *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). The

law is clear that "[w]ater rights are defined by elements. Idaho Code sections 42-1411(2) and 42-1411(3) comprise a list of elements that define a water right. Under Idaho Code section 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." … Thus, a water decree must either contain a statement of [each element] or incorporate one, but not both." *City of Blackfoot v. Spackman*, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017) (footnote omitted). The judicial decree of a water right is conclusive as to the nature and extent of the water right and the Director has a clear legal duty to distribute water according to decreed water rights. *Id*. at 308-09, 396 P.3d at 1190-91.

Accordingly, the first step in the Hearing Officer's analysis in a contested transfer should have been the interpretation of the statutorily prescribed Idaho water right elements. This is particularly true when evaluating enlargement because enlargement is described as an increase or expansion of what the express water rights elements provide for:

> 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).

35-7667 was obtained through the statutory water right permitting process. The legal effect of a licensed water right obtained through this process is equivalent to a decreed water right that has been judicially verified, as provided in Idaho Code § 42-220:

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

> to, and shall pass with a conveyance of, the land for which the right of use is granted. . . . provided, that when water is used for irrigation, **no such license or decree of the court** allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown **to the satisfaction of the department of water resources in granting such license, and to the court in making such decree**, that a greater amount is necessary, and **neither such licensee nor any one claiming a right under such decree**, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, . . .

Idaho Code § 42-220 (emphasis added). Accordingly, the Department has held that "[e]xcept for clerical errors, or licenses that include a term limit or a condition authorizing subsequent review, the Department does not have authority to reconsider the elements of a license after the appeal period has passed." *In the Matter of Application for Transfer No. 82640 in The Name of Clinton K. Aston*, Amended Preliminary Order Approving Transfer, at 14 (October 29, 2019).[3]

Because licensed and decreed water rights have the same legal effect, the interpretation principles for SRBA partial decrees described in recent Idaho Supreme Court cases are the same for interpreting water right licenses. The SRBA was a "general stream adjudication … where thousands of claims and potential parties are involved" to adjudicate all of the water rights in the Snake River Basin throughout Idaho. *In Re SRBA Case No. 39576 Subcase No. 37-00864*, 164 Idaho 241, 244, 429 P.3d 129, 132 (2018). The partial decrees issued in the SRBA in relation to individual water rights are final orders of the Court, and licenses issued by IDWR are likewise final orders, neither of which are subject to subsequent collateral attack. In a 2018 case, the Idaho Supreme Court explained its reluctance to relitigate already-decreed water rights:

> 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.*

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

> *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).

As stated, already-decreed water rights should not be relitigated through imposition of unwritten elements or by otherwise interpreting the plain language of an element to include an implied condition affecting its exercise, unless such requests for interpretation were previously brought before the SRBA court itself. *Rangen*, 159 Idaho at 806, 367 P.3d at 201. Water rights are defined by written elements. They tell the water right holder what they have. To that end, the Idaho Supreme Court has described the appropriate process for interpreting water right partial decrees, and by logical extension, licenses, and no law supports injection of implied conditions into perfected water rights:

> When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. [*A&B Irr. Dist. v. Idaho Dep't of Water Res.*], 153 Idaho [500,] 523, 284 P.3d [225,] 248 [(2012)]. If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. *Cf. Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) ("If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own

> words."). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf. Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 850, 367 P.3d 228, 245 (2016) ("Where terms of a contract are 'reasonably subject to differing interpretations, the language is ambiguous....'" (quoting *Clark v. Prudential Prop. and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003))). Whether ambiguity exists in a decree "is a question of law, over which this Court exercises free review." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)).
>
> Water rights are defined by elements. *See* I.C. §§ 42-1411(2); *see also City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012) ("The elements listed [in section 42-1411(2)] describe the basic elements of a water right."); *Olson v. Idaho Dep't of Water Res.*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). Idaho Code sections 42-1411(2) and 42-1411(3) comprise a list of elements that define a water right. Under Idaho Code section 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." … Thus, a water decree must either contain a statement of [each element] or incorporate one, but not both. *Markel Int'l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 (2012) ("The word 'or' ... is '[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.' "); *In re Snook*, 94 Idaho 904, 906, 499 P.2d 1260, 1262 (1972) ("The word 'or' ... is given its normal disjunctive meaning that marks an alternative generally corresponding to 'either'....").

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

When interpreting a contract or a water right, courts and administrative hearing officers must begin with the document's language and determine whether it is ambiguous. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 454, 259 P.3d 595, 600 (2011). "Whether an ambiguity exists in a legal instrument is a question of law." *Id.* at 455, 259 P.3d at 601. To determine whether ambiguity exists, tribunals must begin with the document's language. If no ambiguity is found, then:

> . . . the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical.

Knipe Land Co., 151 Idaho at 454-55, 259 P.3d at 600-01 (quoting *Potlatch Education Ass'n*, 148 Idaho at 633, 226 P.3d at 1280 and omitting internal citations and quotations).

Blackfoot developed the law of interpreting water rights by specifically holding that a water right decree "must either contain a statement of [each element] or incorporate one, but not both." *Blackfoot*, 162 Idaho at 306-07, 396 P.3d at 1188-89. (citations omitted). The *Blackfoot* decision holds that there cannot be implied water right conditions or a legitimate case of implied incorporation of a document into the elements of water right which define the right. *See id.* Thus, a water right decree is, in effect, an integrated contract, *i.e.*, a merged document that is the "complete and exclusive statement of the terms of the contract." *Anderson & Nafziger v. G. T. Newcomb, Inc.*, 100 Idaho 175, 180, 595 P.2d 709, 714 (1979) (citation omitted). An integrated document is subject to the parol evidence rule. *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). This means that "extrinsic evidence of prior or contemporaneous representations or negotiations are inadmissible to contradict, vary, alter, add to, or detract from the instrument's terms." *Kepler-Fleenor v. Fremont Cnty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012) (citation and internal quotation marks omitted).

There is simply no ambiguity in the written elements of 35-7667. As to other disputes concerning water right interpretation, both this Court and the Idaho Supreme Court have been extremely reluctant to find any ambiguity, uncertainty, or alternative meaning (either patent or latent) within partial decrees issued in the SRBA. *See*, *e.g.*, *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 203 (2016) ("the name Martin–Curren Tunnel is not ambiguous and does not create a latent ambiguity in Rangen's partial decrees"); *United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 408 P.3d 52 (2017); *Order Denying Petitioner's Second Motion for Reconsideration* and *Order Denying Motion to Amend Petition and Complaint* (Case No. CV-

2016-02, Camas County, Fifth Jud. Dist., *Cash v. Cash et al.*, Jan. 12, 2018).[4] This Court has even explained that "[i]t would constitute a serious turmoil and confusion for this Court to issue partial decrees [on the late claims,] which contradict the precise language, intent and effect of that final judgment [i.e., the prior partial decrees]." *Memorandum Decision and Order on Challenges Final Order Disallowing Water Right Claims*, *Subcase Nos. 65-23531 and 65-23532*, (Oct. 7, 2016) at 5. For that reason, the court concluded "that the late claims were extinguished by operation of the plain language of the [prior] final judgment. To find otherwise would offend the plain language of the final judgment and result in contradictory court decrees." *Id*. These same principles apply to interpretation of elements contained on a water right license document.

In addition to the elements of a water right, express conditions are recognized as a further description or limitation on the elements of the water right. For permits, Idaho Code § 42-203A(5) allows the Director to "grant a permit upon conditions." The perfected permit is then licensed pursuant to Idaho Code § 42-219. In some instances, additional conditions can even be added to the license as necessary. *See Idaho Power Co. v. Idaho Dep't of Water Res. (In Re Licensed Water Right No. 03-7018)*, 151 Idaho 266, 255 P.3d 1152 (2011) (Department had authority to include a term condition in Idaho Power's license, even though such a condition was not included in the original permit). As a result of including these conditions in a license, "[s]uch license **shall be binding upon the state** as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right[.]" Idaho Code § 42-220 (emphasis added).

The binding effect of conditions in a water right license remains unchanged in a subsequent court adjudication of a water right license. With claims submitted in an adjudication (such as the

[4] This case was decided by Judge Wildman in his capacity as a district judge after taking over the case from Judge Elgee after his retirement.

SRBA), the claim form requires inclusion of "conditions of the exercise of any water right included in any decree, license, approved transfer application or other document," Idaho Code § 42-1409(j), the report of the Director requires inclusion of the same conditions, Idaho Code § 42-1411(2)(j), and the final step of the adjudication process—issuance of the partial decree—is required to "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." Idaho Code § 42-1412(6). In other words, if conditions limiting the exercise of a water right exist, they must be expressly included in the adjudication claim to be expressly contained in the water right decree. The same principles apply to water right licenses.[5]

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

[5] Some conditions contained within water rights may also be included simply for descriptive or other informational purposes only and are not directives or further limitations on the basic water right elements unless such conditions contain the word "shall". The Idaho Supreme Court specifically addressed this situation in *Telford Lands LLC v. Cain*, 154 Idaho 981, 989, 303 P.3d 1245 (2013) ("The district court did not err in holding that these statements were not mandatory requirements for exercising the water rights.").

water recharge recognition under Water Right No. 01-181C), the Court focused on the *absence* of the word "ground water recharge" under the beneficial use heading of the decree, and held that recharge was not authorized because it was not expressly described on the right:

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

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

The Hearing Officer has read into 35-7667 a "single, combined beneficial use" element. This new water right element is, in reality, simply another name for a consumptive use element as evidenced by the following sentence contained in the *Preliminary Order Denying Transfer* after the Hearing Officer introduced this new concept: "If these two rights were separated or unstacked, the **consumptive use** associated with the water rights would double, because the acres being irrigated under the water rights would double." R. 0594 (emphasis added). The term "consumptive use" in this sentence was later changed to "beneficial use" in the *Final Order* R. 0662 (the only change made to this sentence), but this does not change the fact that consumptive use is clearly the Hearing Officer's basis for this new water right element.

There are several significant problems with the Hearing Officer's determination. First, it reads in a limitation on the water right that is not written anywhere on the water right. This is

wholly improper under the *Blackfoot* holding. Implicitly imposing a restriction on a water right that could easily have been made express in the licensing of 35-7667 would inject significant uncertainty into what legal rights water users received at the end of the statutory permitting process. Even when a partial decree contained reference to a settlement agreement providing that Blackfoot could use surface water for ground water recharge, the Idaho Supreme Court still held that this argument for allowing ground water recharge was "nothing more than a collateral attack" on the decree as this additional nature of use could have easily been included in the partial decrees. Such a restriction on the use of water rights must necessarily be express, and if it is not, it would constitute serious turmoil and confusion for water right holders. *Memorandum Decision and Order on Challenges Final Order Disallowing Water Right Claims*, *Subcase Nos. 65-23531 and 65-23532* (Oct. 7, 2016), at 5.

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

past. There is no such supplemental condition contained on the license for 35-7667. But even if a supplemental condition did exist, transfers that propose to amend supplemental water rights are processed by IDWR based on historic use without running afoul of Idaho Code § 42-222. This is further described below, but supplemental conditions are mentioned here simply as an example of a condition that is easily added to a water right that links water rights together.

Third, by statute, Idaho has made it clear that consumptive use is not an element of a water right and changes to consumptive use do not require filing a transfer application:

> (1) "Consumptive use" means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. **Consumptive use is not an element of a water right**. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. "Authorized consumptive use" means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. **Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code**.

Idaho Code § 42-202B(1); *see also* 2004 Idaho Sess. Laws 258 (the addition of language that consumptive use is not an element of a water right was made in 2004). As described above, the Hearing Officer's "single, combined beneficial use" element is another name for consumptive use. And, to the extent *Barron* imposed or found a consumptive use element on the water rights at issue in that case, the statutory change from 2004 to Idaho Code § 42-202B(1) supersedes *Barron*. "Courts must construe statutes under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed. . . . It is incumbent upon a court to give a statute an interpretation that will not render it a nullity." *Twin Lakes Canal Co. v. Choules*, 151 Idaho 214, 218, 254 P.3d 1210, 1214 (2011) (citations omitted); see also *Idaho Times Publ'g Co. v. Indus. Accident Bd.*, 63 Idaho 720, 735, 126 P.2d 573, 579 (1942) (Givens,

C.J. dissenting) ("When a conflict occurs between the common law and a statute we, here in Idaho, are governed by the statute."); see also *Genies v. State*, 426 Md. 148, 153, 43 A.3d 1007, 1010 (2012) ("'[A] generally accepted rule of law that statutes are not presumed to repeal the common law further than is expressly declared, . . . but we also observed that where a statute and the common law are in conflict, or where a statute deals with an entire subject-matter, the rule is otherwise, and the statute is generally construed as abrogating the common law as to that subject." (citations omitted)).

As to consideration of consumptive use or a consumptive use evaluation, the Department has prepared and issued documentation describing its interpretation of the review criteria of Idaho Code § 42-222 (which includes enlargement) in its *Administrator's Memorandum, Transfer Processing No. 24*, dated December 21, 2009 (the "*Transfer Memo*"). R. 0127-0163. 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." R. 0127. Where the *Transfer Memo* is an interpretation of Idaho Code § 42-222, its statutory interpretation is entitled to "considerable weight" because IDWR meets all of the prongs of the four-prong test applied to determine the appropriate level of deference to be given to an agency construction of a statute. *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 571, 21 P.3d 890, 893 (2001). R. 0434-0436 (prior briefing from Duffin addressing each prong of the *Hamilton* four-prong test).

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

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

R. 0130. As described, consumptive use becomes a component of the enlargement analysis when there is a proposal to change the nature or purpose of use or if there are specific (i.e., express) conditions imposing consumptive use limits (such as on an industrial water right). With 83160, there is no proposal to change the nature or purpose of use for 35-7667. It is authorized for irrigation, and it will continue to be used for irrigation purposes if 83160 is approved.

Fourth, the Hearing Officer's rationale that overlapping places of use imply a combined use is directly contrary to IDWR's position explained by IDWR agent Jeff Peppersack who testified as a designated Department representative at a deposition in a separate proceeding involving a similar situation to the instant matter. He explained:

> 4 Q. Okay. And how does it not occur if the
> 5 transfer goes forward?
> 6 A. Well, if there were -- if it was
> 7 demonstrated, for example, that it wouldn't be an
> 8 enlargement because of conditions or limitations that
> 9 would be imposed or -- or perhaps, you know, an
> 10 explanation of the relationship of the rights, that
> 11 might get at trying to decide whether they are truly
> 12 stacked or primary or supplemental or, you know, used
> 13 in combination some way.
> 14 So if it's demonstrated that they really
> 15 weren't, even though they might reside on the same
> 16 place of use, then we might decide that it's not an
> 17 enlargement because they haven't been used together to,
> 18 you know, provide a full water supply for the place of
> 19 use.

R. 0438, 0470. Recall that the Hearing Officer's rationale for imposing "a single, combined beneficial use" on 35-7667 is as follows: "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**." R. 0664 (emphasis added). This rationale is directly contrary to what Mr. Peppersack explained: "So, if it's demonstrated that they really weren't, **even though they might reside on the same place of use**, then we might decide that it's not an enlargement because they haven't been used together to, you know, provide a full water supply for the place of use." (emphasis added). The Hearing Officer has placed more legal significance to overlapping places of use than the existence or absence of express conditions, and even on the actual water use for both water sources (*even if* 35-7667 is considered to be stacked or supplemental to ASCC water).

Duffin simply finds himself with two independent sources of water to irrigate his property—ground water under 35-7667 and surface water allotted to his ASCC shares. The separate nature of 35-7667 and Duffin's entitlement to surface water allotted to his ASCC shares is further evident by the fact that these water sources were originally developed separately and independently from one another. The ASCC shares were issued to Vern Duffin on April 24, 1970. R. 0370-0371. The application to develop 35-7667 was not submitted until February 2, 1977, nearly seven years later. R. 0371. These sources were not developed together with a common goal of developing a set amount of combined consumptive use to justify imposition of a combined consumptive use amount. The dual and separate nature of these water entitlements is evidenced by the fact that Duffin pays separate monetary assessments for both based on different criteria and not based on the consumptive use associated with 53.9 acres of irrigated land. Duffin pays assessments to the ASCC based on 60 shares he owns that are associated with the property that is the place of use of 35-7667. In 2020, he paid $1,980 in share assessments to ASCC. R. 0636.

Duffin also pays assessments to the Bingham Ground Water District for 35-7667 based on the cfs amount (1.08 cfs), and for 2020, he paid $968.53. R. 0638.[6]

The Hearing Officer has not provided sufficient legal authority in support of this new water law doctrine that, without combination conditions contained in a license or decree document, having two alternative sources of water associated with the same piece of property legally combines such sources to have an implied "single, combined beneficial use of water" with an associated combined consumptive use.[7] For all the above reasons, this Court must perform the interpretation analysis under Idaho law that the Hearing Officer did not. We anticipate that once performed, the inevitable conclusion is that nothing in the plain language of the license for 35-7667 imposes the "single, combined beneficial use" (i.e., consumptive use) element on this water right or on ASCC's water rights. Without the existence of such an element, there is no element to enlarge upon to violate the enlargement criterion of Idaho Code § 42-222 criterion. Based on the foregoing, the *Final Order*'s enlargement determination must be reversed.

2. The plain language of the transfer statute, Idaho Code § 42-222, as well as Idaho cases, limit the enlargement evaluation to the water right or water rights listed on the transfer application.

In addition to the proper interpretation of the water right issues described above, the plain language of the transfer statute—Idaho Code § 42-222—limits the enlargement determination on the water right or water rights listed on the transfer application:

> 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

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

[7] The Hearing Officer relies heavily on the *Barron* case, but as described below, this case is both distinguishable from Duffin's situation and, in our view, does not support the Hearing Officer's positions as he claims it does because portions of the opinion are dicta.

> 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.

Enlargement focuses on exceeding the elements of a water right and if those elements will unlawfully change or be expanded with what is proposed in a transfer. This is supported by the legal definition of the term "enlargement" contained in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996):

> 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.

(emphasis added). The bolded language of this definition is consistent with Idaho Code § 42-222 in that an "enlargement" is specific to the elements of a singular water right ("an existing water right."), not other water entitlements (such as water from canal company shares) that may be associated with the same property as the original water right that are not subject to the transfer application.

Under 83160, 35-7667, a ground water right, is the **only** water right subject to proposed changes. This right is owned by Duffin. The ASCC water rights and other water entitlements (WR 01-23B, WR 01-297, and storage water owned by ASCC that yield water to ASCC) are not owned by Duffin. As an ASCC stockholder, Duffin is only entitled to a proportionate share of the

available ASCC water and 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.

Duffin has not proposed to amend any element of ASCC's water rights, nor could he without authorization from ASCC. Ownership of canal company shares does not vest legal title of the canal company water rights in the shareholder. Ownership matters in Idaho water law as without ownership of such rights, even non-use by shareholders cannot result in forfeiture of the canal company's water rights. See *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 86–87, 982 P.2d 917, 921–22 (1999) ("ASCC, as a Carey Act operating company, holds title to the canal system and is the appropriator of the water rights involved in this case. . . . . A finding of forfeiture in this case, where the appropriator did nothing to cause the nonuse of the water, would have troubling consequences for all Carey Act operating companies. **Such a ruling would give stockholders, who are not appropriators, the power to determine the fate of ASCC's water rights**") (emphasis added; citations omitted).

Despite the foregoing, the Hearing Officer concluded "[t]he proposed change to water right 35-7667 will result in an increase in the number of acres irrigated, which is an enlargement, as noted above [in the *Fremont-Madison* case]." R. 0662. This is not correct. It would only be an enlargement if there was an increase in the number of irrigated acres under **the original right subject to the transfer** (in this case, 35-7667). The Hearing Officer incorrectly conflates language from the *Fremont-Madison* case 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). The Hearing Officer is mistaken. The enlargement analysis spoken of under Idaho Code § 42-222 and the *Fremont-Madison* case should only be directed at 35-7667. In this case, there is no proposed expansion described in 83160 to the 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. As described above, the proposed change cannot "constitute an enlargement in use **of the original right**." There is only one right subject to the transfer—35-7667—and the historic ground water diversion amount will be virtually identical at the proposed new place of use. In other words, there will be no material change to the amount of ground water historically pumped from the ESPA under 35-7667 at the new location. Because "[a]n increase in the volume of water diverted is an enlargement and is not allowed under I.C. § 42–1425," *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012), then it follows that no increase in the volume of water diverted means there is no enlargement. For these reasons, there will be no enlargement of 35-7667 proposed under 83160.

Further, there is no proposal to change the nature of use of 35-7667, which is the typical instance where consumptive use of the original water right is considered to avoid enlargement (i.e., conversion of an irrigation water right to an industrial water right).[8] In other words, there will be no material change[9] in the amount of ground water diversions (and therefore pumping impacts from the diversion of such ground water) if 83160 is approved.

To be clear, the above analysis for 35-7667 described by Duffin is a correct statement of Idaho law because there are no express conditions combining this water right with the ASCC water rights or ASCC shares and/or describing 35-7667 as a supplemental right. Consideration of other water rights is warranted upon submission of a transfer application when (1) the original

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

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

water right contains supplemental conditions; or (2) other water rights are referenced in conditions on the original right. If these types of conditions were present on 35-7667, then these other water sources—referenced or described in such a hypothetical condition—are fair game for consideration because they are expressly included within the written description of "original water right" referenced in Idaho Code § 42-222.

Despite the foregoing, the Hearing Officer, relying on *Barron*, concluded that with or without supplemental conditions, "[t]he enlargement analysis would be identical in either case." R. 0594. However, the Hearing Officer is bound by statute and cannot expand the statutorily prescribed enlargement analysis to other water entitlements not subject to the transfer (again, unless there are supplemental conditions or combined conditions contained on the original right). By doing so, the Hearing Officer's actions are "in violation of . . . statutory provisions" and "in excess of the statutory authority of the agency." Idaho Code § 67-5279(3)(a)-(b). Accordingly, this Court should reverse the Hearing Officer's holding of enlargement.

3. Even if 35-7667 is considered to be supplemental or combined with any other water supply, 35-7667 can still be transferred if the proposed use at the new place of use is consistent with the historic use at the old place of use.

The Hearing Officer dismissed the significance of whether 35-7667 is or is not supplemental to water allocated to ASCC shares associated with the same property covered by the place of use element of 35-7667: "In 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." R. 0662. Continuing, the Hearing Officer held that "the total combined beneficial use for the two sources has always been no more than 53.9 acres" based on the *Barron* decision. *Id.*

As described above, Duffin's position is that is nothing contained within the elements of 35-7667 that combine it with other water entitlements or make it supplemental. This should end the inquiry. However, even if 35-7667 is considered supplemental or combined with other water entitlements, the Department's position is that it can still be transferred without enlargement (after review of historic use information) as described in the *Transfer Memo*, which is contrary to the Hearing Officer's holding. The *Transfer Memo* is an IDWR interpretation of the enlargement criterion under Idaho Code § 42-222. Where the *Transfer Memo* is an interpretation of Idaho Code § 42-222, the above statutory interpretation is entitled to "considerable weight" as described above. Further, where the *Transfer Memo* was issued after *Barron*, and where there is no discussion of this case or the principles the Hearing Officer holds it stands for (single, combined beneficial use element), it is evident that *Barron* is not the controlling law in this matter and was not considered controlling law when the Transfer Memo was issued.

As the *Transfer Memo* provides, there is no enlargement of the water right being changed if there is a clear demonstration, with historic diversion records, that the actual water use (as to 35-7667, ground water diversions) will not increase. The *Transfer Memo* identifies situations where an enlargement occurs, which is "if the total diversion rate, annual diversion volume, or 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." R. 0154. The *Transfer Memo* then discusses specific transfer situations and how analysis of historic use factors into an enlargement analysis, including a situation where there is a proposed conversion of a supplemental ground water right to a primary ground water right. Even though a primary right and supplemental right share the same place of use, the ability or inability to transfer the supplemental right is not based on a shared place of use description.

Rather, it is based on actual historic water use. The Hearing Officer's rationale that overlapping places of use imply a combined use is directly contrary to IDWR's position described by Mr. Peppersack who explained: "So, if it's demonstrated that they really weren't, **even though they might reside on the same place of use**, then we might decide that it's not an enlargement because they haven't been used together to, you know, provide a full water supply for the place of use." (emphasis added).

Accordingly, 35-7667 is eligible for transfer *even if* it had an express supplemental condition, or was even assumed to be supplemental because of historic combined use of surface and ground water, because the enlargement analysis focuses on the actual amount of diverted water. Mr. Peppersack's interpretation by IDWR is entitled to deference, as explained above, but it is also logical as it is based on a water balance approach for rights like 35-7667 by ensuring that no material additional rate or volume of ground water is diverted at the new place of use than was diverted at the old place of use. The Hearing Officer's holding, however, asserts a position that does not at all take into account the historic amount of ground water diverted at the old place of use. It is based solely on overlapping places of use.

Surprisingly, when confronted with this deposition testimony, the Hearing Officer simply dismisses Mr. Peppersack's deposition testimony of the *Transfer Memo* as his "personal interpretation." R. 0664. At the time of this deposition testimony, Jeff Peppersack's position with the Department was chief of IDWR's Water Allocation Bureau, R. 0464, who was designated as a Department representative in the pending litigation to address topics described by the Coalition. Mr. Peppersack began working for IDWR in 1984, R. 0464, and his testimony is entitled to deference. Mr. Peppersack himself was the author of the *Transfer Memo*. R. 0127.

While the Hearing Officer continues by stating that he is not bound by this document "if the memo is inconsistent with Idaho law," he stops short of saying that the *Transfer Memo* is actually inconsistent with Idaho law, rather, 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." R. 0664. We completely disagree. There absolutely is conflict because there is no discussion in the *Transfer Memo* or elsewhere of an implied "single, combined beneficial use" element of a water right, nor does the Hearing Officer acknowledge—as the *Transfer Memo* does—that supplemental water rights can even become independent primary water rights based on historic use despite the fact that a supplemental right shares a place of use with a primary right.

Further, in support of his position, the Hearing Officer only quotes from a portion of the *Transfer Memo*'s discussion of stacked water rights, and the *initial* presumption of enlargement if a transfer is filed on only one of those rights. Subsequent portions of the *Transfer Memo*, however, explain precisely how and based on what information this initial presumption of enlargement can be overcome.[10] For example, a stacked water right can still be transferred, without enlargement, as long as the right proposed for transfer is joined with another primary right provided "the primary rights at the original and proposed places of use provide comparable water supplies." R. 0154. Based on the Hearing Officer's sole reliance on *Barron*, this type of transfer would not be approved because of enlargement.

The *Transfer Memo* further provides that a supplemental right can be converted to a primary right without enlargement, provided that the "applicant can clearly demonstrate, using

[10] In our view, 35-7667 is not supplemental merely because it is "stacked" with ASCC shares. There must be conditions making it so.

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." 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. R. 0155-0156. Based on the Hearing Officer's logic, this type of transfer would also not be approvable.

The Hearing Officer avoids discussing these issues in the *Final Order* by asserting that because Duffin "asserts 35-7667 has never been a supplemental right, [then] those sections of the Transfer Memo would not apply to Application 83160." 35-7667 is not a supplemental right and has not been used in practice as a supplemental right, but the enlargement analysis for allowing the transfer of a supplemental right supports Duffin's position that the Hearing Officer's view of enlargement based on an implied "single, combined beneficial use" element is incorrect. Based on the *Transfer Memo*'s principles, 35-7667 has no supplemental conditions, nor has it been used as a supplemental source to the ASCC shares. Precisely the opposite, on the place of use for 35-7667, there has never been a time when ground water and surface water have been used for irrigation at the same time. R. 0378. The reason 35-7667 was developed in the first place was because, in the 1970s, Duffin's father had difficulty receiving surface water at the end of the Hege Drain off the N Lateral. R. 0380 (showing location of Hege Drain). Once the ground water well was drilled, it was used as the only source of irrigation water on the property until the end of 2016. In 2017, Duffin began exclusively using ASCC water on the property (as ASCC has made significant system and operational improvements over the years resulting in a reliable source of supply). R. 0378-0379 (WMIS data confirming lack of electricity use at the well). In fact, the

same pump that was used to pump ground water has been removed from the well and repurposed to divert the ASCC water from the Hege Drain. R. 0377-0378.

In short, there is no discussion in the *Transfer Memo* or elsewhere of a "single, combined beneficial use" or drying up irrigated acres in this document, which is an agency memo interpreting Idaho Code § 42-222 that is entitled to deference by the Hearing Officer. And *even if* 35-7667 was considered to be supplemental, or even similar to or in the same category as a supplemental right, the *Transfer Memo* authorizes the changing of this right to a primary right because 35-7667 was the exclusive source of irrigation water on Duffin's property until a hard conversion to surface water was accomplished in 2017. R. 0378. Duffin's historic water use on his property is undisputed and described in the *Facts*—there has never been a time where ground water and surface water were used to irrigate the property at the same time. Accordingly, this Court should reverse the *Final Order* and approve 83160 as there is no statutory or other factual basis for imposing the implied "single, combined beneficial use of water" on 35-7667 under Idaho law.

4. The Hearing Officer's reliance on *Barron*, rather than on Idaho statutes and more recent water right interpretation cases, is misplaced. Additionally, the portion of the *Barron* opinion relied upon by the Hearing Officer as the central basis of his decision is judicial dicta.

Despite the foregoing legal authority consisting of statutory language and recent Idaho Supreme Court authority on interpretation of water rights, the 2001 case of *Barron v. Idaho Department of Water Resources*, 135 Idaho 415, 19 P.3d 219, rules the day in the *Final Order*. However, after a review of the language of the opinion, and other documents in the water right backfile associated with this case, our analysis of this opinion differs significantly from that of the Hearing Officer's.

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

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

R. 0619.

Barron is relied upon by the Hearing Officer for his conclusion that Duffin's 35-7667 and his ASCC share entitlement constitute a "single, combined beneficial use," even though he does not find that 35-7667 is a supplemental water right. It is evident that the basis for the Department's 1999 primary/supplemental policy has now been superseded by the *Transfer Memo*, and in our

view, the water right interpretation legal authority discussed above (including the *Blackfoot* case). In other words, the presumption and policy position described in Saxton's letter may have been the Department's position then, but it is not its position today.[11] The 2009 *Transfer Memo* explains that a supplemental right can be changed to a primary right if the applicant provides "convincing water use information" that the supplemental right was the only right used and there is no requirement to dry up acres:

> (4) Changing Supplemental Right to Primary Water Right. A supplemental irrigation right is a stacked water right authorizing the diversion of water for irrigation from a secondary source to provide a full supply for crops when used in combination with a primary right. A supplemental right can provide additional water in conjunction with a primary source, or at times when the primary source is unavailable. The use of a supplemental right is dependent on the supply available under the associated primary right and can be highly variable from year to year. An application for transfer proposing to change a supplemental irrigation right to a use as a primary water right for irrigation or other use will be presumed to enlarge the supplemental right. An exception is when 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. Evidence of the quantity of water beneficially used under the primary right must be accompanied by some evidence of the quantity of water used under the supplemental right to qualify as "convincing water use information." The supplemental right must have been used on a regular basis (used more than 50 percent of the time). Insufficient data will be grounds to reject the application because the department will not be able to ascertain if the right will be enlarged.
>
> If an application proposes to change only a portion of a supplemental irrigation right to a use as a primary water right, the application is not approvable unless the extent of beneficial use under all associated rights prior to the transfer will be proportionately reduced or transferred to another place of use to avoid enlargement of the remaining portion of the supplemental right. The associated right(s) will not need to be reduced if the entire supplemental right will be changed through the transfer.

As the *Transfer Memo* provides, there is no enlargement of the water right being changed or other related rights if there is a clear demonstration, with historic diversion records,

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

that the actual water use (as to 35-7667, ground water diversions) will not increase. There is no discussion in the *Transfer Memo* or elsewhere of a "single, combined beneficial use" or drying up of irrigated acres in this memo, which is an agency memo interpreting Idaho Code § 42-222 entitled to deference. While there are components of the primary/supplemental analysis of the *Barron* case, those components have been superseded by the water right interpretation cases and the *Transfer Memo*. The Hearing Officer has applied policies described in *Barron* (*i.e,* that *Barron* did not require the water sources to be used in the same year for there to be an enlargement; the lack of reference in conditions to 37-2801B, etc.) that are not consistent with today's Department policies. The Court should rely upon the *Blackfoot* case and other water right interpretation cases and the *Transfer Memo* instead.

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

> Barron and the IDWR subsequently exchanged correspondence concerning the transfer application. On **five separate occasions**, the IDWR requested that Barron provide additional information to address the agency's concerns. Although Barron responded in writing to each of the Department's requests, the IDWR indicated in its final letter that Barron **had still not presented sufficient information for the Department to approve his transfer application**.
>
> . . .
>
> The record demonstrates, however, that **Barron did not present sufficient evidence of non-enlargement to the Department such that the director could approve Barron's transfer**. Because Barron has failed to establish this criterion, we concluded that the IDWR's findings were well supported.
>
> . . .

> The Department specifically requested evidence from Barron regarding the historic use of water right 37–02801B on three separate occasions. For example, on January 9, 1998, the IDWR requested that Barron provide detailed evidence about 37–02801's historical use. Specifically, the letter requested that Barron provide a legal description and supporting documentation showing when and where water right 37–02801B had been used during the previous ten years. In addition, the letter asked that Barron present evidence of the "extent of beneficial use made of this right, in terms of the rate and period when water has been diverted...." **Barron's response to these requests reveals that he was unable to present competent evidence to the IDWR**. Barron, through his attorney, replied to the January 9 letter by filing a document entitled "Synopsis of Water Right No. 37–02801B and Transfer No. 5116." The Synopsis states that "[t]he affidavits with this application indicate full use of the right on the licensed place of use in 1991 and 1996." One of these affidavits, that of John Faulkner, the intended recipient of one of the transfers, makes no reference to the historical use of water right 37–02801B. The other affidavit, by Barron himself, merely states that during some years in the 1980's, the right was used to irrigate a parcel of land other than the licensed place of use, and that "[i]n 1991, and again in 1996, [Barron] used Water right No. 37–02801B to irrigate the licensed place of use." **As the district court noted when reviewing the record, absent are any meaningful statements regarding the period of use, the amount of water diverted or consumed, or whether and to what extent groundwater right 37–07295 was used to supplement the surface water right**.

Barron, 135 Idaho at 416, 418-19, 19 P.3d at 221, 223-24 (emphasis added). In other words, it was evident that there were forfeiture problems with the 1905 surface right at issue in the transfer, and no information was provided by the applicant to address those problems. In fact, in the SRBA, the surface water right (37-2801B) was eventually decreed as disallowed based on water right forfeiture, which is evidence that the Department's concerns with historic use were well founded. R. 0639-0645 (final order disallowing water right claim and water right report providing that the water right was disallowed because of forfeiture).

Accordingly, the Hearing Officer has misstated the primary basis for the Department's determination of enlargement in the *Barron* case. The Department presumed enlargement because the applicant was unable and/or unwilling to provide relevant information that would allow IDWR to perform a forfeiture and enlargement analysis. This lack of information as being the primary basis of denying the transfer is supported by other statements from the water right backfile record.

For example, in the preliminary order for Transfer 5116, it does not contain an analysis based on an evaluation of the combined beneficial use authorized by water rights 37-2801B and 37-7295. Rather, it summarily provides the following findings of fact and conclusions of law without any discussion of a consumptive use analysis:

> 7. On December 18, 1997, January 9, 1998, April 1, 1998 and on May 12, 1998, the department corresponded with the applicant or his attorney seeking input relative to deficiencies on the application, ownership of the right sought to be transferred, enlargement of use and injury to other water users.
>
> 10. The applicant has not provided information which shows the actual extent of beneficial use historically made of the water right. In addition, the applicant has not provided a thorough description of past use of the water right.
>
> 11. The applicant has not provided information to show that the proposed changes would not injure other water rights.
>
> 12. The applicant has not provided information relative to availability of water at the proposed new points of diversion.
>
> 3. The applicant has not provided suitable information relative to past use of right no. 37-02801, non-injury to other water rights or to non-enlargement in use to allow the department to approve the application.
>
> 4. The proposed changes will injure other water rights.
>
> 5. The proposed changes will constitute an enlargement in use of the original right.

R. 0646-0650.

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

Enlargement of Use – 37-02801B vs. 37-07295

Another significant concern expressed by I.C. 42-222(1), and hence by IDWR, is if the proposed transfer of water right 32-02801B were approved, would there be an enlargement by virtue of irrigation of the presently licensed place of use under water right 37-07295? Barron made the bold assertion in his transfer application that "this land will be farmed as dry land." R., p. 2. The record is undisputed that Barron neither owns nor exercises lawful control of the land upon which either of the water rights is licensed to

be used. He does not own water right 37-07295. Therefore, IDWR's refusal to accept Barron's statement that the land would be farmed as dry land (which this Court interprets to mean not irrigated) was well taken. Barron has the burden of proof of no enlargement. To ensure no enlargement, there would necessarily have to be some affirmative showing by the owner of water right 37-07295 that it would no longer be used. The record is totally lacking in this regard. Stated another way, because of the asserted split in ownership of the two rights, and because water right 32-02801B is appurtenant to the licensed place of use, the owner of the licensed place of use and of water right 37-07295 would in effect be "necessary and indispensable parties" to the transfer process.

Barron's position is that IDWR can curtail the use of water right 37-07295, and if necessary, the Department can file a suit against the owner of the right for injunctive relief. I.C. § 42-351 and § 42-2933. This Court holds, under the facts and circumstances of this case, that Barron's position is wrong. First, Barron, and not IDWR, has the burden of proof of showing no enlargement. Barron has produced no substantial and competent evidence that water right 37-07295 will not be used if the transfer is approved. Second, in the context of I.C. § 42-222(1), IDWR has no duty to administer a junior supplemental groundwater right so as to enable Barron to obtain a transfer of the primary right (whether by entering into administrative enforcement practices and/or prosecuting a lawsuit against the owner of the junior right). Stated another way, Barron obtained water right 37-02801B as it existed – meaning the water right is appurtenant to the licensed place of use. Because this licensed place of use has also been historically irrigated to some extent by 37-07295, Barron takes his right in this condition. Barron cannot shift his burden of showing no enlargement to IDWR just because he wishes to transfer his right. To require IDWR to "buy" a lawsuit to accommodate Barron is not what is contemplated by the transfer statute. IDWR's decision to deny the transfer in this regard is also well supported.

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

while there is further discussion in the opinion about the primary/supplemental nature of the rights at issue (and because of that described relationship, irrigation of more than 311 acres would be an enlargement),[12] as described above, this has been superseded by the *Blackfoot* case and other cases, as well as the *Transfer Memo*.

The language from the *Barron* opinion set forth in footnote 12 below relied upon by the Hearing Officer is dicta because it was not essential to the Idaho Supreme Court's decision. The holding in *Barron* is based upon the applicant's failure to provide information for the Department to perform an enlargement analysis in the first place. This is described in the Idaho Supreme Court's holding from the opinion:

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

Barron, 135 Idaho at 421, 19 P.3d at 226 (emphasis added).

Dictum is "opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore

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

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

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

not binding even if it may later be accorded some weight." BLACK'S LAW DICTIONARY at 569, 11th Edition (definition of "judicial dictum"). As explained by Chief Justice Marshall:

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

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

Finding dicta in response to arguments asserted on appeal is relatively common, even in recent Idaho decisions. See *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 158, 408 P.3d 899, 913 (2018) ("The Court went further, concluding that the SRBA court did not abuse its discretion in declining to address when a storage right is "filled" or when it concluded that such a determination was within the director's discretion. *See id.* at 394, 336 P.3d at 801. This portion of the Court's opinion was dicta.") (Justice Brody concurring in part and dissenting in part.); *E. Side Highway Dist. v. Delavan,* 167 Idaho 325, 470 P.3d 1134, 1150 (2019) (holding that language from a 2010 case discussing a hostility requirement for establishing a statutory right of public use was dicta. "The District contends that this holding is merely dicta and conflates the requirements for a private prescriptive easement and a public highway created under Idaho Code section 40-202(3). We agree."); *Shubert v. Ada County*, 166 Idaho 458, 461 P.3d 740 (2020) (holding that actions of public defenders are subject to the Idaho Tort Claims Act after finding "[t]he Ada County Defendants' reliance on *Sterling* is misplaced. First, this language from *Sterling* is dicta."); *Phillips v. Eastern Idaho Health Services, Inc.*, 166 Idaho 731, 463 P.3d 365 (2020) (holding that applicable community standard of care can be established by expert testimony through a corporate designee and is fact based. "*Morrison* does not stand for the

proposition that an entity cannot know the standard of care applicable to its employees or persons with whom it contracts to dispense care. To the extent the language employed in *Morrison* suggests such a result, it is dicta."). Similarly, this Court should hold that the portion of the *Barron* decision relied upon by the Hearing Officer is dicta, and even if it is not dicta, that the language from this opinion has been superseded as described herein.

Concerning the logic of the Hearing Officer's "single, combined beneficial use" element, it is also significant for this Court to consider that the surface water right at issue in the *Barron* case—water right 37-2801B—was eventually decreed as forfeited in the SRBA. The Department was suspicious of this right under Transfer 5116 because movement of a possibly forfeited right is the ultimate example of enlargement, and the Department was eventually proven right. It seems clear that the non-use of the right was the reason the applicant Barron did not provide any historical use information in the first place. But what is also important to note is that if *Barron* stands for the proposition that the Hearing Officer asserts it does—that water rights which share a common place of use represent a single, combined beneficial use of water—then water right 37-2801B should not have been decreed forfeited in the SRBA because its associated consumptive use right, water right 37-7295, was valid and did receive a partial decree in the SRBA affirming this right **on the very same day** that water right 37-2801B was disallowed. R. 0652 (this right was split into an "A" portion and a "B" portion as shown on the partial decrees). The Hearing Officer's logic as to Duffin's water entitlements are that 35-7667 and Duffin's ASCC shares represent a single, combined beneficial use of water (the irrigation of 53.9 acres) "regardless of whether the acres have been irrigated with ground water, surface water, or both in the same irrigation season." R. 0662. Using this same logic, if full consumptive use is provided for irrigation under one right, then the exercise of the other right is not necessary, and the unused right should not be forfeited.

This is not what happened with water right 37-2801B. This logical end supports Duffin's position that water rights which share a common place of use without combination conditions are not combined—they are independent rights to be analyzed independently of one another. This conclusion makes further sense given that Duffin pays assessments independently for both his ground water right based on acres and his ASCC shares based on number of shares, and not based on the "single, combined beneficial use" of 53.9 acres.

The proper enlargement analysis begins by interpreting the water rights based on the four corners of the water right document (for 35-7667, the license, and for ASCC's water rights, the partial decrees) to determine if the water rights expressly combine themselves. If they do not, then they are two separate water sources for a single property and either of them can be used to irrigate the property. If it is proposed to move either of them off the property, then the right or water entitlement being proposed to be moved is subject to a forfeiture and enlargement review. As for 35-7667, it is not subject to forfeiture. See R. 0378-0379. And neither is the ASCC water, even though it was not used for decades, because of Idaho Code § 42-223(7). The result of this analysis of both independent and uncombined water sources is that either water supply may be used to irrigate Duffin's property independent of one another and 35-7667 can be moved off the property while Duffin continues to irrigate with water allocated to his ASCC shares.

The Hearing Officer did not follow the proper analysis, but instead of addressing the legal basis for it, the Hearing Officer asserts a public policy position, stating that "Duffin's new approach to enlargement opens the door to more than 23,000 new acres being developed in the ESPA." R. 0667. This is a red herring. While it is certainly possible that some transfers like 83160 may be filed in the future, there is no evidence, nor is it not reasonable to assume, that all owners of water rights without combined limitation conditions with ASCC water will file transfers

like 83160. Nor is there any evidence that there is even 23,000 of new land available or irrigable with feasible access to ground water supplies. Nor is there any evidence that the ground water rights can be easily transferred, particularly when considering the ground water modeling limitations on how far water rights can be moved as described in the *Transfer Memo*. Where each irrigation situation is unique, the Hearing Officer's overstatement is not a persuasive basis to deny 83160. If there is any public policy issue that is truly implicated, it is the Hearing Officer's back-door approach to diminishment or even elimination of the value and utility of a ground water right like 35-7667 by imposing unwritten conditions on such rights. This is akin to a taking of private property. There are other ways under Idaho law to lawfully regulate ground water withdrawals on the ESPA to protect aquifer levels, which this Court is well aware of (i.e., conjunctive management, ground water management area). Going down a path that may result in a taking of or result in takings-like effects should not be condoned by this Court.

In sum, the *Barron* decision does not control the outcome of 83160, and this Court should reverse the *Final Order* accordingly. Considering the clear legal authority set forth above, the Hearing Officer's findings, inferences, conclusions, and decision which concluded with a determination of enlargement violated Idaho Code § 67–5279(3)(a)-(e).

B. Because of the Hearing Officer's failure to properly decide the enlargement issue, the injury to other water rights, conservation of water resources, and local public interest criteria portions of the *Final Order* should also be reversed.

Because the Hearing Officer's "single, combined beneficial use of water" holding serves as the basis for the remainder of the *Final Order*'s conclusions relative to injury to other water rights, conservation of water resources, and local public interest, these sections must be reconsidered in light of the arguments set forth herein. If the Court reverses the *Final Order* decision relative to the "single, combined beneficial use of water" position, then it follows that

these remaining portions of the *Final Order* should likewise be reversed as the key holding served as the primary basis for finding that 83160 does not meet these other transfer criteria. As briefed before the agency, 83160 will not injure other rights, is not contrary to the conservation of water resources, and is in the local public interest. R. 0447-0452.

C. The Hearing Officer's actions prejudiced Duffin's substantial rights.

Having established that the *Final Order* violates each of the provisions of Idaho Code § 67-5279(3), Petitioners must also demonstrate that at least one of its substantial rights have been prejudiced. Idaho Code § 67-5279(4). On the question of substantial rights, the Idaho Supreme Court has explained:

> 'This Court has not yet attempted to articulate any universal rules to govern whether a petitioner's substantial rights are being violated under I.C. § 67–5279(4).' *Hawkins v. Bonneville Cnty. Bd. of Comm'rs*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011). Instead, this determination is made on a case-by-case basis.

Two Jinn, Inc. v. Idaho Dep't of Ins., 154 Idaho 1, 5, 293 P.3d 150, 154 (2013). In general, property rights, such as water rights, are substantial rights. See *Terrazas v. Blaine Cty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 198, 207 P.3d 169, 174 (2009). There is also a substantial right to have a governing board "properly adjudicate their applications by applying correct legal standards". *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 232–33, 254 P.3d 1224, 1228–29 (2011). The Idaho Supreme Court recently held that "[t]his Court has not articulated a bright line test governing whether a petitioner's substantial rights have been violated, however, we have held that such rights were harmed when: (1) property values are impacted; or (2) the variance will interfere with the use and enjoyment of property. *Hungate v. Bonner Cty.*, 166 Idaho 388, 458 P.3d 966, 972 (2020) (internal citations omitted).

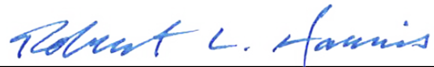
Duffin's 35-7667 is a water right, and "[w]hen one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due

process of law." *Bennett v. Twin Falls N. Side Land & Water Co*., 27 Idaho 643, 651, 150 P. 336, 339 (1915). Accordingly, the *Final Order* has impacted a substantial right of Duffin because the Hearing Officer has imposed a condition on his property right that is not contained anywhere on the express description of 35-7667 and is inconsistent with Idaho law. His property values and other legal rights have been unlawfully impacted, resulting in prejudice to his substantial rights.

IV. CONCLUSION

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

Respectfully submitted this 4th day of December, 2020.



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

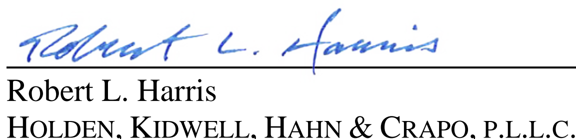
CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December 2020, true and correct copies of *Petitioners' Opening Brief* were served via Email and USPS Delivery, on the following:

ORIGINAL TO: Clerk of the District Court
SNAKE RIVER BASIN ADJUDICATION
253 3rd Avenue North
P O Box 2707
Twin Falls, ID 83303-2707
jconell@idcourts.net

Attorneys and/or Individuals Served:

John K. Simpson, ISB #4242 Travis L. Thompson, ISB #6168 Sarah W. Higer, ISB #8012 **BARKER ROSHOLT & SIMPSON LLP** 163 2nd Avenue West Twin Falls, ID 83301 Email: jks@idahowaters.com tlt@idahowaters.com swh@idahowaters.com	☒ Mail ☐ Hand Delivery ☐ Facsimile ☐ Courthouse Box ☒ Email
Lawrence G. Wasden **ATTORNEY GENERAL** Brian Kane **ASSISTANT CHIEF DEPUTY** Garrick L. Baxter (ISB No. 6301) Sean H. Costello (ISB No. 8743) **DEPUTY ATTORNEYS GENERAL** Idaho Department of Water Resources P. O. Box 83720 Boise, ID 83720-0010 Email: garrick.baxter@idwr.idaho.gov sean.costello@idwr.idaho.gov	☒ Mail ☐ Hand Delivery ☐ Facsimile ☐ Courthouse Box ☒ Email
W. Kent Fletcher **FLETCHER LAW OFFICE** P. O. Box 248 Burley, ID 83318 Email: wkf@pmt.org	☒ Mail ☐ Hand Delivery ☐ Facsimile ☐ Courthouse Box ☒ Email



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