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

JEFFREY and CHANA DUFFIN,

Petitioners,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent,

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

Intervenors.

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

Case No. CV-06-20-1467

RESPONDENT'S RESPONSE BRIEF

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Judicial Review of the Amended Preliminary Order Denying Transfer (dated August 12, 2020) entered by Hearing Officer James Cefalo of the Idaho Department of Water Resources

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I. STATEMENT OF THE CASE

A. THE NATURE OF THE CASE

This case was brought as a petition for judicial review of a final action of the Idaho Department of Water Resources ("IDWR") by Jeffrey and Chana Duffin (hereinafter "Petitioners"). The Petitioners challenge a final decision by IDWR denying an application for transfer under Idaho Code § 42-222. Specifically, Petitioners challenge the Hearing Officer's conclusion that the transfer of their water right would result in an enlargement. Petitioners argue that the Hearing Officer should have only considered the elements within the four corners of the paper water right, not the historic beneficial use of water. IDWR disagrees.

B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Petitioners own water right 35-7667. R. 172. Water right 35-7667 allows for the diversion of 1.08 cfs of ground water for the irrigation of 53.9 acres with a priority date of June 11, 1992. R. 34, 377. The point of diversion is located in the SWNE of Section 20, Township 06 South, Range 31 East, Boise Meridian. R. 34. The place of use is located in the SWNE, SENE and SENW of Section 20, Township 06 South, Range 31 East, Boise Meridian. *Id.* The license for water right 35-7667 includes the following condition: "[t]his right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above." *Id.*

On April 2, 2019, Petitioners filed an *Application for Transfer of Water Right* (hereinafter "*Application*") with IDWR, numbered transfer 83160. R. 285. The *Application* sought to change the point of diversion for water right 35-7667 to the NENE and NWNW of Section 27, Township 05 South, Range 30 East, Boise Meridian, and the place of use to the NENE and NWNE of Section 27, Township 05 South, Range 30 East, Boise Meridian. R. 287. The *Application* stated that the existing place of use for water right 35-7667 was also irrigated with

Aberdeen-Springfield Canal Company ("ASCC") shares and that the existing place of use will continue to be irrigated with the ASCC shares after the proposed transfer. R. 288. Both the existing and proposed points of diversion and places of use on the *Application* are located within the Eastern Snake River Plain Area ("ESPA"), currently under a moratorium order preventing the processing of new applications for permit for ground water uses. R. 5-11.

A *Protest to the Application* ("*Protest*") was filed collectively by A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (also referred to as "the Coalition"). R. 347. The *Protest* alleged that water right 35-7667 "was originally developed as a supplemental groundwater right for use in association with the shares of the [ASCC]," and that "[t]hrough this transfer, the Applicant will use ASCC water on the current property and the groundwater on a separate property - resulting in an expansion of water use." *Id.* The *Protest* also alleged that "[t]he *Application* has failed to demonstrate that the transfer will not injure existing water rights and failed to provide any proposed mitigation to offset impacts resulting from the transfer." R. 348 (emphasis added).

A Hearing Officer was appointed and a prehearing conference was held on the *Application* on August 6, 2019, and a status conference on November 13, 2019. R. 359, 368. The parties agreed that the contested case could proceed without an administrative hearing. R. 590. On May 22, 2020, the parties filed a *Stipulated Statement of Facts* with IDWR. R. 370.

The *Stipulated Statement of Facts* set forth the following facts relevant to this proceeding. On April 24, 1970, sixty (60) shares of ASCC stock were issued to Vern Duffin. The place of

use for the shares is the same as the existing place of use for water right 35-7667.[1] R. 370-71. Vern Duffin owned the sixty (60) ASCC shares when the *Application for Permit* for water right 35-7667 was filed with IDWR. R. 371-72. Sixty (60) shares of ASCC stock for the same place of use were transferred to Petitioners on December 31, 2011, around the same time ownership of water right 35-7667 was transferred. R. 371, 377. In 2017, Petitioners converted the place of use for 35-7667 from being irrigated solely with ground water to being exclusively irrigated with surface water from the ASCC shares. R. 377-78. Ground water from water right 35-7667 and surface water from the ASCC shares have never been used simultaneously to irrigate the place of use. R. 378.

On May 26, 2020, the Hearing Officer incorporated the *Stipulated Statement of Facts* into the evidentiary record and took official notice of documents in IDWR's files that may be relevant to the contested case proceeding. R. 384-85. The Hearing Officer also requested briefing from the parties on the issue of whether the *Application* satisfied the transfer review criteria in Idaho Code § 42-222(1). R. 385. Following the parties' briefing, the Hearing Officer issued the *Preliminary Order Denying Transfer* ("*Preliminary Order*") on July 24, 2020. R. 598.

In the *Preliminary Order*, the Hearing Officer found that approval of the application would result in the ASCC shares and water right 35-7667 irrigating a total of 107.8 acres where previously those rights had only irrigated 53.9 acres. R. 594. The *Preliminary Order* concluded that the *Application* must be denied because the proposed changes: (1) would result in an enlargement of water right 35-7667, (2) would injure other water rights, (3) were not consistent

[1] The *Stipulated Statement of Facts* also states that the sixty (60) shares issued to Vern Duffin on April 24, 1970 were cancelled immediately before sixty (60) shares for the same place of use was issued to him on October 20, 1987. R. 370-71. The cancelation and reissuance of the shares has no impact on the analysis of the issues presented to the Court.

with the conservation of water resources in the State of Idaho, and (4) were not in the local public interest. R. 590-98.

Following the issuance of the *Preliminary Order*, Petitioners filed *Applicant's Petition for Reconsideration* (Aug. 7, 2020) ("*Petition for Reconsideration*"). R. 603. The *Petition for Reconsideration* asked the Hearing Officer to reconsider the denial on four bases: (1) that the Hearing Officer failed to make a determination as to whether water right 35-7667 was supplemental to the ASCC shares or a primary right; (2) that the Hearing Officer read limitations into water right 35-7667 that were not on the face of the license; (3) that the Hearing Officer erred in considering consumptive use; and (4) the Hearing Officer erred in relying on *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 415, 18 P.3d 219 (2001). R. 603-630.

On August 12, 2020, the Hearing Officer simultaneously issued an *Order Granting Petition for Reconsideration* and an *Amended Preliminary Order Denying Transfer* ("*Amended Preliminary Order*"). R. 656-74. The *Amended Preliminary Order* addressed issues raised in the *Petition for Reconsideration* that were not addressed in the *Preliminary Order*. R. 656-669. The Hearing Officer again found that approval of the *Application* would result in more acres being irrigated under the ASCC shares and water right 35-7667 than had been historically, and reaffirmed the denial of the *Application* on the same four (4) bases. *Id.* No party filed exceptions to the *Amended Preliminary Order* and the order became final on August 26, 2020. *See* Idaho Code § 67-5246; R. 670-672. Petitioners then filed this petition for judicial review on September 22, 2020. R. 676.

II. ISSUES PRESENTED ON APPEAL

In their framing of the issues, Petitioners failed to reference the specific errors cognizable under Idaho Code § Idaho Code § 67-5279(3). Accordingly, IDWR reformulated the statement of issues as follows to specify the type of error under § Idaho Code § 67-5279(3) at issue:

1. Whether IDWR's conclusion that approval of the *Application* would result in an enlargement is consistent with Idaho law and supported by substantial evidence.
    a. Whether IDWR acted within its statutory authority and consistent with Idaho law by considering the historic use of water right 35-7667 in determining that approval of the *Application* would result in an enlargement.
    b. Whether IDWR acted within its statutory authority and consistent with Idaho law by considering the overlap between water right 35-7667 and the ASCC shares in determining that approval of the *Application* would result an enlargement.
2. Whether IDWR's conclusions that approval of the *Application* would result in injury to other water users, would not be consistent with the conservation of water resources in the State of Idaho, and would not be in the local public interest are consistent with Idaho law and supported by substantial evidence.
3. Whether Petitioners have shown that the alleged errors prejudiced their substantial rights.

III. STANDARD OF REVIEW

Judicial review of a final decision by IDWR is governed by the Idaho Administrative Procedures Act ("IDAPA"), Idaho Code § 67-5201 *et seq.*, and Idaho Code § 42-1701A(4). Pursuant to IDAPA, courts undertake judicial review of final agency decisions based on the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court must affirm the agency decision unless the Court finds 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. Idaho Code § 67-5279(3); *Barron*, 135 Idaho at

417, 18 P.3d at 222. The Court exercises free review over questions of law. *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017). If the agency action is not affirmed, it must be set aside, in whole or in part, and remanded for further proceedings as necessary. Idaho Code § 67-5279(3).

IV. ARGUMENT

A. IDWR's Conclusion That Approval of the *Application* Would Result in an Enlargement is Consistent With Idaho Law and Based on Substantial Evidence.

Review of IDWR's authority to approve a transfer application begins with an analysis of the applicable statutes. In interpreting a statute, Idaho courts consider the statute as a whole and give words their plain, usual, and ordinary meanings. *Estate of Stahl v. Idaho State Tax Comm'n*, 162 Idaho 558, 562, 401 P.3d 136, 140 (2017). "[T]he Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant." *Id.* (quoting *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011)).

Applications for transfer are governed by Idaho Code § 42-222. Under Idaho Code § 42-222(1), a water right owner who wants to change the point(s) of diversion, place of use, period of use, or nature of use of all or part of their water right, "shall first make application to [IDWR] for approval of such change." Upon receipt of an application, IDWR "shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions," provided that: (1) "no other water rights are injured thereby," (2) "the change does not constitute an enlargement in use of the original right," (3) "the change is consistent with the conservation of water resources within the state of Idaho" and (4) the change "is in the local public interest as defined in section 42-202B, Idaho Code...."[2] Idaho Code § 42-222(1). "The

[2] Idaho Code § 42-222(1) includes other factors that the parties agreed in the proceeding below are not at issue. *See* R. 605.

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." *Id.*

Idaho Code § 42-202B provides the following definitions relevant to this proceeding. "'Local public interest' is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3). Consumptive use is defined as:

> [T]hat 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).

In the present case, the Hearing Officer correctly applied the above standard in determining that approval of the *Application* would result in an enlargement because the proposed changes will result in an increase in the number of acres irrigated under water right 35-7667 and the ASCC shares. R. 662. The Hearing Officer's conclusion was based on the historic use of water right 35-7667. *Id.* The Hearing Officer's decision compared the historical use of water right 35-7667 with the proposed use and found that historically water right 35-7667 and the ASCC shares combined had never been used to irrigate more than 53.9 acres and under the proposed changes they would now irrigate 107.8 acres. *Id.* Petitioners argue that the Hearing Officer erred in his enlargement analysis by (1) considering the historic use of water right 35-

7667 and (2) considering the overlap between water right 35-7667 and the ASCC shares. *Pet'rs' Opening Br.* at 6-41 (Dec. 4, 2020). Each of these arguments is addressed in turn below.

i. IDWR Acted Within Its Statutory Authority and in Compliance With Idaho Law by Considering How Water Right 35-7667 Had Been Historically Used to Determine That Approval of the *Application* Would Result in an Enlargement.

Petitioners spend considerable time arguing that IDWR erred by considering information outside the four corners of the paper water right in determining whether approval of the *Application* would result in an enlargement. *Pet'rs' Opening Br.* at 6-21. IDWR agrees that beneficial use is not included as an element on the face of a water right. However, that does not mean that IDWR is prevented from considering the historic use of a water right in determining whether approval of a transfer would result in an enlargement. In fact, the Idaho Legislature has expressly directed IDWR to consider such use.

Idaho Code § 42-222(1) provides that IDWR must determine that a change proposed in an application for transfer "does not constitute an enlargement **in use** of the original right." (emphasis added). Petitioners' argument that IDWR cannot consider historic use completely writes out the words "in use" from the statute, and for that reason should be rejected. *Stahl*, 162 Idaho at 562, 401 P.3d at 140. Moreover, the Idaho Supreme Court has already determined that Idaho Code § 42-222(1) requires consideration of historic beneficial use in determining whether a transfer would result in an enlargement. *Barron*, 135 Idaho at 420, 18 P.3d at 225 ("Idaho law prohibits any transfer from resulting in an enlargement of the water right above its historical beneficial use."); *see also Fremont-Madison Irrigation Dist. and 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."). The Hearing

Officer correctly interpreted Idaho Code § 42-222(1) and the above Idaho Supreme Court decisions and considered how water right 35-7667 had been historically used in determining that approval of the *Application* would result in an enlargement. R. 659-62.

Petitioners argue that changes to the definition of consumptive use provided in Idaho Code § 42-202B(1) after *Barron* evidence that the Legislature no longer intended IDWR to consider changes in consumptive use when considering an application for transfer. *Pet'rs' Opening Br.* at 17-18. Specifically, Petitioners rely on the addition of the following language at the end of Idaho Code § 42-202B(1): "Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." *Id.* However, Petitioners' interpretation fails to consider the language in Idaho Code § 42-222(1) that expressly provides: "[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 rights." The change in the definition of consumptive use highlighted by Petitioners did not remove this provision, and consumptive use remains a consideration in determining whether a proposed transfer would result in an enlargement.[3]

Additionally, while consumptive use and beneficial use are related concepts, they are not interchangeable as Petitioners suggest. As defined in Idaho Code § 42-202B(1), consumptive use refers to water that is diverted that is not otherwise returned to the waters of the State. Beneficial use, while not statutorily defined, has been used in a broader sense to refer to water

[3] The legislative history also supports this interpretation. House Bill 636 as originally introduced struck the language from Idaho Code § 42-222 providing that consumptive use may be considered in determining an enlargement. The bill was later amended and that language was retained in the final version of House Bill 636a that was passed by the Legislature. This Legislative history is available at https://legislature.idaho.gov/sessioninfo/2004/legislation/H0636/.

diverted and applied to the designated use of a water right, which may include some non-consumptive use. *See Barron*, 135 Idaho at 420, 18 P.3d at 225 (discussing historic beneficial use as "water diverted *or* consumed to accomplish the beneficial use") (emphasis added); *Fremont-Madison Irrigation Dist. and Mitigation Grp.*, 129 Idaho at 458, 926 P.2d at 1305 (stating that enlargements in beneficial use include, "an increase in the number of acres irrigated, [or] an increase in the rate of diversion or duration of diversion"). Idaho Code § 42-222(1) also recognizes this distinction. If by using "enlargement in use" in Idaho Code § 42-222(1) the Legislature meant to only include consumptive use, there would have been no need to specify later in the same provision that "[t]he director may consider consumptive use…as a factor in determining whether a proposed change would constitute an enlargement in use of the original water rights." Idaho Code § 42-222(1).

Petitioners also argue that the Idaho Supreme Court has effectively overruled *Barron*, citing several cases holding that decreed water rights may not be relitigated. *Pet'rs' Opening Br.* at 8-16 (citing *In Re SRBA Case 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 408 P.3d 899 (2018); *City of Blackfoot*, 162 Idaho 302, 396 P.3d 1184; *Rangen Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193 (2016)). Petitioners allege that the Hearing Officer's consideration of historic beneficial use was a relitigation of water right 35-7667 because it attempted to insert a new "single, combined beneficial use element" into the water right. *Id.* at 15.

The cases cited by Petitioners do not overrule *Barron* and do not limit IDWR's ability to consider historic beneficial use when determining whether to approve a transfer. The Idaho Supreme Court has considered and rejected similar arguments when reviewing IDWR's role in administering water rights. In *American Falls Reservoir Dist. 2 v. Idaho Dep't of Water Res.*

(hereinafter "*AFRD*#2"), the Idaho Supreme Court rejected the argument that considering the quantity of water that may reasonably be applied to beneficial use in a delivery call rather than the full quantity of the decreed water right was a relitigation of the elements of the senior water right. 143 Idaho 862, 876-77, 154 P.3d 433, 447-48 (2007). The Court concluded that IDWR "has the duty and authority to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right." *Id.* at 876, 154 P.3d at 447. The Court additionally determined that "[i]f the Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water." *Id.* That same reasoning applies here.

Considering how water has been beneficially applied since a water right has been licensed is not relitigating the elements of a water right but is applying the beneficial use limitation set forth in the Idaho Constitution. *See* Idaho Const. art. XV, § 3; *AFRD*#2, 143 Idaho at 876, 154 P.3d at 447; *see also Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 131, 369 P.3d 897, 909 (2016) (summarizing decisions discussing the beneficial use limitation on the prior appropriation doctrine). The Legislature has specifically provided in Idaho Code § 42-222(1) that an application for transfer shall not be approved if it would result in an enlargement in use of water. A comparison of the historic use of water to the proposed use is, therefore, in line with constitutional and statutory provisions and necessary to meet the Legislature's express directive.

It is important to remember that a transfer application is brought before IDWR to change the elements of an existing water right while maintaining the right's original priority. If a water right holder wishes to expand their use of water beyond the historic use of their existing water

rights, the law requires that they file an application for permit and obtain a new water right. Idaho Code §§ 42-201 and 42-229. A transfer cannot be used to enlarge existing uses of water, as such enlargement would be in violation the mandatory permit and licensing statutes in title 42, chapter 2, Idaho Code.

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

ii. IDWR Acted Within Its Statutory Authority and Consistently With Idaho Law by Considering Whether Water Right 35-7667 Overlapped With Other Water Rights in Determining That Approval of the *Application* Would Result in an Enlargement.

Petitioners make three arguments in support of their position that the Hearing Officer erred in relying on the overlap between water right 35-7667 and the ASCC shares in determining there was an enlargement: (1) IDWR was limited to considering only water rights owned by the applicant and proposed to be transferred in determining an enlargement; (2) IDWR erred in relying on the *Barron* decision; and (3) even if the water rights overlapped, IDWR should have approved the transfer if the proposed use was consistent with the historic use. Each of the arguments is addressed in turn below.

a. IDWR Correctly Considered the Overlap Between Water Right 35-7667 and the ASCC Shares Even Though the *Application* Did Not Propose to Transfer the ASCC Shares.

Petitioners allege that that Idaho Code § 42-222(1) limits the enlargement determination to an examination of the water rights listed on the transfer application because the enlargement determination is limited to "an enlargement in use **of the original right**." *Pet'rs' Opening Br.* at

21 (quoting Idaho Code § 42-222(1) (emphasis added by Petitioners)). Petitioners argue IDWR's evaluation is limited "to the elements of a singular water right" and cannot consider "other water entitlements (such as water from canal company shares) that may be associated with the same property ...." *Pet'rs' Opening Br.* at 22. According to Petitioners, IDWR was legally barred from considering the overlap with the ASCC shares in denying the *Application* because the *Application* does not propose making changes to the ASCC shares and because there is no combined use limitation on water right 35-7667 specifically referring to the ASCC shares. *Id.* at 22-25.

The limitations that Petitioners seek to impose are not in keeping with the plain language of Idaho Code § 42-222(1). Idaho Code § 42-222(1) provides that IDWR "shall examine all the evidence and available information" in determining whether there is an enlargement in use of the original right. Thus, on its face Idaho Code § 42-222(1) is not limited to the four corners of the water right being transferred as the Petitioner's contend. As discussed above, the Legislature has directed that IDWR not approve a transfer that would result in an enlargement in historic beneficial use. This requires a comparison of the use under the original water right with the proposed use after the transfer. In order to make that comparison, IDWR must examine how a water right is being used, in fact. This necessarily includes an examination of the context in which a water right is being used, such as the existence of overlapping water rights. The language in Idaho Code § 42-222(1) requiring that, "the change does not constitute an enlargement in use of the original right," is more reasonably interpreted to capture that comparison between existing and proposed use, not to limit the scope of information that IDWR may consider in determining an enlargement.

Moreover, the Idaho Supreme Court has previously upheld IDWR's consideration of overlapping water rights in determining whether approval of a transfer would result in an enlargement. In *Barron*, the applicant sought to split an existing surface water right, water right 37-2801B, into two water rights, changing the existing point of diversion and place of use. 135 Idaho at 415-16, 18 P.3d at 220-21. The existing place of use for water right 37-2801B overlapped with the place of use for an existing ground water right, water right 37-7295. *Id.* at 416, 18 P.3d at 221. As relevant here, water right 37-7295 was not owned by the applicant or included on the transfer application. *Barron*, 135 Idaho at 416, 418-20, 18 P.3d at 221, 24-25.

IDWR denied the application for transfer at issue in *Barron* on several bases, including identifying three ways in which approval of the application may result in an enlargement in use of the original right. *Id.* at 418-20, 18 P.3d at 223-25. One of the enlargement issues identified by IDWR was that moving the place of use for water right 37-2801B would potentially result in an enlargement in the combined use of water rights 37-2801B and 37-7295. *Id.* at 419, 18 P.3d at 224. The Supreme Court upheld this determination, finding that, "the previously combined use of the two water rights is limited to the consumptive use on the 311 acres tract of land." *Id.* at 420-21, 18 P.3d at 224-25. The Court continued, concluding that "[i]f water right 37-2801 is moved to another tract...with the result that the two rights would irrigate more than 311 acres, then there is an enlargement of the water right." *Id.*

The Idaho Supreme Court's holding is directly applicable to the present case. The facts in this matter are uncontested. Petitioners agreed that the existing place of use for water right 35-7667 completely overlaps with the land described in the ASCC shares owned by Petitioners. R. 370-71, 378. Petitioners also agreed that ground water from 35-7667 and surface water from the ASCC shares have never been used simultaneously to irrigate the place of use for water right 35-

7667. R. 378. The *Application* specifically stated that the existing place of use will continue to be irrigated with the ASCC shares after the proposed transfer. R. 288.

Based on those uncontested facts, the Hearing Officer correctly applied the principles set forth in *Barron* and concluded that the proposed change to the place of use "will result in an increase in the number of acres irrigated, which is an enlargement." R. 662. The Hearing Officer reasoned that, "[c]urrently, water right 35-7667 and the ASCC shares authorize the irrigation of the same 53.9 acres," and, therefore, "in combination, represent a single beneficial use of water at the existing place of use—the irrigation of 53.9 acres." *Id.* The Hearing Officer continued, stating that while "[w]ater right 35-7667 and the ASCC shares each represent a full water supply for irrigation of the 53.9-acre place of use...the total combined beneficial use for the two sources has always been no more than 53.9 irrigated acres." *Id.* Therefore, as the Hearing Officer concluded, the proposed changes set forth in the *Application* show the owner intends to exercise water right 35-7667 and the ASCC shares "in a way that will result in 107.8 acres being irrigated for the full irrigation season instead of the 53.9 acres which are currently irrigated under the rights," which is a clear enlargement. *Id.*

As discussed above, Idaho Code § 42-222(1) requires IDWR to consider "all the evidence and relevant information" including the historic beneficial use of a water right in determining whether approval of a transfer application will result in an enlargement. IDWR is not bound to consider only the elements of the water right appearing on the face of the license. Petitioner's argument that IDWR could not consider an overlap in water rights unless there was an express combined-use limitation on the license is not in keeping with this Legislative directive or in keeping with the Supreme Court's holding in *Barron*. In *Barron*, there is no mention of any express combined use limit. *See generally Barron*, 135 Idaho 414, 18 P.3d 219. Rather, the

Court focused on the actual overlap of water rights 37-02801B and 37-7295. *Id.* at 419-20, 18 P.3d at 224-25.

The Hearing Officer correctly applied *Barron*, concluding that "[i]f two water rights authorize the irrigation of the same acres, then the water rights represent a combined irrigation use on the overlapping acres, regardless of whether the water right overlap is recognized in a condition." R. 664. As the Hearing Officer concluded, "it is undisputed that water right 35-7667 and the ASCC shares are appurtenant to the same acres and have been for at least forty years...[s]eperating or unstacking these rights without a reduction in authorized beneficial use at the existing place of use would constitute an enlargement of the rights." *Id.* The fact that water right 35-7667 does not include an express combined-use limitation with the ASCC shares does not change that they in fact overlap and that approval of the application would result in more acres being irrigated.

Moreover, the license for water right 35-7667 does include a condition expressly limiting the total amount of water that may be applied to the place of use under water right 35-7667 "when combined with all other rights" R. 34. This condition is a specific recognition of combined water use on the property and explicitly limits the total combined use of water on the property for irrigation to "no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate." *Id.* While the ASCC shares are not expressly referenced, there is no question that this condition applies and limits the combined use of the ASCC shares and water right 35-7667 at the existing place of use. Approval of the transfer would undo the effect of this condition and would result in enlarged use. Petitioners fail to address this condition in their briefing.

Petitioners also appear to argue that IDWR's enlargement analysis should not apply to canal company shares. *Pet'rs' Opening Br.* at 22-23. Petitioners are correct that ASCC owns the underlying water right. R. 657. However, Petitioners do own the place of use for which the ASCC shares and water right 35-7667 are appurtenant and have control over the beneficial use of the ASCC shares. R. 371, 377. Additionally, the Court's analysis in *Barron* was not limited to water rights owned by the transfer applicant, demonstrating that ownership of overlapping water rights is not a prerequisite to the rights being part of the enlargement analysis. *Barron*, 135 Idaho at 416, 419-20, 18 P.3d at 221, 224-25.

Petitioners have pointed to no authority which limits IDWR's enlargement analysis to water rights owned by the applicant. As discussed at length in the *Amended Preliminary Order*, if such a limitation is read into Idaho Code § 42-222(1), it could have significant ramifications for areas like the ESPA with severe water shortages and a large number of water rights held by organizations for the benefit of their shareholders. R. 666-67. As found by the Hearing Officer, "the water rights held by ASCC authorize the irrigation of 61,772.6 acres," and approximately 23,000 of these acres are overlapped by ground water irrigation rights that do not include combined use limitations. R. 666. If IDWR applied Petitioners' interpretation, ground water rights could be transferred to irrigate new acres, opening the door to more than 23,000 new acres being developed in the ESPA just under ASCC's rights. R. 667.

b. IDWR Correctly Applied the Idaho Supreme Court's Holding in *Barron* to Determine that Approval of the *Application* Would Result in an Enlargement.

Petitioners argue that the portions of *Barron* relied on by the Hearing Officer are dicta and that the Hearing Officer's application of *Barron* is not consistent with Memorandum issued by IDWR in 2009. *Pet'rs' Opening Br.* at 25-41. Specifically, Petitioners allege that IDWR's "enlargement analysis in *Barron* was not based upon an actual evaluation of the combined

beneficial use of the referenced rights, rather [IDWR] was *unable* to perform an enlargement evaluation because the applicant did not provide the requested historical use information." *Id.* at 33-34 (citing *Barron*, 135 Idaho at 416, 418-19, 18 P.3d at 221, 223-24). This statement is a mischaracterization of the enlargement issues raised and decided in *Barron.*

The Court in *Barron* separately considered three enlargement issues: (1) enlargement in historical consumptive use, (2) enlargement in number of acres irrigated under 37-2801B and 37-7295, and (3) enlargement in the amount of water diverted. 135 Idaho at 419-20, 18 P.3d at 224-25. In first considering the enlargement in consumptive use, the Court found that IDWR "specifically requested evidence from Barron regarding the historic use of water right 37-02801B on three separate occasions." *Id.* at 419, 18 P.3d at 224. The Court also found that, "Barron's response to these requests reveals that he was unable to present competent evidence to the IDWR" and that, "Barron failed to provide the IDWR with sufficient information to establish the historical consumptive use." *Id.*

In a separate section, the Court address the overlap between water rights 37-02801B and 37-7295, stating that "[a]nother area of concern for [IDWR] was the potential enlargement of groundwater right 37-7295 should Barron's application be granted." *Id.* The Court went on to conclude that if water right 37-2801B is moved "with the result that the two rights would irrigate more than 311 acres, then there is an enlargement of the water right." *Id.* at 420, 18 P.3d at 225. The Court's consideration of the enlargement in irrigated acres is separate and distinct from its consideration of the lack of proof of historical consumptive use.

The issue of overlap between water right 37-02801B and 37-7295 was squarely before the Court, and the Court in *Barron* separately considered IDWR's enlargement concerns in a reasoned opinion. This is not a situation where the Court's conclusion was "made without

argument, or full consideration of the point." *Smith v. Angell*, 122 Idaho 25, 35, 830 P.2d 1163, 1173 (1992) (Bistline, J., concurring) (quoting BLACK'S LAW DICTIONARY 454 (6th ed. 1990)). The Court's holding that increasing the number of acres irrigated by 37-02801B and 37-7295 would result in an enlargement was "necessary to decide the issue presented to the appellate court." *State v. Hawkins*, 155 Idaho 69, 74, 305 P.3d 513, 518 (2013).

For those reasons, the Court's holding that an increase in the acres irrigated by overlapping water rights constitutes an enlargement is not dicta. Even if this Court does decide that the foregoing conclusion is dicta, it still is persuasive authority in keeping with the intent and plain language of Idaho Code § 42-222(1), and IDWR did not err in relying on it. *See Farm Dev. Corp. v. Hernandez*, 93 Idaho 918, 921, 478 P.2d 298, 301 (1970) ("Although the language of the Court might therefore be construed to be dicta, nevertheless that language is persuasive.")

The Petitioners also argues that IDWR erred in relying on *Barron* because the reasoning in the opinion not in line with a guidance document issued by IDWR on December 21, 2009, (*Transfer Processing Memorandum 24* (hereinafter "*Transfer Memo*")). *Pet'rs' Opening Br.* at 32; *see also* R. 127-163. As is clearly stated in the *Transfer Memo*, "[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.* at 127. The transfer memo also includes the required statement for executive agency guidance documents: "The Guidance Document is not new law but is an agency interpretation of existing law." *Id.*; *see also* Executive Dep't State of Idaho, Executive Order 2020-2, *Transparency in Agency Guidance Documents*.

An agency guidance document does not have the force and effect of law, and in no way takes precedence over an Idaho Supreme Court opinion. *See generally Asarco Inc. v. State*, 138

Idaho 719, 69 P.3d 139 (2003). In so far as there is any conflict between the *Transfer Memo* and the Idaho Supreme Court's decision in *Barron*, *Barron* is controlling. Moreover, in actuality there is no conflict between the *Transfer Memo* and the Court's holding in *Barron*, and the *Amended Preliminary Order* is consistent with both.

The *Transfer Memo* provides that "[f]or any application for transfer, [IDWR] must determine whether the change will enlarge the use of water under the water right(s)." R. 154. The *Transfer Memo* then goes on to set forth factors for consideration including whether there are "stacked water rights." *Id.* "Stacked water rights" are described as "when two or more water rights, generally of different priorities and often from different sources, are used for the same use and overlie the same place of use." *Id.* The *Transfer Memo* goes on to state that, "[a]n application for transfer proposing to 'unstack' one or more water rights used for irrigation or other use, without changing all the rights for the same use, is presumed to enlarge the water right." *Id.* The guidance provided above is clearly in line with the standard applied in *Barron* and that applied by the Hearing Officer in the present case. *Compare* R. 154, *with* R. 662-66 *and* *Barron*, 135 Idaho at 419-20, 18 P.3d at 224-25. As discussed further below, the sections of the *Transfer Memo* cited by Petitioners as incompatible with *Barron* all relate to circumstances where an applicant has presented evidence of historic use to rebut the presumption that unstacking water rights would result in an enlargement. Such circumstances were not present in *Barron* and are not present in this case.

c. Petitioners Did Not Present Any Evidence to Rebut the Presumption That Unstacking Water Right 35-7667 and the ASCC Shares Would Result in an Enlargement.

Petitioners argue that the Hearing Officer erred by not considering whether the proposed change in place of use would be consistent with the historic use of water right 35-7667 even if

the right was unstacked from the ASCC shares. *Pet'rs' Opening Br.* at 25-30. IDWR agrees with Petitioners that the *Transfer Memo* identifies specific circumstances where the presumption of enlargement from unstacking water rights may be rebutted "**if there is a clear demonstration, with historic diversion records,** that the actual water use...will not increase." *Id.* at 26 (emphasis added). In the circumstances described in the *Transfer Memo*, clear evidence is required to show that while water rights are unstacked, the proposed use will not actually result in an increase from the historic beneficial use.[4] *See* R. 154 ("The place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right...so long as the primary rights at the original and proposed places of use provide comparable water supplies."); R. 155 (providing that a supplemental right may be changed to a primary right "when the applicant can clearly demonstrate, using historic diversion records for the supplemental right...or other convincing water use information, that there would be no enlargement"). In the present case, Petitioners presented no such evidence.

The facts on the record are not in dispute. The *Application* itself stated that the existing place of use for water right 35-7667 completely overlapped with the ASCC shares and that the ASCC shares would continue to be used to irrigate the existing place of use should the transfer

[4] Petitioners also point to a deposition taken of an IDWR staff member in a different matter to support their argument that the Hearing Officer erred by not considering whether the proposed change in place of use would be consistent with the historic use of water right 35-7667. *Pet'rs' Opening Br.* at 27. The statements cited by Petitioners from that deposition are in line with the statements from the *Transfer Memo* that the presumption of enlargement may be rebutted by the applicant presenting evidence demonstrating that the unstacking would not actually result in an enlargement. *Compare* R. 154-155 *with* R. 470. As stated above, no such evidence was presented here. Moreover, statements made by an IDWR staff member in response to hypothetical questions, posed in a deposition in another contested case, are not legally binding. Those statements in no way substitute for the plain language of Idaho Code § 42-222(1) and the Idaho Supreme Court precedent. Even if this Court finds that statements in the deposition are not consistent with *Barron*, *Barron* is controlling, and the Hearing Officer was correct in applying *Barron* here.

be approved. R. 288. There is no dispute that historically water right 35-7667 and the ASCC shares together irrigated no more than 53.9 acres and that under the proposed changes set forth in the *Application* those rights would now irrigate 107.8 acres. R. 287-88, 377-78. The Hearing Officer found that Duffin did not propose to divide the existing beneficial use between water right 35-7667 and the ASCC shares or to dry up acres at the existing place of use and hold the ASCC shares unused. R. 662, 664. Therefore, as the Hearing Officer concluded, "[t]he changes proposed in [the *Application*] would result in an enlargement of water right 35-7667 and must be denied pursuant to Idaho Code § 42-222(1)." R. 662.

Petitioners also appear to allege that the "unstacking" enlargement analysis should only be applied where a water right is found to a supplementary source of water not a primary source. *Pet'rs' Opening Br.* at 25-26. As the Hearing Officer concluded, it is immaterial whether water right 35-7667 is primary or supplementary as "[t]he enlargement analysis would be identical in either case." R. 662. It does not matter if water right 35-7667 were to be considered the primary or supplemental source of water where the total combined use of water right 35-7667 and the ASCC shares would be increased by moving water right 35-7667 to a different place of use and continuing the irrigate the existing place of use with the ASCC shares.

Petitioners' argument seems to suggest that if a transfer application proposes moving a primary right, IDWR could not deny the transfer, but would have to limit the use of the supplementary right to avoid an enlargement. *Pet'rs' Opening Br.* at 25-26. The Idaho Supreme Court addressed and rejected a similar argument in *Barron*. There, the applicant suggested that IDWR should approve the transfer of water right 37-2801 because it was the primary right and then curtail the overlapping "supplemental" groundwater right to avoid an enlargement. *Barron*, 135 Idaho at 420, 18 P.3d at 225. The Court rejected this suggestion, concluding that this

proposition "is really an attempt to shift the burden of preventing enlargement to the IDWR, yet it is [the applicant] and not [IDWR] who bears this burden." *Id.*

Upon filing an application for transfer, the burden in on the applicant to show "an absence of enlargement." *Id.* Here, Petitioners did not provide evidence to IDWR to support such a finding, and therefore, under Idaho Code § 42-222(1), IDWR was required to deny the *Application*. IDWR acted within its statutory authority and consistent with statutory and constitutional provisions in concluding that approval of the *Application* would result in an enlargement, and its decision is supported by substantial evidence. IDWR, therefore, respectfully requests that the Court uphold the *Amended Preliminary Order*.

B. IDWR's Conclusions That Approval of the *Application* Would Injure Other Water Rights, Was Not Consistent With the Conservation of Water Resources in the State of Idaho, and Was Not in the Local Public Interest are Consistent With Idaho Law and Supported by Substantial Evidence.

Petitioners summarily argue that because the Hearing Officer's conclusion regarding enlargement "serves as the basis for the remainder of the *Final Order's* conclusions," then "it follows that the remaining portions of the *Final Order* should likewise be reversed." *Pet'rs' Opening Br.* at 41-42. However, it is important to note that Petitioners' arguments regarding the enlargement analysis do not challenge the finding of the Hearing Officer that approval of the *Application* would, in fact, result in more acres being irrigated under water right 35-7667 and the ASCC shares. *See generally Pet'rs' Opening Br.* Petitioners are essentially asking this Court to conclude that IDWR was legally barred from considering that fact in determining that there was an enlargement under Idaho Code § 42-222(1).

Petitioners do not provide any argument as to why the Hearing Officer could not consider this fact in determining whether approval of the *Application* would (1) injure other water rights, (2) be consistent with the conservation of water resources in the State of Idaho, and

(3) be in the local public interest. A review of the Hearing Officer's conclusions on these issues provides ample reason to affirm the Hearing Officer's decision even if the Court determines that IDWR erred in the enlargement analysis.

The Hearing Officer's analysis of these factors focused on water availability and the impact of having both water right 35-7667 and ASCC fully utilized each year where previously only one had been used. R. 667-68. As the Hearing Officer found, "[t]he Upper Snake River system is fully appropriated during the most of the irrigation season," and "[a]ny increase in demand in the ASCC system would result in less water available to full junior water rights on the Snake River." R. 667. The Hearing Officer also recognized that the current moratorium order in the ESPA was put in place to prevent any new diversions of ground water within that area in order to address "declining aquifer levels and spring discharges and changing Snake River flows that resulted in insufficient water supplies to satisfy existing beneficial uses." R. 668.

Because of the lack of available water in the area and the current moratorium order, the Hearing Officer concluded that approving the *Application*, which proposed to double the beneficial use under water right 35-7667 and the ASCC shares, would injure other water rights, was not consistent with the conservation of the State's water resources, and was not in the local public interest. R. 667-69. The *Petition* has presented no argument as to why the Hearing Officer should not have considered the increase in irrigated acres in its analysis of these factors. The Hearing Officer's analysis of these factors is consistent with Idaho law and supported by substantial evidence and, therefore, should be upheld.

C. The Petitioners Have Failed to Show Prejudice to a Substantial Right.

In order to meet the requirements of Idaho Code § 67-5279(4), Petitioners must show that (1) they have a substantial right, and (2) that right was prejudiced. IDWR agrees that Petitioners

have a substantial right in the transfer application. However, Petitioners have failed to show that the errors alleged in this proceeding prejudiced their right.

Petitioners have failed to show prejudice because IDWR did not err in considering the overlap between water right 35-7667 and the ASCC shares in its enlargement analysis. Additionally, even if the Court finds that IDWR erred in its enlargement analysis, Petitioners still have not shown prejudice because they have provided no argument as to why the increase in acres irrigated under those rights would not be relevant to the injury, conservation, and local public interest considerations provided in Idaho Code § 42-222(1). IDWR agrees with Petitioners' statement that the Idaho Supreme Court has not "attempted to articulate a universal rule to govern whether a petitioner's substantial rights are being violated under I.C. § 67-5279(4)." *Petition* at 42 (quoting *Two Jinn, Inc. v. Idaho Dep't of Ins.*, 154 Idaho 1, 5, 293 P.3d 150, 154 (2013)). However, in discussing whether a substantial right has been prejudiced in other contexts, the Idaho Supreme Court has stated that it must be shown that the alleged error could affect the outcome of the litigation. *See Matter of Estate of Hirning*, ___ Idaho ___, 475 P.3d 1191, 1199 (2020). This requirement logically applies to judicial review proceedings, as the remedy if error is found is a remand back to the agency. Such a remand would be unnecessary if the alleged error would not have changed the agency's determination.

In this case, the Hearing Officer provided four (4) separate bases for denial of the transfer. R. 656-69. Even if the Court were to accept Petitioners' arguments on the enlargement issue, IDWR's denial of the transfer would still be supported by its conclusions that approval of the transfer would injure other water rights, would not be consistent with conservation of the State's water resources, and would not be in the local public interest. Petitioners have failed to adequately challenge three of the four bases for IDWR's denial of the *Application*. As such, they

have failed to show their substantial rights were prejudiced because the outcome would have been the same regardless of the errors alleged in this proceeding.

V. CONCLUSION

In short, IDWR's determination the *Application* did not meet the criteria set forth in Idaho Code § 42-222(1) was consistent with Idaho law and supported by substantial evidence. Petitioners have not met their burden to demonstrate that IDWR erred in one of the ways specified in Idaho Code § 67-5279(3) and that the alleged error prejudiced their substantial rights. Therefore, IDWR respectfully requests that the Court uphold the denial of the *Application.*

Respectfully submitted this 8th day of January, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January, 2021, I caused a true and correct copy of the foregoing *Respondent's Response Brief* is filed with the District Court and served on the following parties by the indicated methods:

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