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,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent.

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

Case No. CV06-20-1467

SURFACE WATER COALITION'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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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 (collectively the "Surface Water Coalition" or "Coalition"), by and through undersigned counsel, hereby jointly submit this *Response to Petitioner's Opening Brief.*

INTRODUCTION

At issue in this Appeal is the Hearing Officer's answer to the question, does Transfer Application 83160 satisfy the transfer review criteria set forth in Idaho Code § 42-222(1)? More specifically, will Transfer 83160 result in injury to other water rights, result in an enlargement, is it contrary to the conservation of water resources within the State of Idaho, and will it conflict with the local public interest? For the reasons presented below, the Hearing Officer correctly determined that proposed Transfer 83160 does not satisfy the requirements of I.C.§ 42-222(1) because it will result in an enlargement, it will injure other water rights, it is contrary to the conservation of water resources and it is not in the local public interest.

STATEMENT OF FACTS AND PROCEDURE

The following Statement of Facts is taken from the *Stipulated Statement of Facts*, submitted by the parties in the underlying contested case on May 22, 2020. Therefore, the facts outlined below are undisputed by the parties to this appeal.

This matter began with the filing of Transfer Application 83160 ("83160") by Chana and Jeffrey Duffin ("Duffin") on April 2, 2019. Duffin requested to change the place of use and point of diversion for Water Right No. 35-7667 ("35-7667") which is a ground water right authorized for irrigation purposes. Application for permit no. 35-7667 was originally filed by Vern Duffin on February 2, 1977 to develop 1.2 cfs of ground water for irrigation with a proposed place of use of 60 acres. *Stipulated Statement of Facts* ("SOF"), □ 6; *Settled Agency Record* ("R") R.

372. As currently described in IDWR records, 35-7667 is appurtenant to the same property as the current place of use for 60 shares of Aberdeen-Springfield Canal Company ("ASCC") stock issued to Vern Duffin on April 24, 1970. SOF □ 2-3; R. 370. Those 60 shares of ASCC stock were conveyed to Chana and Jeffrey Duffin on December 31, 2011. SOF □ 4; R. 371.

When Vern Duffin filed the application for 35-7667, he did not list the ASCC shares under item 8.c, which requests a listing of "any other water rights used for the same purposes as described above" instead writing "none." SOF □ 7; R. 372. The overlap review for 35-7667 indicated there were no other water rights associated with the place of use or point of diversion, SOF □ 14; R. 374, but the field exam notes observed the presence of the 60 ASCC shares at the same place of use. SOF □ 15; R. 374. The field exam also documented the development of 55 acres of irrigation, rather than the 60 described in the application. SOF □ 16; R. 375. 35-7667 was eventually licensed by IDWR on December 24, 2001. SOF □ 20; R. 376. On August 7, 2015, IDWR approved Transfer Application 80188 resulting in a split of 35-7667, with 35-7667 now authorized for the irrigation of 53.9 acres. SOF □ 23; R. 377.

In 2017 Duffin converted the irrigation at the place of use from exclusively ground water to exclusively surface water with the ASCC shares. SOF □ 24; R. 377. The ground water system and the surface water system at this place of use have never been interconnected and have never been used to irrigate at the same time. SOF □ 25; R. 378. When Duffin filed Transfer Application 83160 on April 2, 2019 the application confirmed the current place of use for 35-7667 is irrigated with the ASCC shares. SOF □ 29; R. 380.

On May 20, 2019, the Surface Water Coalition ("SWC") filed a protest to Transfer Application 83160 on the grounds that the transfer would result in the expansion of water use, the application failed to demonstrate the transfer would not injure other water rights and it failed

to provide mitigation for impacts resulting from the transfer. *SWC Notice of Protest*, 1-2; R. 347-348. SWC also argued that 83160 failed to meet the transfer criteria in I.C. § 42-222. *Id.* On May 26, 2020, the Hearing Officer issued a *Request for Briefs* to address the question:

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

On July 17, 2020 both parties filed briefs in response to the Hearing Officer's question, with Duffin filing *Applicant's Argument Brief*, R. 423-457, and SWC filing *Surface Water Coalition's Brief on Questions of Law*, R. 574-589. The Hearing Officer issued a *Preliminary Order Denying Transfer* on July 24, 2020. R. 590-601. On August 7, 2020, Duffin filed *Applicant's Petition for Reconsideration.* R.603-630. On August 12, 2020, the Hearing Officer issued an *Amended Preliminary Order Denying Transfer* in which he concluded:

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

R. 669. The *Amended Preliminary Order Denying Transfer* became IDWR's final action on the transfer application for purposes of judicial review.

STANDARD OF REVIEW

Under Idaho Code section 67-5240, all proceedings by an agency that may result in the issuance of an order are governed by the provisions of the Idaho Administrative Procedure Act ("IDAPA"). *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Further, "the agency's factual determinations are binding on the reviewing court, even where

there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A & B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho 500 (2012) (quoting *Urrutia v. Blaine Cnty.*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000)).

"A strong presumption of validity favors an agency's actions." *Chisholm v. Idaho Dept. of Water Resources*, 142 Idaho 159, 162, 125 P.3d 515, 518 (quoting *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 807, 25 P.3d 117, 120 (2001)). IDWR's decision may only be overturned where it (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) is made upon unlawful procedure; (d) is not supported by substantial evidence in the record; or (e) is arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3); *Barron*, at 417. Duffin, the petitioner, must show that IDWR "erred in a manner specified in I.C. § 67-5279(3), and then establish that a substantial right has been prejudiced." *Barron*, at 417 (citing *Price v. Payette County Bd. of Comm'rs*, 131 Idaho 426, 429, 915 P.2d 583, 586 (1998)). "Even if one of these conditions is met, this Court will still affirm the agency action unless substantial rights of the appellant have been prejudiced." I.C. § 67–5279(4); *A & B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho at 506 (internal quotations omitted).

ARGUMENT

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

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code....

I.C. § 42-222(1) (emphasis added). Of the elements required in the review, Duffin and SWC narrowed the issues identified in the *Stipulated Statement of Facts* to the relevant legal questions[1]:

1. Does the proposed transfer constitute an enlargement of the original water right?
2. Is the proposed transfer contrary to the conservation of water resources within the State of Idaho?
3. Will the proposed transfer conflict with the local public interest?

In the *Amended Preliminary Order Denying Transfer*, the Hearing Officer concluded that proposed Transfer 83160 would constitute an enlargement, will injure other water rights, is contrary to the conservation of water resources in Idaho and is not in the local public interest. R. 669. Duffin has appealed the Hearing Officer's decision while SWC counters in support of the Hearing Officer's decision, and addresses each of those issues below.

I. The Hearing Officer Correctly Determined that Transfer Application 83160 will Result in an Enlargement.

In the appeal of the Hearing Officer's order that Transfer 83160 will result in an enlargement, Duffin alleges that the Hearing Officer 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." *Pet. Br.* at 1. SWC addresses both arguments in turn.

[1] Despite the parties' narrowing of the issues, the Hearing Officer also conducted an injury analysis and concluded that Transfer 83160 would result in injury to other water rights.

A. IDWR is Required to Examine all the Evidence Not Just the Face of a Water Right in a Transfer Analysis.

The language in the Idaho statute governing water right transfers, I.C. § 42-222(1), clearly and unambiguously requires that the "director of the department of water resources shall examine all the evidence and available information...." I.C. § 42-222(1)(emphasis added). The Idaho Supreme Court has also adopted this approach:

> What Barron ignores, however, is that the director, in deciding whether to approve the transfer, is statutorily required to examine all the available evidence and information. *See* I.C. § 42–222(1). Essentially, Barron's argument is that the Department is required to accept his evidence as a prima facie showing, and, if no protest is lodged, grant the transfer without further consideration. But it is based upon the examination of the information and evidence in the record—including the information applicant provides, the Department's investigation and records, and the watermaster's recommendation—that the director makes the determination of whether the proposed transfer should be endorsed.

Barron v. Idaho Dep't of Water Res., 135 Idaho 414, 421, 18 P.3d 219, 226 (2001) (emphasis added). *See also Jenkins* ("The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right....") *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (emphasis added).

Contrary to the statute and settled case law, Duffin claims the Director should look only to the water right proposed for transfer, and specifically only the elements and conditions of the water right. Duffin takes this position because a "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." *Pet. Br.*, at 8 (citing *City of Blackfoot*, 162 Idaho at 308-9) (emphasis added). The key word in that statement is "distribute" because it confuses the

duty to administer water with the duty to examine all the evidence in a transfer analysis, which are two distinct and different agency duties.

Ignoring the statutory directive to "examine all evidence", Duffin endorses a narrow transfer analysis, contending "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." *Pet. Br.*, at 8. Nothing in I.C. §42-222 supports this assertion. In fact, the first step for the Director, according to the language of the statute, is to examine the transfer application. *See* I.C. § 42-222(1)("Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same....").

IDWR's transfer application forms first require information regarding the name of the applicant and relevant ownership documentation. Next, the application requires information about the purpose of the transfer. Then the applicant is to provide a "description of rights after the requested changes." *Application for Transfer of Water Right*, Part I (B) (emphasis in original). In addition to information about the elements of the water right(s) after the proposed transfer, including place of use, nature of use, source, amount and point of diversion, the transfer application requires the applicant to provide the following information:

> e. Describe the effect on the land now irrigated if the place or purpose of use is changed pursuant to this transfer:
>
> f. Describe the use of any other water right(s) for the same purpose or land, or the same diversion system as right(s) proposed to be transferred at both the existing and proposed point(s) of diversion and place(s) use:

Application for Transfer of Water Right, Part I (5)(e)(f). Thus, Duffin's statement that "the first step in the Hearing Officer's analysis" is an examination of the water right before the proposed

transfer finds no support in the plain language of I.C. §42-222(1) or the Department's transfer application forms.

Duffin then takes this limited transfer analysis further, arguing that "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.'" *Pet. Br.*, at 12 (quoting *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 180, 595 P.2d 709, 714 (1979) and insisting that the review is "subject to the parol evidence rule." *Id.*, (quoting *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005)). Duffin's position is simply contrary to law. There is no way the Director can satisfy the statutorily required transfer analysis, which must "examine all the evidence and available information", and in the same review limit the evidence to only the four corners of the water right.

Duffin arrives at the position that the plain language of the water right limits the Hearing Officer's transfer analysis based on the Idaho Supreme Court's decision *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017). *Pet. Br.*, at 12-14. According to Duffin, "[t]he *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 [a] water right which define the right." *Pet. Br.*, at 12. However, extending this holding to a transfer analysis is too broad a reading of the *Blackfoot* decision.

At issue in *City of Blackfoot* was whether a reference to a settlement agreement in a condition to one of the City's water rights was sufficient to incorporate the beneficial use of "recharge" into the water right's purpose of use elements. In *City of Blackfoot*, the City was attempting to use its irrigation water right for a different purpose of use, recharge, that was not

authorized by the water right decree.[2] The Idaho Supreme Court declined to include "recharge" as an implied purpose of use because:

> … section 42-1412(6), which only allows an element to either contain a statement defining the element or incorporate a statement that defines the element. The City's argument, by allowing a document incorporated under the other provisions element to add a use to those already contained in the purpose of use element, would allow both. Not only is this prohibited under the language of 42-1412(6), *see supra* (discussing the requirement that a decree either contain or incorporate a statement of each element, but not both), it would impermissibly muddy the decree.

City of Blackfoot, 162 Idaho at 309 (citing *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 808, 367 P.3d 193, 203 (2016) (noting that adopting a perspective that would render a "partial decree less, rather than more, clear" is disfavored)). The Court further found that because the water right had been decreed without "recharge" as a purpose of use (which the City did not challenge at the time) and because the settlement agreement was a "private agreement between private parties" which did not include IDWR, the Director was not bound by the settlement agreement, nor could he enforce it. *City of Blackfoot*, 162 Idaho at 309. "To allow the Settlement Agreement to enlarge or otherwise alter the clearly decreed elements of [water right] 181C, would allow private parties to alter a judicial decree." *Id.*

The facts and the holdings of *City of Blackfoot* are not on point for the issue before this Court, which is whether Transfer Application 83160 meets the transfer criteria of I.C. § 42-222. *City of Blackfoot* analyzed whether a purpose of use element could be implied from a condition referencing a settlement agreement, not whether the proposed action met transfer criteria. Accordingly, the Hearing Officer declined to adopt Duffin's position that "*Blackfoot* developed

[2] As a preliminary matter, the Supreme Court held the City must file transfer to in order to change the purpose of use. *City of Blackfoot*, at 308. The Settlement Agreement required the written permission of SWC for the City to file the transfer. The City eventually filed a transfer, without the required written permission, and then withdrew it. *Id.*, at 307.

the law of interpreting water rights…" and that "[t]he *Blackfoot* decision strongly indicates that there cannot be implied water right conditions or a case of implied incorporation of a document into a water right decree." *Applicant's Argument Brief*, at 7; R at 0429. Rather, the Hearing Officer properly relied on *Barron* for his analysis of 83160 because, as discussed below, "*Barron* addressed enlargement issues very similar to those raised in this contested case." *Amended Preliminary Order Denying Transfer*, at 4.

B. The Hearing Officer has not Introduced a New Water Right Element

Duffin accuses the Hearing Officer of adding a "new water right element" into his analysis of the transfer application, the "single, combined beneficial use" element. *See Pet. Br.*, at 15. Duffin takes the position that this "new" element is "simply another name for a consumptive use element…" *Id.* Duffin's attack on the Hearing Officer's consumptive use analysis is threefold: first, that it is a limitation that is not in the water right; second, that any limitation should have been added during the adjudication; and third, that under Idaho law consumptive use is not an element of a water right. *See id.*, at 15-21. All three arguments fail.

Duffin's first assertion, relying on *City of Blackfoot*, falls flat for the reasons explained above, namely that the matter at hand is a transfer analysis, not water right administration. Duffin's second argument also suffers from the misplaced reliance on water right elements for administrative purposes, rather than a transfer analysis. Finally, while Duffin is correct that "consumptive use" is not an element of a water right under I.C. 42-202B, under I.C. 42-222(1) it may be a consideration in a water right transfer analysis, "[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." I.C. § 42-222(1) (emphasis added); *see also Barron*, at 419.

C. The Hearing Officer Correctly Applied Idaho Law and Case Law

The Hearing Officer began his enlargement analysis with an overview of *Barron v. Idaho Department of Water Resources*, both the district court and Idaho Supreme Court's decisions. As in this matter, *Barron* dealt with a proposed transfer application for a water right that had the same existing place of use as another existing water right. In *Barron*, as here, the surface water right was acquired before the ground water right, the field exam for the ground water right did not reveal the surface water right at the same place of use, and there was no indication of any co-mingling of the water rights at the place of use. Unlike the present matter, the applicant in *Barron* did propose drying up the existing place of use as part of the transfer. *Barron*, at 420.

The Idaho Supreme Court's enlargement analysis in *Barron* evaluated historical consumptive use, the relationship between the water right proposed for transfer and the remaining water right, and the historical availability of water. The Court's discussion of the relationship between the two water rights sharing the same place of use squarely addresses the issue raised by 83160:

> 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 v. Idaho Dep't of Water Res., 135 Idaho 414, 419–20, 18 P.3d 219, 224–25 (2001) (emphasis added). The Court thus relied on the "combined use" of the water rights in its determination that a transfer of one right that would result in the irrigation of more acres is an enlargement. Therefore, the consideration of "combined" uses in a transfer analysis is not new.

Further, the Hearing Officer did not make "combined beneficial use" an element of a water right, contrary to Duffin's contention that he "introduced a new, implied, water right

element into Idaho water law referred to as the 'single, combined beneficial use' element." *Pet. Br.*, at 2. In a transfer analysis, the Director is required to "examine all the evidence" which in this case includes historic use of both surface and ground water at the current place of use. Under *Barron*, he properly considered the "combined use of the two water rights...." *Barron*, at 419.

SWC agrees with the Hearing Officer that "[i]n light of the *Barron* decision, the outcome of this contested case is clear." *Amended Preliminary Order Denying Transfer*, at 7. The Hearing Officer's application of *Barron* to the proposed Duffin transfer is directly on point:

> The 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. Currently, water right 35-7667 and the ASCC shares authorize the irrigation of the same 53.9 acres. These two water rights, in combination, represent a single beneficial use of water at the existing place of use – the irrigation of 53.9 acres. If these two rights were separated or unstacked, the beneficial use associated with the water rights would double, because the acres being irrigated under the water rights would double. Water right 35-7667 and the ASCC shares represent a single 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. The changes proposed in Application 83160 would result in an enlargement of water right 35-7667 and must be denied pursuant to Idaho Code § 42-222(1).

Amended Preliminary Order Denying Transfer, at 7.

The Hearing Officer was correct in his rejection of Duffin's argument that "the ASCC shares and water right 35-7667 do not represent a combined beneficial use of water because the two sources of water have never been used to irrigate the existing place of use in the same irrigation season." *Amended Preliminary Order Denying Transfer*, at 7 (citing *Duffin Brief*, at 24). Turning again to *Barron*, the Hearing Officer wrote:

> Even though there was no evidence that the two sources were ever used in the same irrigation season, the *Barron* District Court confirmed that the proposal to separate or unstack the water rights was an enlargement, which could only be remedied by drying up acres under one of the water rights. *Id.* at 16 ("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 Idaho Supreme Court also found that unstacking water rights 37-2801B and 37-7295 without drying up acres would constitute an enlargement of the water rights. *Barron*, 18

> P.3d at 224-225, 135 Idaho at 419-420 (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.")

Amended Preliminary Order Denying Transfer, at 8 (quoting *Barron*, 135 Idaho at 419-420). The Hearing Officer rightly observed "[e]nlargement is not contingent on the previous comingling of water rights from different sources. Rather it is based on the combined beneficial use represented by authorized places of use for the water rights." *Id.*

Throughout *Petitioner's Opening Brief*, Duffin alleges that *Barron* is no longer "controlling law" (*Pet. Br.*, at 26), that it has somehow been overruled by a 2004 amendment to I.C. 42-202B's definition of "consumptive use" and, more implausibly, by the Department's *Transfer Memo*. But there is nothing to suggest this is the case. To begin with, *Barron* has no "flags" in Westlaw, in fact, it has no "negative treatment" at all.

Furthermore, there is no discord between *Barron* and any subsequent statutory amendments or agency guidance. For example, Duffin claims "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*." *Pet. Br.*, at 17. There is no support for this assertion in the *Barron* decision, which states "Under I.C. § 42–222(1), the director may consider historical consumptive use, as defined in I.C. § 42–202B, as a factor in determining whether a proposed transfer would result in an enlargement in use or injure other water rights. See I.C. § 42–222(1)." *Barron*, at 419. That is a correct statement of Idaho law that stands today as the statutory language makes clear "[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." I.C. § 42-222(1). If the Idaho

Legislature was motivated to overrule *Barron*, the necessary legislative amendment would have been to remove that statement from I.C. § 42-222(1). The language in I.C. § 42-202B, "Consumptive use is not an element of a water right", does nothing to overrule *Barron*. "Statutes and rules that can be read together without conflicts must be read in that way." *State v. Garner*, 161 Idaho 708, 711, 390 P.3d 434, 437 (2017). These two statutes can be read without conflict because there is none.

Duffin further attempts to dispose of the precedent established by *Barron* by dismissing the Supreme Court's language as "dictum" and by crediting the outcome of the case to Barron's failure to submit sufficient evidence of water use to IDWR in the transfer process. *See Pet. Br.*, at 37 - 39. This is the language in the *Barron* decision that Duffin claims is "dictum":

> 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, 135 Idaho at 419-420. Duffin advances this argument because the paragraph in which the language resides begins with the phrase "Another area of concern…" and because "it was not essential to the Idaho Supreme Court's decision." *Pet. Br.*, at 37 and FN 12.

SWC agrees with the Hearing Officer's position that "[t]he question of enlargement as a result of unstacking overlapping water rights was squarely before both the District Court and the Supreme Court. The courts set forth clear principles of law that can be applied to this contested case." *Amended Preliminary Order Denying Transfer*, at 6. It is clear that this language was "necessary to decide the issue presented to the appellate court" and is therefore, not dictum. *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 157, 408 P.3d 899, 912, FN 8 (2018) (quoting *State v. Hawkins*, 155 Idaho 69, 74, 305 P.3d 513, 518 (2013).

Regardless, as the Hearing Officer noted, even if this Court should agree with Duffin that the language in *Barron* is dictum, it only means the Hearing Officer isn't bound by it, but not that the language itself is incorrect. *Amended Preliminary Order Denying Transfer*, at 6.

II. The Hearing Officer Correctly Determined that Transfer Application 83160 will Injure Existing Water Rights, Violate Idaho's Policy to Conserve Water Resources and is not in the Local Public Interest

In reviewing an application to transfer a water right, the director must determine "no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code...." I.C. § 42-222(1). The burden is on the transfer applicant to "produce sufficient evidence to enable the director to approve his proposed transfer" including "sufficient evidence of non-injury, no enlargement, and favorable public interest..." *Barron*, at 420-421. "The Court will not substitute its judgment for that of the agency as to the weight of the evidence presented." *Id.*, at 417 (citing I.C. § 67–5279(1)).

Even though these considerations are central to the Director's transfer analysis, and the burden rests with Duffin to demonstrate the proposed transfer meets these factors, Duffin responds to the Hearing Officer's conclusions on injury, conservation of water resources and the local public interest by insisting they should be "reconsidered" because they are based on an invalid "holding" of enlargement. *See Pet. Br.*, at 41. More specifically, Duffin asserts that the Hearing Officer's "'single, combined beneficial use of water' serves as the basis for the remainder of the *Final Order's* conclusions...." *Id.* SWC counters that not only is the Hearing Officer's enlargement analysis and conclusion solidly based in law and precedent, his conclusions relative to injury, conservation of water and local public interest properly considered

additional factors relating to Idaho's water resources. Those factors include the 1993 ESPA Moratorium Order, the Comprehensive Aquifer Management Plan (CAMP) and the State Water Plan. For reasons explained in more detail below, the Hearing Officer's conclusions as to injury, conservation of water resources and the local public interest are accurate, entitled to deference and should be upheld on appeal.

A. The Transfer will Injure Existing Water Rights

The Hearing Officer did not err in concluding that the changes proposed in Transfer 83160 will result in injury to other water rights. Currently, Duffin's combined water rights – the 60 ASCC shares and ground water right 35-7667 – are authorized to irrigate 53.9 acres at the existing place of use. Approval of Transfer 83160 would result in the irrigation of an additional 53.9 acres, doubling the number of irrigated acres currently irrigated and resulting in an enlargement. "An enlargement may include such events as an increase in the number of acres irrigated under an original water right." *A&B Irrigation Dist. v. Aberdeen–American Falls Ground Water Dist.*, 141 Idaho 746, 751, 118 P.3d 78, 83 (2005).

Idaho law presumes an enlargement will injure other water rights. *City of Pocatello v. State of Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) ("Likewise, there is *per se* injury to junior water rights holders anytime an enlargement receives priority.") (Quoting *A & B Irrigation Dist. v. Aberdeen–American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005)). Because approval of 83160 would result in the unstacking of two water rights resulting in a doubling of acres irrigated, it will result in an enlargement and, under Idaho law, injury.

Not only will 83160 result in *per se* injury, the Hearing Officer was right to acknowledge the "Upper Snake is fully appropriated during most of the irrigation season" resulting in

curtailments of junior water rights every summer (including ASCC's). *Amended Preliminary Order Denying Transfer*, at 12. Therefore "[a]ny increase in demand in the ASCC system" which would undoubtedly occur with the approval of 83160 "would result in less water available to fill junior water rights on the Snake River." *Id.*

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

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

Amended Preliminary Order Denying Transfer, at 12. Duffin has not identified or offered any mitigation to offset injury caused by this new consumptive use as required by the 1993 Moratorium Order. *See 1993 Moratorium Order*, at 5.

B. The Transfer will not Conserve Water Resources

Duffin argues that the proposed transfer will be consistent with the conservation of water resources in the state of Idaho because the proposed place of use will be irrigated with sprinklers. *Applicant's Argument Brief*, at 25-26; R 0447-8. The Hearing Officer, while acknowledging the conservation benefits of sprinkler irrigation, correctly found the proposal contrary to the conservation of water resources because a "proposal to double the amount of water delivered under the combined water rights (water right 35-7667 and the ASCC shares) and double the beneficial use occurring under the combined rights is antithetical to the concept of water conservation." *Amended Preliminary Order Denying Transfer*, at 13 (emphasis added).

IDWR's Transfer Memorandum requires the Department to consider whether the proposed transfer would be compatible with the objectives and policies of the State Water Plan. Duffin's proposal to double the total irrigated acres through Transfer 83160 would result in the increased consumptive use of water which contradicts the objectives of the State Water Plan and consequently, the Transfer Memo.

C. The Transfer is not in the Local Public Interest

Idaho Code defines "local public interest" to be "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." I.C. § 42-202B (3). "This [Idaho Supreme] Court determined that by adopting the general phrase 'local public interest,' the legislature 'intended to include any locally important factor impacted by the proposed appropriations.'" *Shokal v. Dunn*, 109 Idaho 330, 338–39, 707 P.2d 441, 449–50 (1985). "Factors of the local public interest carry different weight depending on the specific circumstances and interests involved, and both the benefits and detriments must be considered." *Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005) (internal citations omitted). The Idaho Supreme Court has held "the local public interest has many elements and the determination of which local public interests are impacted and balancing those impacts is left to the sound discretion of IDWR." *Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005) (emphasis added).

The Hearing Officer, in balancing the impacts that 83160 would have on the local public interest, properly concluded that 83160 is not in the local public interest. Under the broad interpretation of local public interest, a transfer application that results in an enlargement and does not conserve the water resources of the state of Idaho is contrary to the local public interest in sustaining the ESPA. Transfer 83160 seeks to double the number of acres irrigated under

Duffin's current water rights. The resulting increase in the consumptive use of water within the Eastern Snake Plain would violate the local public interest.

The Hearing Officer identified concerns that the point of diversion is in a moratorium area and that approval of the transfer would violate the CAMP goal to "reduce the withdrawals from the aquifer." *Amended Preliminary Order Denying Transfer*, at 13-14 (quoting CAMP for the ESPA, at 7). The 1993 Moratorium Order was issued because of chronic drought and depletion of ground water. Through that order, the Director issued a moratorium on issuance of permits to divert and use ground water from the ESPA and tributary drainages in order to "protect existing water rights." *1993 Moratorium Order*, at 5. The practical impact of Transfer 83160 would be to double the consumptive use under the current water rights without providing mitigation to offset the additional stress on the ESPA, an action that directly conflicts with the plain language of the 1993 Moratorium Order.

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

The Hearing Officer also properly found 83160 is not in the local public interest because the proposed transfer is in an area subject to a delivery call and IDWR has already issued

curtailment orders. The result is that any increase in consumptive use from either the ESPA or the Snake River "will exacerbate the conditions giving rise to the delivery call filed by the Coalition." *Amended Preliminary Order Denying Transfer*, at 14. Finally, the Hearing Officer was correct that any proposal to unstack water rights resulting in the doubling of a beneficial use is not in the local public interest. *Id.*

"[T]he local public interest has many elements and the determination of which local public interests are impacted and balancing those impacts is left to the sound discretion of IDWR." *Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho at 164. The Hearing Officer thoroughly considered the evidence before him and correctly determined that the local public interest criteria were not satisfied. Duffin offered nothing in *Petitioner's Opening Brief* to overcome the Hearing Officer's decision. As this decision is left to the "sound discretion of IDWR" the Hearing Officer's decision must stand and Transfer 83160 denied.

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

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

The SWC agrees with Duffin that water rights are "substantial" property rights. *Pet. Br.*, at 42. *See also Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 277, 346 P.3d 286, 294 (2015). However, again SWC will look to *Barron* for guidance as to the extent of the property interest. In *Barron*, the Court found "Barron obtained water right 37–02801 as it

currently exists, i.e., as a water right for which there is a supplemental appropriation. Because the licensed place of use historically has been irrigated to some extent by groundwater right 37–07295, Barron took the surface right, 37–02801, subject to the groundwater right's utilization." *Barron v. Idaho Dep't of Water Res.*, 135 Idaho at 420. Likewise, Duffin "obtained water right [35–7667] as it currently exists," meaning Duffin's property interest in water right 35-7667 is limited by the combined beneficial use limitation it shares with the ASCC water right. Duffin has no right to expand 35-7667 into something for which it was not historically used, in this case water use separate and apart from irrigation on lands combined with ASCC shares. Therefore, the Court should not hold that the Hearing Officer's decision has prejudiced a substantial right of Duffin's.

CONCLUSION

Duffin has failed to demonstrate that the *Amended Preliminary Order Denying Transfer* (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) is made upon unlawful procedure; (d) is not supported by substantial evidence in the record; or (e) is arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). To the contrary, the Order is firmly grounded in the relevant statutory provisions, is squarely within IDWR's authority, was made upon lawful procedure, is supported by the evidence in the record and is not arbitrary, capricious, or an abuse of discretion. The Hearing Officer's decision is solidly based in Idaho Code and case law and should be upheld.

DATED this 8th day of January, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of January, 2021, I served true and correct copies of the foregoing upon the following by the method indicated:

SRBA District Court 253 3rd Ave. North P.O. Box 2707 Twin Falls, Idaho 83303-2707	____ U.S. Mail, Postage Prepaid __X__ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
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