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

JEFFREY AND CHANA DUFFIN, husband and wife,

Petitioners,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent,

v.

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

Intervenors.

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

Case No. CV-0620-0001467

PETITIONERS' REPLY BRIEF

PETITIONERS' REPLY BRIEF

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

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Jeffrey Duffin and Chana Duffin (collectively "Duffin" or "Petitioners"), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Petitioners' Reply Brief*. This reply addresses *Respondent's Response Brief* ("*IDWR Response*") and the *Surface Water Coalition's Response Brief* ("*Coalition Response*") both of which were filed on January 8, 2021 and contain virtually identical arguments. These briefs respond to *Petitioners' Opening Brief* filed on December 4, 2020.

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

I. ISSUES PRESENTED ON APPEAL

Under IDWR's Issues Presented on Appeal section of its response, IDWR asserts "Petitioners failed to reference specific errors cognizable under Idaho Code § 67-5279(3)," and based on this assertion, IDWR "reformulated the statement of issues . . . to specify the type of error under Idaho Code § 67-5279(3) at issue." *IDWR Response* at 10. We disagree that Duffin has failed to reference specific errors cognizable under Idaho Code § 67-5279(3) that allows IDWR to rewrite Duffin's issues on appeal, which Duffin has the right to set forth as the appellant in this matter. *See* I.A.R. 35(a)(4). If IDWR contends that these described issues are "insufficient, incomplete, or raise additional issues . . ," then IDWR "may list additional issues presented on appeal," I.A.R. 35(b)(4), which it has not done. This rule does not allow a respondent to

"reformulate" a petitioner's issues on appeal. Accordingly, Duffin maintains the following issues on appeal contained in *Petitioners' Opening Brief*, which describe with sufficient detail the issues Duffin challenges in the *Final Order*:

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

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

3. Whether the hearing officer erred in finding that "combined beneficial use" is an element and/or component of a water right, and whether "combined beneficial use" is merely another term for "consumptive use" (which is not an element of a water right) in violation of Idaho Code § 42-202B(1) and other applicable Idaho law.

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

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

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

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

II. LEGAL ARGUMENT

A. The Hearing Officer's conclusion that approval of 83160 will result in an enlargement is not consistent with Idaho law and is not based on substantial evidence.

In response to Duffin's arguments concerning interpretation of water right decrees, the Department agrees "that **beneficial use** is not included as an element of a water right." *IDWR Response* at 13 (emphasis added). To ensure there is no misunderstanding of the Department's admission, a water right's "beneficial use" **is** included as an element of a water right (*i.e.*, irrigation is the beneficial use for which diversion of water under 35-7667 is authorized as described on the license), but the "single, combined beneficial use" element implied into 35-7667 is not described

as an element of a water right. Given the context of Duffin's arguments, IDWR's use of the phrase "beneficial use" in the above quote must be a reference to the "single, combined beneficial use" element of a water right.

Additionally, the *IDWR Response* does not defend the Hearing Officer's stated legal basis for its imposition of the "single, combined beneficial use" element, which is the overlapping place of use description of ground water right 35-7667 within the place of use of Aberdeen-Springfield Canal Company's ("ASCC") water rights:

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

R. 0662-0663. As described in *Petitioners' Opening Brief*, the Hearing Officer's rationale that overlapping places of use imply a combined use is directly contrary to IDWR's position described by Mr. Peppersack, chief of IDWR's Water Allocation Bureau, who explained: "So, if it's demonstrated that they really weren't, **even though they might reside on the same place of use**, then we might decide that it's not an enlargement because they haven't been used together to, you know, provide a full water supply for the place of use." R. 0438, 0470 (emphasis added).

Having acknowledged the lack of a "single, combined beneficial use" element of a water right under Idaho law, the Department's opening argument in response turns to statutory interpretation and then to discretion. *IDWR Response* at 13-18. But these arguments expose the problem with the Hearing Officer's conclusions on enlargement and why this analysis is not consistent with Idaho law and is not based on substantial evidence. The Department tries to stretch the statutory singular word "water right" found in Idaho Code § 42-222(1) into the plural form of "water rights" as part of the transfer enlargement analysis. With interpretation of statutes, the

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

> There is no mention of co-guardians in the guardianship statutes. For example, Idaho Code section 15-5-204 begins, "The court may appoint *a guardian* for an unmarried minor," not multiple guardians or co-guardians for an unmarried minor. (Emphasis added.) As mentioned above, Idaho Code section 15-5-209 sets forth the powers and duties of *a guardian*. The first sentence of the statute states that the guardian has the "powers and responsibilities of *a parent* who has not been deprived of custody of his minor unemancipated child." (Emphasis added.) **The remainder of the statute lists specific powers and duties of the guardian and always refers to the guardian in the singular. There is no reference to multiple guardians or co-guardians**. Specifically, section 15-5-209(3) begins, "*The guardian* is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice." (Emphasis added.) It would be inconsistent with the provisions of Idaho Code section 15-5-209 to hold that multiple co-guardians can be appointed, with each having the powers and duties of *a parent* or with all of them together having the powers and duties of *a parent*.

Doe v. Doe, 160 Idaho 311, 314, 372 P.3d 366, 369 (2016) (emphasis added).

Based on this faulty premise, IDWR asserts that "the Hearing Officer correctly applied [statutory standards] in determining that approval of [83160] would result in an enlargement because the proposed changes will result in an increase in the number of acres under water right 35-7667 **and the ASCC shares**." *IDWR Response* at 12 (emphasis added). However, it is this bolded language that stretches language found in Idaho Code § 42-222(1) beyond its breaking point. In its efforts to ignore the plain language of this statute and the license for 35-7667, the Department instead believes certain emphasized statutory language justifies the *Final Order*:

> 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.

Id. at 13. This argument mischaracterizes Duffin's position, but it also exposes the major problem with the Department's legal position. It is not Duffin that has written out words from Idaho Code

§ 42-222(1), but the Department, which completely ignores the four critical words "of the original right" after its emphasized language of "in use." The "in use" language is clearly, specifically, and expressly modified by the phrase "of the original right." The Department's attempt to expand the scope of its analysis is contrary to the plain language of this statute.

To be clear, there is no question that the Hearing Officer is required to consider the water right elements of 35-7667 and the historical use of 35-7667 under Idaho Code § 42-222 to determine if there is an enlargement because it is *only* 35-7667 that is proposed to be amended under 83160 *and* there is no condition on 35-7667 that makes this right supplemental or otherwise combines this right with Duffin's ASCC share entitlement. But the Court should reject IDWR's attempt to unlawfully expand its legal authority to consider use of *other* water rights or *other* water entitlements not subject to the transfer or not otherwise addressed or even implicated by any conditions in the water right subject to the transfer. The first step in the Hearing Officer's analysis in a contested transfer should have been the interpretation of the statutorily prescribed Idaho water right elements. This is particularly true when evaluating enlargement because enlargement is described as an increase or expansion of what the express water right's elements provide for:

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

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

Continuing to ignore the plain language of Idaho Code § 42-222(1)'s limit of its analysis to the water right subject to the transfer, the Department incorrectly asserts "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." *IDWR Respons*e at 14. This, again, is a false characterization of Duffin's arguments.

As explained by Duffin previously, as to consideration of consumptive use or a consumptive use evaluation, the Department has prepared and issued documentation describing its interpretation of the review criteria of Idaho Code § 42-222 (which includes enlargement) in its *Transfer Memo*. R. 0127-0163. The opening sentence of the *Transfer Memo* provides that "[t]he purpose of this memorandum is to provide policy guidance for processing applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, and other applicable law." R. 0127. Where the *Transfer Memo* is an interpretation of Idaho Code § 42-222, its statutory interpretation is entitled to "considerable weight" because IDWR meets all the prongs of the four-prong test applied to determine the appropriate level of deference to be given to an agency construction of a statute. *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 571, 21 P.3d 890, 893 (2001); *see also* R. 0434-0436 (prior briefing from Duffin addressing each prong of the *Hamilton* four-prong test).

Under the section entitled "When a Transfer is not Required," the *Transfer Memo* provides the following relative to changes in consumptive use:

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

R. 0130. As described, consumptive use becomes a component of the enlargement analysis when there is a proposal to change the nature or purpose of use of a water right or if there are specific

(*i.e.*, express) conditions imposing consumptive use limits on the water right (such as on an industrial water right). That is why Idaho Code § 42-222(1) provides that the "director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right."

Conversely, there is no consumptive use consideration or requirement to file a transfer when a farmer switches the type of crop grown (*e.g.*, from barley (a less water consumptive crop) to alfalfa (a more water consumptive crop)). That is the point of the language of Idaho Code § 42-202B(1) which provides that "[c]hanges in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." In a footnote in the *IDWR Response*, the Department points to legislative history of House Bill 636 it claims supports "this interpretation," but it is not entirely clear what interpretation IDWR is advancing. As stated above, Duffin has consistently stated that consumptive use is a relevant consideration when there is a change in the beneficial use (nature of use) of a water right. Where IDWR and Duffin disagree is that Duffin asserts this consideration of consumptive use does not reach to other water rights or entitlements not part of the transfer application, while IDWR argues it does. Accordingly, IDWR's position is that it has significantly broader authority than the plain language of the Idaho Code § 42-222 to imply a "single, combined beneficial use" component into a water right. The question then becomes whether House Bill 636 supports this interpretation. It does not.

The Statement of Purpose for House Bill 636, found on the same hyperlink contained in the *IDWR Response* at 14, provides (with emphasis added):

> This legislation secures the right to make full beneficial use of water rights by clarifying the meaning and role of "consumptive use." By defining authorized consumptive use, this legislation makes it clear that a water right entitles the owner to make any use authorized by the right, without applying for approval of a transfer pursuant to Idaho Code section 42-222. **The owner of an irrigation right, for example, may grow any crop or vegetation at the authorized place of use, and**

> **may change from less water-consumptive crops to more consumptive crops without obtaining approval from the Idaho Department of Water Resources (IDWR). This legislation further secures the right to make full beneficial use by making it clear that, when a water right owner seeks to change an element of the right (e.g. point of diversion, place of use or nature of use), the consumptive use authorized by the right is retained.** Currently, the IDWR attempts to limit water use after certain transfers to "historic consumptive use." This requirement imposes upon the transfer applicant the nearly impossible burden of attempting to identify the crops that have been grown since the water right was perfected, which is often over the last 100 to 140 years. This requirement compounds the time and effort IDWR staff must expend in evaluating such information to determine whether the requirement is satisfied. The clarification provided by this legislation will save many transfer applicants, and IDWR, this unnecessary expenditure of time and money.

Accordingly, just because there is a change in the consumptive use of a crop does not mean an element of a water right has been unlawfully enlarged, the remedy for which would be a notice of violation or demand to file a transfer application. The Court should also note the lack of any reference to consideration of consumptive use of other water entitlements in the above quote, or any hint of consideration of use of canal company shares described in this example. Accordingly, we disagree that this legislative history supports the *Final Order*'s enlargement determination or the Department's defense of it. With 83160, there is no proposal to change the nature or purpose of use for 35-7667. It is authorized for irrigation, and it will continue to be used for irrigation purposes at its proposed new place of use if 83160 is approved.

The Department next asserts that "[i]f by using 'enlargement of 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 right[].'" *IDWR Response* at 15.[1] This argument is misguided because it is based upon a

[1] The *IDWR Response* pluralized water right to be water rights in this quote, but this appears to be a typo. However, given the importance of the statutory interpretation issue, we note it here. Idaho Code § 42-222 provides the following with the term "water right" used in the singular: "The director may consider consumptive use, as defined in

premise that Duffin has not asserted, which is that enlargement can *only* occur with an increase in consumptive use. This is not the case. We have asserted that the new "single, combined beneficial use" element is simply another name for a consumptive use water right element.[2] In terms of the Department's assertion quoted above in this paragraph, ignoring consumptive use when changing the nature of use of a water right is only one way a water right can be enlarged, but a water right can be enlarged in other ways. An enlargement is an increase or expansion of what any of the express water rights elements provide for, including, for example, an increase in the number of irrigated acres authorized under the right or exceeding the diversion rate of the right. *See Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.); *see also Transfer Memo*, R. 0154 (an enlargement occurs "if the total diversion rate, annual diversion volume, or extent of beneficial use (except for nonconsumptive water rights), exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer."). Based on the foregoing, the statutory language argument asserted by the Department is unavailing.

Next, the Department relies upon a water delivery call proceeding case, the *AFRD #2* case, to justify consideration of the historical use of water rights or entitlements that are not listed in the transfer application. *IDWR Response* at 16. However, the *AFRD #2* case is inapposite because it involved a delivery call proceeding, and quite specifically, a constitutional legal challenge to

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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**." (emphasis added).

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

application of the CM Rules applied in the Coalition delivery call proceeding. Just prior to the Department's quoted language in the *IDWR Response* it asserts supports its position, it is clear that this quoted language is specific to the CM Rules:

> **CM Rule 42 lists factors** "the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste…." IDAPA 37.03.11.42.01. Such factors include the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion. *Id.* **American Falls argues the Director is not authorized to consider such factors before administering water rights**; rather, the Director is "required to deliver the full quantity of decreed senior water rights according to their priority" rather than partake in this re-evaluation. (emphasis in original brief). American Falls asserts the Rules are defective in giving the Director, in essence, the authority to negotiate with the senior water right holder regarding the quantity of water he will enforce under a delivery call -- a quantity that in some instances, has already been adjudicated.

Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 876, 154 P.3d 433, 447 (2007) (emphasis added). There are no formal promulgated administrative rules for transfer applications, and consequently, Duffin is not challenging any promulgated administrative rules in this appeal. Accordingly, the Department's application of the reasoning of *AFRD #2* to this matter is not persuasive as its reasoning and rationale is based upon interpretation of specific promulgated administrative rules. Instead of such administrative rules, the plain language of Idaho Code § 42-222 controls in this proceeding, and it limits the enlargement determination on the water right or water rights listed on the transfer application:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change **does not constitute an enlargement in use 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, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve

> reasonably anticipated future needs as provided in this chapter. **The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use <u>of the original water right</u>**. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

Idaho Code § 42-222 (emphasis added).

The Department seemingly knows it is limited as Duffin has asserted, as it next contends the following: "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 **<u>of the original right</u>**." *IDWR Response* at 18 (emphasis added). That's right—and the original right is 35-7667. But then the Department subtly ignores the "original right" language in subsequent argument to expand the scope of Idaho Code § 42-222 by rewriting this statute to excise "the original water right" language from the statute and insert the broader phrase "enlargement in use **<u>of water</u>**." *IDWR Response* at 16 (emphasis added).[3] The Department cannot simply excise statutory language it does not like and insert language it prefers to justify the Hearing Officer's conclusions. Even courts cannot "ignore or re-write the plain language of a statute simply to reach a more desirable result." *Berrett v. Clark Cnty. Sch. Dist. No. 161*, 165 Idaho 913, 928, 454 P.3d 555, 570 (2019).

The enlargement analysis spoken of under Idaho Code § 42-222 and the *Fremont-Madison* case should only be directed at 35-7667. In this case, there is no proposed expansion described in 83160 to the diversion rate (1.08 cfs), maximum diversion volume (215.6 acre-feet), or irrigation of 53.9 acres with *ground water* that is authorized under 35-7667. As described above, the proposed change cannot "constitute an enlargement in use **<u>of the original right</u>**." There is only

[3] The entire sentence in the *IDWR Response* where this quote is taken is: "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."

one right subject to the transfer—35-7667—and the use of this right will be virtually identical at the proposed new place of use. In other words, there will be no material change to the amount of ground water historically pumped from the ESPA under 35-7667 at the new location. For these reasons, there will be no enlargement of 35-7667 proposed under 83160.

Further, there is no proposal to change the nature of use of 35-7667, which is the most common instance where consumptive use of the original water right is considered to avoid enlargement (*i.e.*, the conversion of an irrigation water right to an industrial water right).[4] In other words, there will be no material change[5] in the amount of ground water diversions (and therefore pumping impacts from the diversion of such ground water) if 83160 is approved.

To be clear, the above analysis for 35-7667 described by Duffin is a correct statement of Idaho law because there are no express conditions combining this water right with the ASCC water rights or ASCC shares and/or describing 35-7667 as a supplemental right. Consideration of other water rights is warranted upon submission of a transfer application such as 83160 when (1) the original water right contains supplemental conditions; or (2) other water rights are referenced in conditions on the original right. If these types of conditions were present on 35-7667, then these other water sources—referenced or described in such a hypothetical condition—are fair game for consideration because they are expressly included within the written description of "original water right" referenced in Idaho Code § 42-222. The Department claims that "Petitioners have pointed to no authority which limits IDWR's

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

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

enlargement analysis to water rights owned by the applicant." *IDWR Response* at 22. This is simply false. As set forth above, the plain language of Idaho Code § 42-222 limits the IDWR enlargement analysis in this case to 35-7667, the water right subject to the transfer.

Next, the Department suggests that even with the scope of enlargement review limited by the plain language of Idaho Code § 42-222, this statute provides that IDWR "'shall examine all evidence and available information' in determining whether there is an enlargement in use of the original right." *IDWR Response* at 18. The Department suggests that this language grants it absolute authority to consider whatever it wants in an enlargement review, no matter the property rights involved, or the statutory limitations imposed on its enlargement review. This argument is without merit. If this position is adopted, then there are no limits on what the Department can consider, leaving the Department with unlimited power. There are clearly limits on the Department's discretion. For example, in the case of *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 376 P.3d 722 (2016), the Idaho Supreme Court held that the Director's local public interest discretion is not absolute, but limited by statutory definitions:

> The Director's interpretation of "local public interest" in this case is entitled to no deference because it is inconsistent with the plain language of the statutory definition provided in Idaho Code section 42–202B.
>
> . . .
>
> Nor is the Director's conclusion regarding local public interest supported by the record. The Director cited no evidence relevant to the statutory definition of local public interest in the pertinent section of the final order. **Because the Director exceeded his authority by evaluating local public interest based on factors not contemplated in the statutory definition, the district court did not err in setting aside the Director's conclusion.** We affirm the district court's order setting aside the Director's conclusion that the Districts' application was not in the local public interest.

N. Snake Ground Water Dist., 160 Idaho at 525, 376 P.3d at 729 (emphasis added). Similarly, here, the scope of the Department's enlargement review is not unlimited. To paraphrase the Idaho

Supreme Court, the Hearing Officer "exceeded his authority by evaluating [enlargement] based on factors not contemplated in the statut[e]" in the *Final Order*.

Other than the *Barron*-based arguments which are addressed below, the Department concludes its enlargement legal arguments by asserting for the first time that the standard duty of water condition included in the license for 35-7667 combines this ground water right with the ASCC shares such that approval of 83160 "would undo the effect of this condition and would result in enlarged use." *IDWR Response* at 21. The Department asserts that "[p]etitioners fail to address this condition in their briefing." *Id*. This is true, but only because this argument is being raised for the first time and this license condition was not used as a basis by the Hearing Officer as the basis for his imposition of the "single, combined beneficial use" element of a water right, relying instead on overlapping places of use. As described above, the Department did not defend the overlapping place of use rationale in its briefing, and now appears to have turned to the license condition to justify the Hearing Officer's findings and conclusions. In any event, the Department's arguments are without merit.

The license condition in 35-7667 embodies Idaho's well-known "duty of water" policy, which is use of "that amount of water reasonably necessary to achieve the purpose for which the water was appropriated, and no more." IDAHO WATER LAW HANDBOOK, Fereday et al., at 36 (October 8, 2020 version). In Idaho, this statutory presumption has been codified in one of the application for permit statutes:

> In case the proposed right of use is for agricultural purposes, the application shall give the legal subdivisions of the land proposed to be irrigated, with the total acreage to be reclaimed as near as may be; provided, that no one shall be authorized to divert for irrigation purposes more than one (1) cubic foot of water per second of the normal flow for each fifty (50) acres of land to be so irrigated, or more than five (5) acre feet of stored water per annum for each acre of land to be so irrigated, unless it can be shown to the satisfaction of the department of water resources that a greater amount is necessary.

Idaho Code § 42-202(6). Idaho Code § 42-220, the effect of license statute in the Idaho Code, provides for the same thing:

> provided, that when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one (1) second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor anyone claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, . . .

The plain language of the duty of water condition found in 35-7667 does not combine water rights to make it part of an enlargement analysis. Rather, whatever the source of water available for diversion and use on the Duffin property, it limits the use of a certain amount of water to prevent waste of water. "The duty of water and beneficial use requirements both are central concepts in the corollary rule of Western water law that a water right does not include the right to waste water." IDAHO WATER LAW HANDBOOK, Fereday et al., at 37 (October 8, 2020 version). This rationale is further evident by the fact that the duty of water applies to water users with or without a condition in the water right license: "Each water right is limited by its 'duty of water' even though the license, decree, or other basis for the right may not quantify that amount." *Id*. at 36. It is the use of water that is limited by the duty of water. This means, for example, that a farmer cannot *use* water diverted from a ground water right, water rights leased through the Idaho water supply bank, and leased storage water to apply water that is more than the duty of water. The explanation of this policy is clear as an early Idaho case describes:

> How the individual land owner may have used the water that was delivered to him under his contract is not, in any event, material in this case in the absence of proof that respondent knew, or was charged with notice, that it was being wasted to the possible injury of another land owner. **It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of**

> **water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it.** What constitutes a reasonable use of water is a question of fact, and depends upon the circumstances of each case. No person is entitled to use more water than good husbandry requires. It is the duty of a canal company under the Carey Act, as much as of a user under such canal, not to knowingly permit the waste of water. It is as much against public policy for a canal company to knowingly furnish water in excess of the needs and beneficial use of a consumer, with knowledge that such consumer is wasting it, as it is for the consumer to waste it, and a company which knowingly furnishes water to a consumer in excess of any beneficial use, or with knowledge that it is not being put to any beneficial use and is being wasted by being permitted to seep needlessly upon the lands of another, ...

Munn v. Twin Falls Canal Co., 43 Idaho 198, 207-08, 252 P. 865, 867 (1926) (emphasis added). Accordingly, the duty of water condition contained in the license for 35-7667 is not a condition which combines water rights or limits the water rights or entitlements that can be procured to irrigate property. It does, however, limit the amount of water applied to prevent waste. As described above, the *Transfer Memo* identifies the situations where an enlargement occurs, which is "if the total diversion rate, annual diversion volume, or extent of beneficial use (except for nonconsumptive water rights), exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer." R. 0154. There is nothing in the *Transfer Memo* that identifies or addresses the duty of water condition as a condition that triggers an enlargement review, which is further authority that the duty of water condition does not combine water rights. Nothing in the 35-7667 license condition references ASCC shares or combines water entitlements in any way, even though such language could have easily been included at the licensing stage (or in the SRBA for other water rights). The Department's attempt to ascribe additional meaning for purposes of its enlargement analysis to this standard condition is without merit. For all the above reasons, the license condition in 35-7667 does not implicate enlargement.

Finally, the Department concludes this portion of this response by restating the Hearing Officer's public policy argument, which is that "Duffin's new approach to enlargement opens the door to more than 23,000 new acres being developed in the ESPA." R. 0667. As previously stated, this is a red herring. While it is certainly possible that some transfers like 83160 may be filed in the future, there is no evidence, nor is it reasonable to assume, that all owners of water rights without combined limitation conditions with ASCC shares will file transfers like 83160. Where each irrigation situation is unique, the Hearing Officer's overstatement is not a persuasive legal basis to deny 83160. But most importantly, it is not the Department's prerogative to "ignore or re-write the plain language of a statute simply to reach a more desirable result." *Berrett*, 165 Idaho at 928, 454 P.3d at 570. The Department should not impose its desired policies to decrease or ration water use or irrigated acreage on the ESPA in a transfer proceeding when there is a direct way to address delivery call matters under the CM Rules. Indeed, Duffin is already a full participant in the ESPA mitigation activities as he pays assessments to the Bingham Ground Water District for 35-7667 based on the cfs amount (1.08 cfs). For 2020, he paid $968.53. R. 0638.[6]

Indeed, if there is any public policy issue that is truly implicated, it is the Department's back-door approach to diminishment or even elimination of the value and utility of a ground water right like 35-7667 by imposing unwritten conditions on such rights. This is akin to a taking of private property without just compensation. There are other ways under Idaho law to lawfully regulate ground water withdrawals on the ESPA to protect aquifer levels, which this Court is well aware of (*i.e.*, conjunctive management, ground water management area). Going down a path that may result in a taking of or result in takings-like effects should not be condoned by this Court.

Duffin simply finds himself with two independent sources of water to irrigate his

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

property—ground water under 35-7667 and surface water allotted to his ASCC shares. The separate nature of 35-7667 and Duffin's entitlement to surface water allotted to his ASCC shares is further evident by the fact that these water sources were originally developed separately and independently from one another.

In conclusion, the Hearing Officer's enlargement analysis, which included the imposition of a new "single, combined beneficial use" element of a water right, violates Idaho law. The Hearing Officer is bound by statute and cannot expand the statutorily prescribed enlargement analysis to other water entitlements not subject to the transfer (again, unless there are supplemental conditions or combined conditions contained on the original right). By doing so, the Hearing Officer's actions are "in violation of . . . statutory provisions" and "in excess of the statutory authority of the agency." Idaho Code § 67-5279(3)(a)-(b). Accordingly, this Court should reverse the Hearing Officer's holding of enlargement for all of the above reasons.

B. The Hearing Officer did not correctly apply Idaho statutes and more recent water right interpretation cases and instead relied upon judicial dicta in *Barron*.

IDWR disagrees with Duffin's position on *Barron* and further distances itself from the plain language of the *Transfer Memo*, which IDWR itself promulgated. *IDWR Response* at 22-25. Rather than replicating the entirety of Duffin's prior arguments here, the positions of the parties have already been described. Duffin encourages the Court to review the analysis of *Barron* in *Petitioner's Opening Brief* at 30-40. However, a couple of points asserted by IDWR merit specific response.

The Department asserts that Duffin has mischaracterized the enlargement issues raised and decided in *Barron*. *IDWR Response* at 23. We obviously disagree that we have mischaracterized *Barron*. Duffin's analysis quotes extensively from the *Barron* opinion (with bolded language from the opinion) and the underlying district court's opinion that supports our view that *Barron* is not

the controlling law in this matter. The Department presumed enlargement because the applicant in *Barron* was unable and/or unwilling to provide relevant information that would allow IDWR to perform a forfeiture and enlargement analysis. The critical reason the transfer was denied was because of a failure of the applicant Barron to provide information necessary for IDWR to meet its statutory obligations to analyze the transfer under Idaho Code § 42-222. That was the holding in *Barron*:

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

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

Secondly, the Department argues that even in this Court does decide that the portions of *Barron* relied upon by the Hearing Officer is judicial dicta, "it is still persuasive authority in keeping with the intent and plain language of Idaho Code § 42-222(1)." *IDWR Response* at 24. This argument is not credible given that it directly contravenes the plain language of Idaho Code § 42-222 as discussed herein. And, evidently, the Department even believes the 2001 *Barron* opinion is even more persuasive than the 2009 *Transfer Memo*, which must have taken *Barron* into account.

In reply to this argument, the Department's reading of *Barron* is not consistent with the plain language of Idaho Code § 42-222(1) as set forth above as the enlargement analysis focuses on the "original water right," not other water entitlements which are not listed in the transfer application (again, unless there are supplemental conditions or combined conditions contained on the face of the original right). The plain statutory language must control over *Barron*.

Relative to the *Transfer Memo*, we are candidly astonished at IDWR's position. Counsel for Duffin has represented water right applicants and water right transfer applicants for over 16 years, and promulgated IDWR memos must be followed to further process the applications or the applications will be rejected and returned to the applicant. The *Transfer Memo* guidance cannot be ignored by an applicant before regional office agents, but once challenged on appeal, the Department—the very entity who promulgated the administrative memos—dismiss them as simply a "guidance document" that cannot take precedence over an Idaho Supreme Court opinion. And perhaps even most surprising, the Department minimizes the role of Jeff Peppersack (the author of the *Transfer Memo*, a long-time Department employee, and deponent on the *Transfer Memo* cited in *Petitioners' Opening Brief*) by referring to him as merely an "IDWR staff member." This is unfair to Mr. Peppersack and detrimental to the regulated community. The opening sentence of the *Transfer Memo* provides that "[t]he purpose of this memorandum is to provide policy guidance for processing applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, and other applicable law." R. 0127. Where the *Transfer Memo* is an interpretation of Idaho Code § 42-222, its statutory interpretation is entitled to "considerable weight" because IDWR meets all the prongs of the four-prong test applied to determine the appropriate level of deference to be given to an agency construction of a statute. *Hamilton*, 135 Idaho at 571, 21 P.3d at 893. R. 0434-0436 (prior briefing from Duffin addressing each prong of the *Hamilton* four-prong test, incorporated herein by reference).

Perhaps sensing the problem with this position, the Department continues its argument by alternatively asserting that, in actuality, "there is no conflict between the Transfer Memo and the Court's holding in *Barron*, . . ." *IDWR Response* at 25. The problem is that the

Department's subsequent discussion only selectively quotes from the *Transfer Memo* and ignores other portions of the *Transfer Memo* that are relevant to 35-7667. The Department only quotes from a portion of the *Transfer Memo*'s discussion of stacked water rights, and the *initial* presumption of enlargement if a transfer is filed on only one of those rights. Subsequent portions of the *Transfer Memo*, however, explain precisely how and based on what information this initial presumption of enlargement can be overcome.[7] For example, under the *Transfer Memo*, a stacked water right can still be transferred, without enlargement, if the right proposed for transfer is joined with another primary right provided "the primary rights at the original and proposed places of use provide comparable water supplies." R. 0154. Based on the Department's view and reliance on *Barron*, this type of transfer would not be approved because of enlargement.

The *Transfer Memo* further provides that a supplemental right can be converted to a primary right without enlargement, provided that the "applicant can clearly demonstrate, using historic diversion records for the supplemental right as described in (5) below, or other convincing water use information, that there would be no enlargement of the water right being changed or other related water rights." R. 0155. The "(5)" referred to is a section on historic beneficial use information, which generally provides that data from the most recent five consecutive years is presumed to be sufficient information. R. 0155-0156. Under the Hearing Officer's logic, this type of transfer would *also* not be approvable. Accordingly, in reply to the specific argument from the Department, there is conflict between enlargement principles described in the *Transfer Memo* and the Hearing Officer's interpretation of *Barron*. At the end

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

of the day, enlargement is concerned about expanding the historical diversion of water beyond its prior use (again, allowing for year to year variation based on climate conditions), and the 5-year average use of 35-7667 between 2012 and 2016—the only right subject to 83160—is 122.2 acre-feet. R. 0378-0379.[8] This is the same average amount of water that will be used at the new place of use, meaning there will be no change in effect to the ESPA in the exercise of 35-7667 at the proposed new place of use.

In sum, the *Barron* decision does not control the outcome of 83160, and this Court should reverse the *Final Order* accordingly. Further, there is no discussion in the *Transfer Memo* or elsewhere of a "single, combined beneficial use" or drying up irrigated acres in this document, which is an agency memo interpreting Idaho Code § 42-222 that is entitled to deference by the Hearing Officer and from this Court. And *even if* 35-7667 was a supplemental water right, or even similar to or in the same category as a supplemental right, the *Transfer Memo* authorizes the changing of this right to a primary right because 35-7667 was the exclusive source of irrigation water on Duffin's property until a hard conversion to surface water was accomplished in 2017. R. 0378. Duffin's historic water use on his property is undisputed and described in the *Facts*—there has never been a time where ground water and surface water were used to irrigate the property at the same time. Accordingly, this Court should reverse the *Final Order* and approve 83160 as there is no statutory or other factual basis for imposing the implied "single, combined beneficial use of water" on 35-7667 under Idaho law. Considering the clear legal authority set forth above, the Hearing Officer's findings, inferences, conclusions, and decision which concluded with a determination of enlargement violated Idaho Code § 67–5279(3)(a)-(e).

[8] The water use amounts based on WMIS data for this range, after rounding, is 611 acre-feet. 611 acre-feet divided by 5 years is 122.2 acre-feet.

C. Duffin absolutely did present evidence of historical use of 35-7667 confirming it was used as a sole source of water for irrigation of Duffin's land for at least 5 consecutive years.

Turning now to a factual question, as opposed to the legal questions addressed above, the Department claims Duffin did not present evidence of historic diversion records for 35-7667 to justify the unstacking of 35-7667 from the ASCC shares without enlargement. *IDWR Response* at 26.

In response, we continue to maintain that 35-7667 is not supplemental to the ASCC shares, but the discussion of being able to convert a supplemental right to a primary right underscores the principle that actual diversion and use of water under a water right is the relevant consideration in an enlargement analysis. Accordingly, 35-7667 is eligible for transfer *even if* it had an express supplemental condition or was even assumed to be supplemental because of historic combined use of surface and ground water, because the enlargement analysis focuses on the actual amount of diverted water. Mr. Peppersack's interpretation by IDWR is entitled to deference, as explained above, but it is also logical as it is based on a water balance approach for rights like 35-7667 by ensuring that no material additional rate or volume of ground water is diverted at the new place of use than was diverted at the old place of use. The Hearing Officer's holding, however, asserts a position that does not at all consider the historic amount of ground water diverted at the old place of use. It was based solely on overlapping places of use.

As the *Transfer Memo* provides, there is no enlargement of the water right being changed or other related rights if there is a clear demonstration, with historic diversion records, that the actual water use (as to 35-7667, ground water diversions) will not increase. The Department's assertion that Duffin did not present evidence of the historical use of 35-7667 is simply untrue.

Paragraphs 24-26 of the *Stipulated Facts* contains facts regarding the hard conversion from ground water to surface water that occurred in 2017, as well as IDWR WMIS data from the ground water well that verifies that ground water was solely used to irrigate Duffin's property prior to 2017:

> 24. In 2017, Jeffrey and Chana Duffin converted the place of use for 35-7667 from being irrigated solely with ground water to being exclusively irrigated with surface water allocated to the 60 ASCC shares described herein. To divert surface water allocated to the 60 ASCC shares, Duffin moved and continues to use the same pump for the surface water system that he previously used to divert ground water at the well location.
>
> 25. The ground water system and surface water system on the Duffin property have never been interconnected such that ground water and surface water have never been used simultaneously to irrigate the Duffin property.
>
> 26. Power usage information from the Department's WMIS system confirms the conversion from ground water use to surface water use in 2017 as it contains the following ground water diversion information associated with the Duffin well:

Idaho Department of Water Resources

WMIS
Water Management Information System

Quick Search: For assistance, email WMIS Info

Login

Search Method: WMIS Number
WMIS Number 600524

Search

You are logged in as BJORDAN

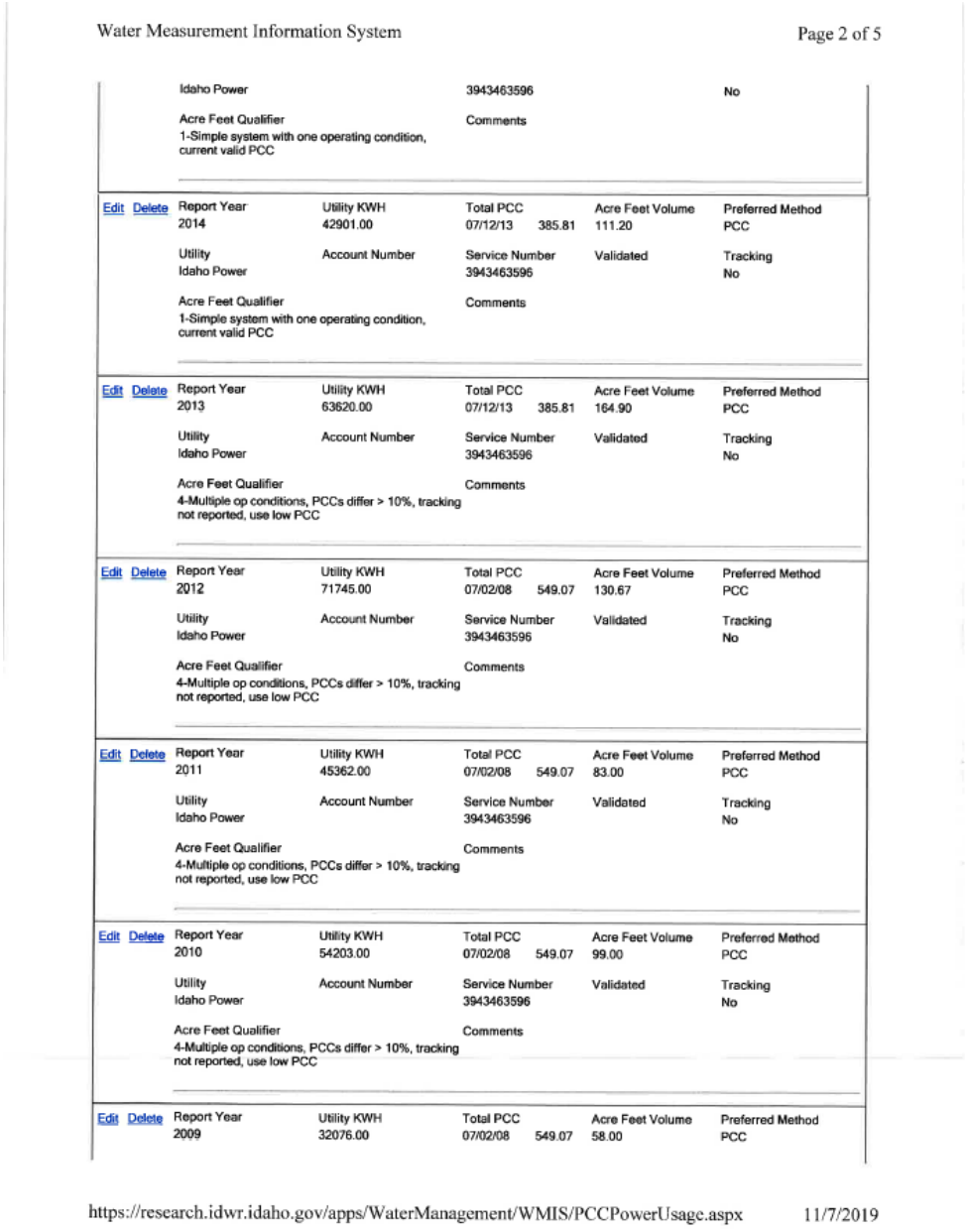
Point Of Diversion PCC Flow Meter Time Clock Alternate Contacts Data Summary Other Logout

PCC Power Usage

You are viewing 600524; A0006459

Click here to insert a new record.

Edit Delete	Report Year 2018	Utility KWH 33456.00	Total PCC		Acre Feet Volume 0.00	Preferred Method PCC
	Utility Idaho Power	Account Number	Service Number 3943463596		Validated	Tracking No
	Acre Feet Qualifier Z-Zero pumpage		Comments Need to verify source of power. See site visit comments. jbh			
Edit Delete	Report Year 2017	Utility KWH 29191.00	Total PCC 07/12/13	385.81	Acre Feet Volume 0.00	Preferred Method PCC
	Utility Idaho Power	Account Number	Service Number 3943463596		Validated	Tracking No
	Acre Feet Qualifier Z-Zero pumpage		Comments See 2016 Comments. jbh --corrected based on site visits. jbh 1-10-2019			
Edit Delete	Report Year 2016	Utility KWH 23310.00	Total PCC 07/12/13	385.81	Acre Feet Volume 60.42	Preferred Method PCC
	Utility Idaho Power	Account Number	Service Number 3943463596		Validated	Tracking No
	Acre Feet Qualifier Q-Other qualifying conditions, see PCC comments for explanation		Comments System has cheanged between 2015 and 2016. will measure in 2017. jbh			
Edit Delete	Report Year 2015	Utility KWH 55469.00	Total PCC 07/12/13	385.81	Acre Feet Volume 143.77	Preferred Method PCC
	Utility	Account Number	Service Number		Validated	Tracking



Water Measurement Information System Page 2 of 5

	Idaho Power		3943463596		No
	Acre Feet Qualifier 1-Simple system with one operating condition, current valid PCC		Comments		
Edit Delete	Report Year 2014	Utility KWH 42901.00	Total PCC 07/12/13 385.81	Acre Feet Volume 111.20	Preferred Method PCC
	Utility Idaho Power	Account Number	Service Number 3943463596	Validated	Tracking No
	Acre Feet Qualifier 1-Simple system with one operating condition, current valid PCC		Comments		
Edit Delete	Report Year 2013	Utility KWH 63620.00	Total PCC 07/12/13 385.81	Acre Feet Volume 164.90	Preferred Method PCC
	Utility Idaho Power	Account Number	Service Number 3943463596	Validated	Tracking No
	Acre Feet Qualifier 4-Multiple op conditions, PCCs differ > 10%, tracking not reported, use low PCC		Comments		
Edit Delete	Report Year 2012	Utility KWH 71745.00	Total PCC 07/02/08 549.07	Acre Feet Volume 130.67	Preferred Method PCC
	Utility Idaho Power	Account Number	Service Number 3943463596	Validated	Tracking No
	Acre Feet Qualifier 4-Multiple op conditions, PCCs differ > 10%, tracking not reported, use low PCC		Comments		
Edit Delete	Report Year 2011	Utility KWH 45362.00	Total PCC 07/02/08 549.07	Acre Feet Volume 83.00	Preferred Method PCC
	Utility Idaho Power	Account Number	Service Number 3943463596	Validated	Tracking No
	Acre Feet Qualifier 4-Multiple op conditions, PCCs differ > 10%, tracking not reported, use low PCC		Comments		
Edit Delete	Report Year 2010	Utility KWH 54203.00	Total PCC 07/02/08 549.07	Acre Feet Volume 99.00	Preferred Method PCC
	Utility Idaho Power	Account Number	Service Number 3943463596	Validated	Tracking No
	Acre Feet Qualifier 4-Multiple op conditions, PCCs differ > 10%, tracking not reported, use low PCC		Comments		
Edit Delete	Report Year 2009	Utility KWH 32076.00	Total PCC 07/02/08 549.07	Acre Feet Volume 58.00	Preferred Method PCC

https://research.idwr.idaho.gov/apps/WaterManagement/WMIS/PCCPowerUsage.aspx 11/7/2019

R. 0378-0379. The 5-year average use of 35-7667 between 2012 and 2016—the only right subject to 83160—is 122.2 acre-feet of ground water. R. 0378-0379.[9] This is the same average amount of water that will be used at the new place of use, meaning there will be no change in effect to the ESPA in the exercise of 35-7667 at the proposed new place of use.

[9] The water use amounts based on WMIS data for this date range, after rounding, is 611 acre-feet. 611 acre-feet divided by 5 years is 122.2 acre-feet.

This evidence is clear. Indeed, so clear that it appears when the Department states the "proposed use will not actually result in an increase from the historic beneficial use," *IDWR Response* at 26, IDWR's use of the words "historic beneficial use" relates back to IDWR's erroneous view that there is a "single, combined beneficial use" of water consisting of irrigated acres. Historic beneficial use described in the *Transfer Memo* refers to the historic use of the right that is proposed to be transferred—in this case, 35-7667—and the historical use data is clear, unequivocal, and unchallenged. The Department asserts "[t]here is no dispute that historically water right 35-7667 and the ASCC shares together irrigated no more than 53.9 acres . . ." That is inaccurate. As described in paragraph 25 of the *Stipulated Facts*, ground water and surface water from ASCC have *never* been used together to irrigate Duffin's property. The pump used to pump the ground water is now on the ASCC canal pumping surface water and the ground water well has been decommissioned. They have not been used "together" to irrigate 53.9 acres. Accordingly, IDWR has not acted within its statutory authority and the *Final Order* is not supported by substantial evidence in the record. The evidence provides precisely the opposite. For these reasons, this Court should reverse the *Final Order* on the question of enlargement.

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

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

served as the primary basis for finding that 83160 does not meet these other transfer criteria. As briefed before the agency, 83160 will not injure other rights, is not contrary to the conservation of water resources, and is in the local public interest. R. 0447-0452.

In response to this, the Department argues "[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." *IDWR Response* at 29 (emphasis added). In support of this claim, the Department defends the Hearing Officer's position that "the current moratorium order in the ESPA was put in place to prevent any new diversion of ground water within the 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.'" *Id.*

First, 83160 is not a proceeding to appropriate a new water right, so the ESPA moratorium is inapplicable. Second, as described several times, approval of 83160 will not allow for a "new diversion of ground water" because 35-7667 has historically been diverting ground water and this amount (approximately 122.2 acre-feet each year) will not change. Duffin's proposed actions under 83160 do not violate the local public interest and conservation of water resources criteria of Idaho Code § 42-222.

83160 does not propose to divert more water under 35-7667 than has been diverted historically, full stop. Indeed, there will be more effect on the overall water supply if an irrigation district or canal company (such as the Coalition members) irrigate more acres under their rights where the irrigation district or canal company has historically irrigated less than the irrigated acres allowed under its rights. The Coalition members would be within their legal rights to increase irrigation in this instance, even with its affects on the water supply. Relative to the exercise of

recognized property rights, the starting point for analysis of whether an action will impact another property owner (water rights are defined as real property under Idaho Code § 55-101) is this recognition:

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

McVicars v. Christensen, 156 Idaho 58, 62, 320 P.3d 948, 952 (2014), *as corrected* (Feb. 20, 2014) (quoting *White v. Bernhart*, 41 Idaho 665, 669–70, 241 P. 367, 368 (1925)) (emphasis added). Duffin holds a water right that he is entitled to utilize within the bounds of its elements, which 83160 does not change. He should be "master of his own" just like the Coalition members or other water users who may increase water use under their rights already authorized. Recognition of property rights is in the local public interest. The Department's conclusions otherwise are unavailing and should be reversed.

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

The Department asserts that Duffin has failed to show prejudice to a substantial right, *IDWR Response* at 29, although it agrees Duffin has a substantial right in the transfer application. *Id*. at 30. The Department further claims that Duffin has "failed to adequately challenge three of the four bases of IDWR's denial of 83160. *Id*. We disagree. As set forth above, Duffin has squarely addressed each of the Hearing Officer's bases for denying 83160. Just because the Department may not agree with these arguments does not mean they have not been addressed.

Overall, the parties essentially disagree on whether the *Final Order* was correctly decided or not, and the outcome of that determination will dictate whether a substantial right has been violated. Duffin therefore incorporates the prior arguments on this issue contained in *Petitioner's Opening Brief*.

III. CONCLUSION

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

Respectfully submitted this 2nd day of February, 2021.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February 2021, true and correct copies of *Petitioners' Reply Brief* were served via Email and USPS Delivery, on the following:

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