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

JAMES WHITTAKER, an individual, and WHITTAKER TWO DOT RANCH LLC, an Idaho limited liability company,

Petitioners,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES, an administrative agency of the State of Idaho,

Respondent,

and

BRUCE and GLENDA MCCONNELL,

Intervenors.

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 84441 IN THE NAME OF BRUCE AND GLENDA MCCONNELL

Case No. CV-30-21-0304

PETITIONERS' REPLY BRIEF

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Judicial Review of the *Order on Exceptions; Final Order Approving Transfer* (dated November 2, 2021)

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James Whittaker and Whittaker Two Dot Ranch LLC (collectively "Petitioners" or "Whittaker"), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Petitioners' Reply Brief*. This reply addresses arguments from *Respondent's Brief* filed by the Idaho Department of Water Resources ("*IDWR Response*") and the *McConnell Response Brief* filed by intervenors Bruce and Glenda McConnell ("*McConnell Response*"), both of which were filed on May 12, 2022. These briefs responded to *Petitioners' Opening Brief* filed by Whittaker on April 14, 2022.

For the sake of clarity and brevity, Whittaker will use terms as defined in *Petitioners' Opening Brief*. To the extent any arguments in the responses are not specifically addressed, Whittaker maintains the positions initially set forth in *Petitioners' Opening Brief*.

I. ISSUES PRESENTED ON APPEAL

Under IDWR's Issues Presented on Appeal section of its response, IDWR sets forth '[t]he Department's formulation of the issues presented is as follows." *IDWR Response* at 12. Similarly, under McConnell's Issues Presented on Appeal section of its response, McConnell asserts the following: "McConnell reframes the issues on review as follows." *McConnell Response* at 11.

There is no rule that allows either IDWR or McConnell to "formulate" or "reframe" Whittaker's issues on appeal, which Whittaker has the right to set forth as the appellant in this matter. Neither IDWR nor McConnell cross-appealed which would allow them to formulate their own issues on appeal. Idaho Appellate Rule 35(a)(4) provides that the appellant sets forth the issues on appeal. If IDWR or McConnell contend that Whittaker's described issues are "insufficient, incomplete, or raise additional issues . . ," then these parties "may list additional issues presented on appeal," Idaho Appellate Rule 35(b)(4), but it does not provide that these parties can "reformulate" or "reframe" the issues Whittaker asserts on appeal. Idaho Appellate

Rule 35 is clear on this point, and IDWR and McConnell have violated this rule. The court should follow Idaho Appellate Rule 35 and disregard IDWR's and McConnell's attempts as a non-appellant to take over the appeal and the issues asserted on appeal by the appellant Whittaker. IDWR and McConnell can choose how they respond to Whittaker's Issues on Appeal, but they cannot recast Whittaker's Issues on Appeal. Accordingly, Whittaker will follow the same order of its Issues on Appeal and address IDWR's and McConnell's response arguments as they relate to Whittaker's Issues on Appeal, which are:

1. Whether the *Order* properly rejected the Hearing Officer's attempt to recast the historic confluence of two streams as the confluence of those streams.
2. Whether, as a matter of law, it is proper for an injury and enlargement analysis to be based upon the historic confluence of two stream channels, or whether the injury and enlargement analysis must be based upon the confluence of those stream channels.
3. Whether the Department's determination that Whittaker's use of water in the Stroud Creek drainage after 2014 (when Whittaker's use was alleged to be "unauthorized") caused the change from the historic confluence to the confluence is supported by evidence in the record, or whether any such actions were undertaken by man prior to 2014 (beginning in the early 1900s as described in the Idaho Supreme Court decision of *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956)) as supported by evidence and testimony in the record.
4. Whether the presence of certain structures and natural features testified to at the hearing supports a finding that the historic confluence of Stroud Creek and Lee Creek was not at the mapped location and whether, upon review, the Court should reverse the Department's reliance on maps and instead rely upon witness testimony of these physical features.

5. Whether the Department erred by not applying the equitable doctrine of laches and whether the Court should now apply this equitable doctrine.
6. In the alternative to the above, whether the Court should grant Whittaker's *Petition to Re-open Hearing and Petition for Site Visit*.
7. Whether the Department's actions have prejudiced Whittaker's substantial rights.

II. LEGAL ARGUMENT

A. The Department did not apply the correct legal standard in this matter. The legal standard for where a stream channel is located, including the confluence of a stream channel with another stream, is that which exists at the present time, regardless of where the channel may have been located in the past.

As an overall matter, the Department attempts to recast this appeal to be exclusively about factual issues in a clear attempt to utilize a more favorable standard of review: "The pivotal issue in this case is factual: Where is the confluence of Stroud Creek with the Right Fork of Lee Creek relative to the Upper Diversion." *IDWR Response* at 1. Contrary to this assertion, the pivotal issue in this case is *legal*, which is whether the injury and enlargement analyses under a transfer must be based on *current* conditions, including where the confluence of two streams is *currently* located.

On appeal, IDWR initially acknowledges that Whittaker's position is correct: "The Department and Whittaker agree that the injury and enlargement analyses for Transfer 84441 must be based on *current* conditions." *Id*. at 29. This is a good starting point. Where the parties diverge is that Whittaker's position is that this statement of current conditions includes the objective current location of a stream confluence, while the Department maintains that the application of the legal standard is left to the Department's discretion based on the factual determination of where the confluence "should" or "would" be. In other words, the Department's position is that the legal standard for a confluence location is not a legal question at all, but entirely a factual one, and where

the confluence is located (for purposes of a transfer injury and enlargement analysis) can be the location of the former location of a stream confluence (*i.e.*, the historic confluence) if the hearing officer elects to designate the former confluence location as the confluence location. This position allows the Department to assert that "[t]he disagreement—on the current location of the confluence—is factual." *Id*. The Department asserts that a hearing officer has discretion as to what legal standard to apply depending on the facts of a case rather than determining current conditions and applying the established legal standard to those facts. The Department's position should be rejected as an abuse of discretion. *See, e.g, Fletcher v. Lone Mt. Rd. Ass'n,* 165 Idaho 780, 784, 452 P.3d 802, 806 (2019) (determining that a district court's application of the wrong legal standard was an abuse of discretion).

Further, since the Department is determined not to use the term "current confluence"—the commonly understood and plain language term describing the location where one stream runs into another—it injects another term into this matter by describing the confluence location as the "unmapped confluence" located between McConnell's diversions. *IDWR Response* at 17, 21, 22, 23, 24, 25, and 31. IDWR should not be entitled to redefine well-accepted and understood terms to soften or obscure the significance of its holdings. IDWR repeatedly calls the historic confluence of Stroud Creek and Lee Creek the "confluence" of these creeks, and it calls the present-day confluence of these creeks the "unmapped confluence" of these creeks. It is IDWR that is "[e]mphasizing semantics[,]" *IDWR Response* at 23, not Whittaker, as the Department asserts.

Cindy Yenter, the former watermaster for Water District 170, who testified as one of McConnell's witnesses at the hearing in this matter, used the correct terminology. She correctly referred to the historic confluence as the historic confluence in this matter:

> I am not convinced that the lower McConnell diversion is below the historic confluence of Stroud Creek and Lee Creek. The lower diversion is below the confirmed confluence of an unidentified stream and Lee Creek. The undefined stream enters Lee Creek from the south and seems to be coming out of the Stroud Creek drainage, but does not appear to be the historic channel of Stroud Creek. Rather, it could be a side channel that developed over time and is presently conveying most of the water from Stroud Creek. The historic channel could not be definitively located. Viewed as a natural hydrologic change, the altered flow path of Stroud Creek does have the potential to affect administration of Lee and Stroud Ck water rights under the prinicipal of futile call. However, futile call was not conclusively determined during the 2020 irrigation season, and certain upstream diversions remain out of compliance with control and measurement requirements.

R. 561 (Exhibit 10). Likewise, the Director referred to the historic confluence as the historic confluence:

> As a result of the hearing officer's conclusions related to the **historic** Stroud Creek stream channel, the hearing officer concluded the **historic** confluence of Stroud Creek and Right Fork of Lee Creek is located upstream of McConnell's current, approved Upper Diversion. *Preliminary Order* at 8-9; *Order Denying Petitions for Reconsideration* at 7. "The 1989 USGS Map and 1954 Map show the Stroud Creek channel extending from the West Springs Ditch area north to a confluence located upstream of McConnell's Upper Diversion." *Order Denying Petitions for Reconsideration* at 7. The hearing officer reasonably relied on maps in the record showing the confluence as it would be without Whittaker's unauthorized diversion. For purposes of this contested case and the approval of Transfer No. 84441, the **historic** confluence of Stroud Creek and Right Fork of Lee Creek is in the southwest comer of the SENE of Section 30, Tl 6N, R25E.
>
> Because McConnell's authorized point of diversion and proposed point of diversion are downstream of the **historic** confluence of Stroud Creek and Right Fork of Lee Creek, approval of the new point of diversion will not injure Whittaker's water rights.

R. 347-348 (emphasis added). Clearly the Director used the correct terminology—"historic confluence" rather than simply "confluence"—in the *Order*. But the former location of the confluence—the historic confluence—of two stream channels is not the confluence of those streams. The confluence of streams is where water from the tributary is currently flowing into the other creek. Contrary to the Department's contentions otherwise, *IDWR Response* at 17 (fn. 5), the plain language of the Director's words in the *Order* correctly uses the term historic confluence, which is consistent with Ms. Yenter's use of this term.

As previously explained, this clarification is important because the *Order* makes the Department's decision in this matter clear, which is that the Department based its Idaho Code §

42-222 injury and enlargement analyses on the historic confluence location of two streams where a channel is no longer present rather than the actual, current confluence of those streams where a channel does exist. *See Petitioners' Opening Brief* at 13-14. Whittaker's position is that, as a legal matter, the *current* location of the confluence of two streams is a *current* condition that injury and enlargement analyses for Transfer 84441 must be based on. IDWR did not follow this legal standard in the *Order*, which is an abuse of discretion and must be reversed on appeal.

The first principle listed in Idaho Code § 42-222(1) concerning evaluation of a transfer application is that "no other water rights are injured thereby." This statute does not contain a definition of injury, or additional detail as to every situation that constitutes an "injury," including situations where a confluence location may have changed. When these unaddressed situations arise, the Idaho Supreme Court has described the process to engage in to determine if related statutes or legal authorities exist that inform the proper interpretation of a generic statutory term. The Idaho Supreme Court did so in the case of *3G Ag, LLC v. IDWR*, Docket No. 48769 (May 18, 2022) (hereinafter, simply "*3G*"),[1] an opinion issued on May 18, 2022, after *Petitioners' Opening Brief* and the response briefs were submitted in this matter. A copy of this opinion is attached hereto as Exhibit 1 for the convenience of the court and parties.

In *3G*, the owner of a ground water right that overlapped with a surface water entitlement (evidenced by shares in the Aberdeen-Springfield Canal Company) filed a transfer application under Idaho Code § 42-222 that sought to unstack the ground water right and change its authorized point of diversion and place of use to a new location. *3G* at 2-3. After stipulating to facts, the parties briefed the question of whether, as a legal matter, the transfer application would result in an "enlargement" under the transfer statute. *Id*. at 4. The hearing officer in that case ultimately

[1] This opinion is available at https://isc.idaho.gov/opinions/48769.pdf.

determined that the transfer application would result in an enlargement, which was affirmed by the district court, and ultimately the Idaho Supreme Court. *Id*. at 21. In its decision to affirm, the Idaho Supreme Court laid out statutory interpretation principles that are directly applicable to this matter.

As to the definition of "enlargement," the Idaho Supreme Court noted, "[t]o begin, the meaning of 'enlargement' under Idaho Code section 42-222(1) is not defined by statute or rule." *Id*. at 8; *see also* IDWR Administrative Rules *available at* https://adminrules.idaho.gov/rules/current/37/ (last visited June 2, 2022) showing there are no administrative rules specific to transfer applications). Similarly, here, the meaning of "injury" under Idaho Code § 42-222 is not defined by statute or rule.

In *3G*, the Court turned to the statute that addressed enlargement principles in a different context—decree of enlargement water rights in an adjudication under Idaho Code § 42-1425(2)—and a prior Idaho Supreme Court opinion (*Fremont-Madison District & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996)) addressing this adjudication statute. The basis for turning to these authorities to interpret "enlargement" in a different context—under Idaho Code § 42-222—was described by the Court:

> Although *Fremont-Madison* dealt with "enlargement" in the context of transferring water rights under section 42-1425(2) and not section 42-222(1), there is no language in either statute that suggests the Idaho Legislature intended "enlargement" to mean something different as between these two transfer statutes.

3G at 9.

Similarly, here, this Court should turn to IDWR's stream channel alteration rules, even though they apply in a different context, because they are nevertheless rules binding on IDWR and they inform the correct legal standard for injury in the context of a transfer application where the location of a stream channel (including its confluence) changes. The Idaho Supreme Court in *3G*

turned to another statute to inform the definition of "enlargement," and administrative rules are another appropriate source to turn to because "IDAPA rules and regulations are traditionally afforded the same effect of law as statutes." *Huyett v. Idaho State Univ*., 140 Idaho 904, 908, 104 P.3d 946, 950 (2004).

When it comes to stream channels and how they are located and evaluated, IDWR's Stream Channel Alteration Rules, under the definition of "stream channel," include a sentence directly addressing the question of where the legally recognized channel (including the confluence) is located:

> The channel referred to is that which **exists at the present time, regardless of where the channel may have been located in the past**.

IDAPA 37.03.07.010.15 (emphasis added).[2] This rule is specific, concise, and precisely on point.

In *3G*, the Court also turned to another case to glean legal principles to support its decision (*Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001)). The Court determined that "[a]lthough *Barron* provides the correct 'enlargement' analysis, [3G] was correct that IDWR's action of imputing a 'single combined beneficial use' limit against a fully licensed water right—that does not expressly contain such a limit—has never been specifically addressed by this Court." *3G* at 20-21. Accordingly, the Court in this matter should also consider relevant principles from existing Idaho cases and other persuasive authority from other jurisdictions on this question of stream channel location.

As previously asserted, there are cases that support Whittaker's legal standard for where a stream channel is currently located. Stream channels move by both natural and artificial means, but even if a change in confluence location was caused by artificial means, the Idaho Supreme

[2] In *Petitioner's Opening Brief*, this rule was cited to as IDAPA 37.03.07.010.12, which was under a prior set of rules. Under the most recent version of the Stream Channel Alteration Rules, the correct citation is to IDAPA 37.03.07.010.15, which were authorized on March 18, 2022.

Court has clearly held that "[a] stream does not lose the attributes of a water course merely because a part of its channel may have been artificially created." *Poole v. Olaveson*, 82 Idaho 496, 503, 356 P.2d 61, 65 (1960) (citing 1 KINNEY ON IRRIGATION AND WATER RIGHTS, p. 489). The use of the altered Spring Creek channel in *Poole* was for drainage water from a church's irrigation, and while the persons who constructed the artificial drainage channel near where Spring Creek's natural channel ran sought to enjoin the church from discharging wastewater into the channel, the Idaho Supreme Court held:

> I.C. § 42-101 provides that "the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed." Substitution of the artificial drainage channel for the natural channel of Spring Creek did not affect the rights of users of the waters of the Creek to the use of its water course to drain away waste waters arising from use of waters of the Creek.

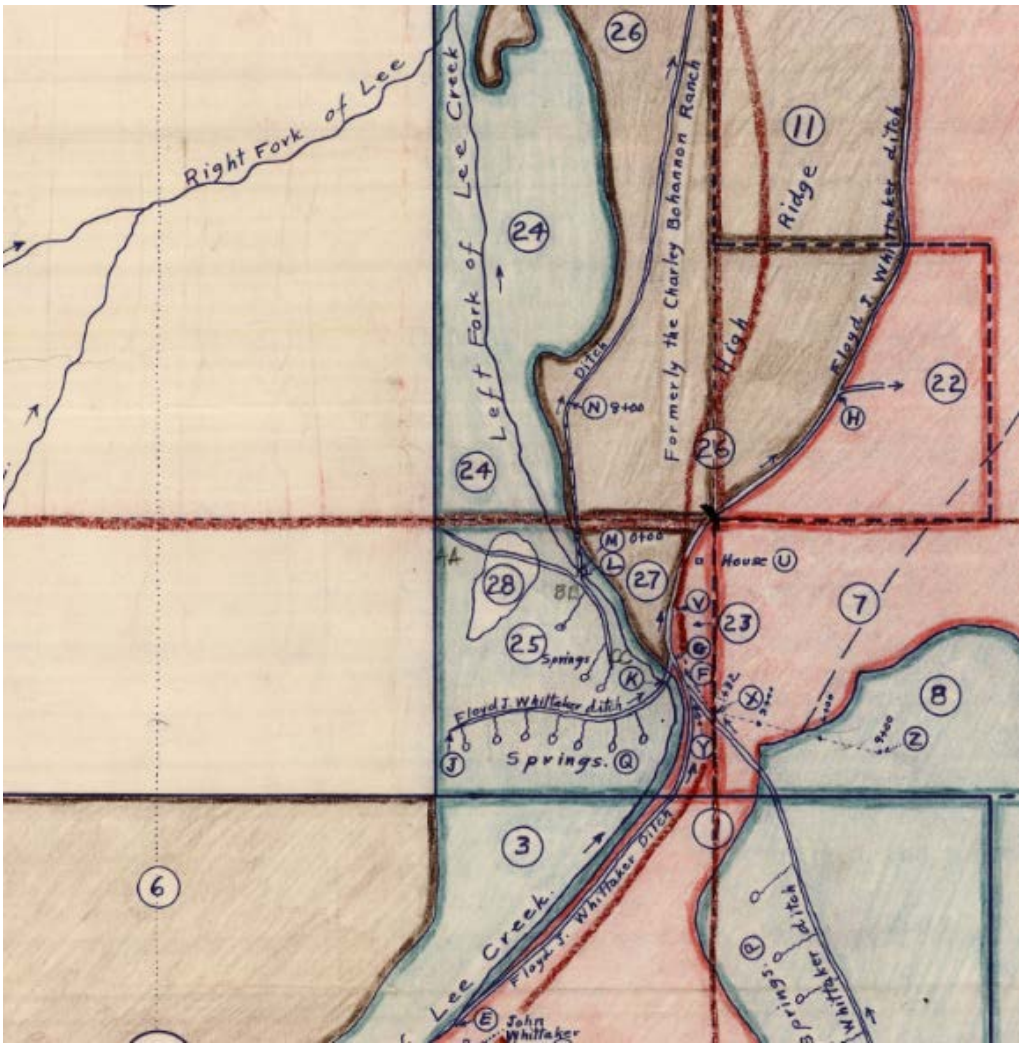
Id. Accordingly, even if the change in confluence location was caused by artificial means,[3] such as changes in the watershed or the authorized diversion and use of water in the watershed for decades as is present in this appeal, the resulting new confluence is the legally recognized confluence. Accordingly, IDWR's injury determination, as a legal matter, is evaluated if there has been a change in the location of a confluence from "that which exists **at the present time**, regardless of where the channel may have been located in the past." IDAPA 37.03.07.010.15 (emphasis added). The statutory interpretation principles articulated in *3G* necessitate that conclusion.

IDWR argues that IDAPA 37.03.07.010.15 is "inapplicable." *IDWR Response* at 25. IDWR asserts that the legal authority rule of the Stream Channel Alteration Rules (IDAPA 37.03.07.000) limits its applicability and "are expressly inapplicable to this transfer proceeding under Idaho Code § 42-222." *Id*. However, in *3G*, the specific context of another legal authority did not limit the

[3] By making this argument, Whittaker does not concede that the change to the confluence location in this matter was artificial.

Court's turning to another statute to inform the definition of enlargement under the transfer statute, as the Court observed "there is no language in either statute that suggests the Idaho Legislature intended 'enlargement' to mean something different as between these two transfer statutes." *3G* at 9. Similarly, here, on the issue of a stream channel confluence location, there is no language that suggests the standard for the location of a stream channel (including its confluence) should be different as between the transfer statute and the Stream Channel Alternation Rules when evaluating a stream's location (including its confluence).

Oddly enough, after arguing the Stream Channel Alteration Rules are not applicable in this matter, IDWR then *turns* to the Stream Channel Alteration rules to support further argument. *IDWR Response* at 25-26 (citing to IDAPA 38.03.07.010.15 in support of argument that this definition excludes Whittaker's ditches even if the rules applied). Turning to these rules as legal authority is correct based on *3G*, as described above, but IDWR's specific argument is misplaced. The confluence location is not currently and has never been part of Whittaker's ditch system. R. 748-49 (Exhibit 154). Where IDWR may be confused is that Whittaker has elected not to pursue on appeal the Department's determination that the channel between the headgate referred to as the "Whittaker Diversion," which is labeled in the 1954 map as "E," and the West Springs Ditch labeled on the map as "K," is a private ditch system. R. 185, 274-77. For reference purposes, here is a clip of the relevant portion of the 1954 map depicting these features:



R. 748-49 (Exhibit 154). There is no depiction of any ditch system near the historic confluence location. Whittaker's ditch system in the Stroud Creek drainage ends at the West Springs Ditch. Accordingly, use of the stream channel definition as it relates to Whittaker's private ditch that exists between the Whittaker headgate at the head of the Floyd J. Whittaker Ditch and the West Springs berm is misplaced as this is not an issue on appeal. Whittaker *has* appealed the question of where the confluence of Stroud Creek and Lee Creek is and the proper legal standard to apply. There is no evidence that Whittaker has ever used any facility below the West Springs Ditch location as part of its ditch system, including the area of this lower Stroud Creek stream channel near the historic confluence location and confluence location.

Turning to *Poole*, it provides for the straightforward principle that "[a] stream does not lose the attributes of a water course merely because a part of its channel may have been artificially created." *Poole v. Olaveson*, 82 Idaho at 503, 356 P.2d at 65 (1960). Rather than address this legal principle directly, IDWR once again attempts to blur the line between a legal and factual matter, asserting that Whittaker's position is "bizarre" and that Whittaker's position is "that an appropriator can compel legal recognition of a new stream channel merely by diverting the original stream into a private ditch—in this case, without a water right authorizing the diversion and regarding of the effect on other appropriators' rights." *IDWR Response* at 27. First, this has never been Whittaker's position. Second, the claim that the exchange described and upheld in *Whittaker v. Kauer* by the Idaho Supreme Court (which caused the hydrologic changes in the Stroud Creek watershed) was unlawful is not correct. Because a response to this argument is factual in nature, when the purpose of this first section is to address the correct legal standard in this matter, IDWR's argument is specifically addressed in Section II.C below.

Continuing further, IDWR adopts the Hearing Officer's position on *Poole*, *IDWR Response* at 28, which is that the facts of *Poole* are distinguishable from the facts present here. However, the facts of *Poole* do not change the important legal principles from this case.

And finally, as to the cases from other jurisdictions that support the principles of *Poole*, IDWR dismisses these as "out-of-state cases from the 1930s and '40s." *IDWR Response* at 28. However, these cases have not been overruled, are consistent with the principles of *Poole*, and are persuasive authority for the court's consideration in this matter.

As set forth above, IDWR's injury determination in this case must be based on the legal standard that the stream confluence is "that which exists **at the present time**, regardless of where the channel may have been located in the past." IDAPA 37.03.07.010.15 (emphasis added). The

location of a stream's confluence, for purposes of an injury and enlargement evaluation, is not a choice between two locations. The principles from the *3G* case discussed above clearly support use of IDAPA 37.03.07.010.15 to inform the legal standard to apply in this case. Accordingly, the *Order* is in violation of applicable provisions of Idaho Code § 67–5279(3). This Court should reverse the *Order* and remand the matter back to the Department with instructions to approve 84441 to allow for McConnell's use of the Lower Diversion, but with an additional condition of approval to subordinate McConnell's use of the Lower Diversion to Whittaker's WR 74-157 just like the Department did for Steven Johnson's water right (Water Right No. 74-1831).

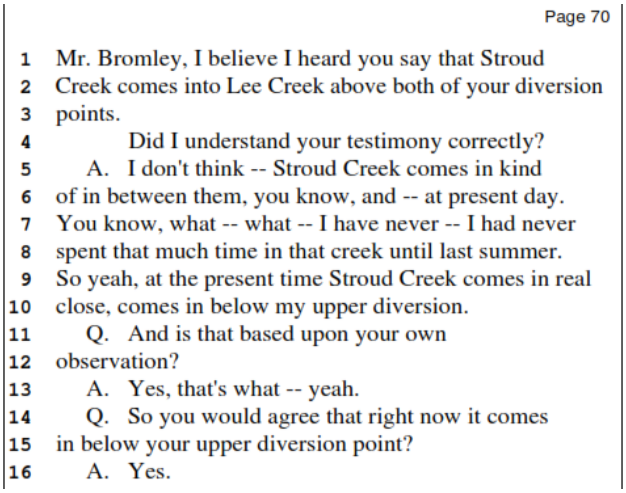
In the event this Court does not, this case will stand for a principle with significant repercussions for future transfer applications as it will serve as a lone exception to what the Department and Whittaker agree upon, which is that the injury and enlargement analyses for Transfer 84441 must be based on *current* conditions. *IDWR Response* at 29. Endorsing this lone exception will open the door for others to argue for use of past conditions and circumstances as the relevant time period to base an injury and enlargement evaluation on in any other context where a hearing officer decides it wants to apply a further exception to the current conditions standard. Upholding the *Order* will also endorse IDWR's position that a hearing officer has discretion as to what legal standard to apply depending on the specific facts of a case instead of doing what decisionmakers are supposed to do, which is to dispassionately apply the facts to the correct legal standard. This will lead to uncertainty in transfer proceedings and have far-reaching negative implications, which this Court should prevent.

B. It is undisputed that the current location of the confluence of Stroud Creek with Lee Creek is below McConnell's Upper Diversion. Accordingly, after applying the correct legal standard to the undisputed facts, there is no dispute that without subordination protection, approval of 84441 will injure Whittaker's WR 74-157.

In *3G*, once the Idaho Supreme Court articulated the legal standard for what an enlargement is, it applied the relevant facts to the enlargement standard, and determined that the transfer in that case would result in an enlargement. *3G* at 12. In this matter, the Court can do the same thing.

IDWR's position is "that the issue of injury in a transfer proceeding presents a question of fact subject to limited appellate review." *IDWR Response* at 26. However, as set forth above, the facts must be dispassionately applied to the correct legal standard. The Department's and McConnell's briefing is primarily devoted to recounting all the facts they believe support the factual finding of where the historic confluence used to be. *IDWR Response* at 16-24; *McConnell Response* at 13-18. At the end of the day, these facts are immaterial if the facts are dispassionately applied to the correct legal standard.

It is undisputed that the current confluence of Stroud Creek and Lee Creek—where water from Stroud Creek enters the Lee Creek channel—is in the SWSW of Section 20, T16N, T16N, R25E, which is below McConnell's Upper Diversion. This was acknowledged by the applicant Bruce McConnell:



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Mr. Bromley, I believe I heard you say that Stroud Creek comes into Lee Creek above both of your diversion points.

Did I understand your testimony correctly?

A. I don't think -- Stroud Creek comes in kind of in between them, you know, and -- at present day. You know, what -- what -- I have never -- I had never spent that much time in that creek until last summer. So yeah, at the present time Stroud Creek comes in real close, comes in below my upper diversion.

Q. And is that based upon your own observation?

A. Yes, that's what -- yeah.

Q. So you would agree that right now it comes in below your upper diversion point?

A. Yes.

Tr. p. 70 LL. 1-16. Other water users agreed with Bruce McConnell's testimony. Tr. p. 272, LL. 2-18; p. 280, LL. 9 through p. 282, LL. 7 (Testimony of Merritt Udy); Tr. p. 330, L. 17 through p. 331, L. 2 (Testimony of Jordan Whittaker); Tr. 551, L. 4 through L. 20 (Testimony of David Tomchak).

Cindy Yenter, the watermaster for Water District No. 170, also described the lower Stroud Creek channel and its confluence location as evidenced by multiple exhibits containing correspondence predating the hearing:

> Based on the investigation conducted yesterday, it appears that water from Stroud Creek may flow into Lee Creek below McConnell's authorized point of diversion.
> R. 755-756 (Letter dated August 6, 2020).

> The lower diversion is below the confirmed confluence of an unidentified stream and Lee Creek. The undefined stream enters Lee Creek from the south and seems to be coming out of the Stroud Creek drainage, but does not appear to be the historic channel of Stroud Creek. Rather, it could be a side channel that developed over time and is presently conveying most of the water from Stroud Creek.
> R. 561 (Exhibit 10).

Further, Merritt Udy testified that this lower channel generally has water present in it, is identified by many as Stroud Creek, and in his opinion, is Stroud Creek. Tr. p. 272, LL. 2-18 (I don't know what else it could be . . . [b]ecause when you walk from the 74-157 down it—it stays in—stays in that channel."); p. 280, LL. 9 through p. 282 LL. 7; Tr. p. 287, LL. 11-14. When Mr. Udy carried out actions to send water down the Stroud Creek drainage, as instructed by Ms. Yenter, the *IDWR Response* even acknowledges that "'24 hours later it showed up in McConnell's lower diversion' but the 'upper diversion didn't seem to be affected.'" *IDWR Response* at 9; Tr. p. 275, LL. 4-9.

Further, and importantly, at the historic confluence location (which the Department has deemed the "confluence" for purposes of this proceeding), there is no existing channel that flows into Lee Creek. Tr. p. 253, LL. 16-23 (Testimony of Cindy Yenter); Tr. p. 603, LL. 20-24

(Testimony of Steven Johnson describing the separation between the lower Stroud Creek Channel and Lee Creek Channel); Tr. p. 280, L. 9 through p. 282, L. 7, and Tr. p. 343 LL. 3-24 (Merritt Udy); Tr. p. 551, LL. 4 through LL. 20 (David Tomchak); Tr. p. 376, L. 10 through L. 23; Tr. p. 379, L. 15 through p. 380, L. 4 (James Whittaker, who installed culverts in the channels near where the historical confluence is depicted).

Against this undisputed evidence, there was no evidence presented at the hearing that the confluence of Stroud Creek and Lee Creek is currently above the Upper Diversion point.

Based on the foregoing application of facts to the correct legal standard, adding a point of diversion below this current confluence will gives McConnell administrative access to water below the current confluence of Stroud Creek and Lee Creek. Applying the proper legal standard to this fact, this is an injury to Whittaker's WR 74-157 and an enlargement of McConnell's rights, as recognized by the Hearing Officer and even McConnell's expert:

> If the confluence is downstream of the Upper Diversion (the only existing point of diversion on the McConnell Rights), then adding a point of diversion downstream of the confluence could result in injury to junior water rights on Stroud Creek and enlargement of the McConnell Rights.

R. 188; *see also* Tr. p. 168 L. 10 through p. 169 L. 10 (Testimony of McConnell expert Scott King). In the case of Steven Johnson, to remedy his injury caused by the addition of the Lower Diversion to McConnell's water rights, the Department subordinated McConnell's use of the Lower Diversion to his water right, which is a clear recognition of this form of injury. R. 193.

Accordingly, upon the dispassionate application of the correct legal standard as set forth above concerning the confluence location, the court should reverse the Department's determination that there will be no injury to Whittaker's WR 74-157 if 84441 is approved. Ultimately, this Court should reverse the *Order* and remand the matter back to the Department with instructions to approve 84441 to allow for McConnell's use of the Lower Diversion, but with

an additional condition of approval to subordinate McConnell's use of Lower Diversion to Whittaker's WR 74-157.

C. Whittaker's diversion of water at the West Springs Ditch was not "unauthorized" or "illegal" prior to 2014 and there is no evidence in the record indicating changes made by Whitaker to the Stroud Creek watershed occurred after 2014 that could have led to a change in the Stroud Creek watershed from the historic confluence location to the current confluence location.

In *Petitioners' Opening Brief*, Whittaker devotes almost ten pages on the question of whether the Department's determination that Whittaker's use of water in the Stroud Creek drainage *after* 2014 (when Whittaker's use was argued to be "unauthorized") is what caused the change from the historic confluence to the confluence, whether such a finding was supported by evidence in the record, and whether such actions were undertaken by man *before* 2014 (beginning in the early 1900s as described in the Idaho Supreme Court decision of *Whittaker v. Kauer*, 78 Idaho 94, 298 P.2d 745 (1956)) as supported by evidence and testimony in the record. *See Petitioners' Opening Brief* at 20-29. These arguments are incorporated here again, but a couple of points bear emphasis in response to arguments made in the response briefs.

As previously explained, in the *Preliminary Order*, the Hearing Officer held the following:

> Stroud Creek no longer flows in its natural channel between the West Springs Ditch and the confluence with Lee Creek. Ex. 151 at 6-7. This section of the Stroud Creek drainage has been dewatered as a result of **Whittaker's unauthorized diversion** of Stroud Creek into the West Springs Ditch.
>
> . . .
>
> In the absence of an existing, clearly-defined and unmanipulated Stroud Creek natural channel, the hearing officer must rely on the best evidence available for

> where the natural channel would exist were it not for the **unauthorized diversion and channel alterations occurring on the Whittaker Two Dot Ranch property**.

R. 186 (emphasis added). In this initial decision, there was no language from the Hearing Officer that defines the timeframe within which the diversion and use of water in the Stroud Creek drainage by Whittaker and/or its predecessors was "unauthorized." Without any described timeframe, the Hearing Officer's language implied that the use of water in the Stroud Creek drainage by Whittaker and/or its predecessors was *always* "unauthorized," dating back to the early 1900s.

When this issue was raised on reconsideration, the Hearing Officer clarified his *Preliminary Order* language by stating that **the *Preliminary Order* does not determine whether Whittaker's historical pre-SRBA (before 2014) use was unauthorized**:

> The *Preliminary Order* does not determine whether Whittaker's historical (pre-SRBA) diversion of Stroud Creek water at the West Springs Ditch was authorized. Nor does it state that Whittaker's actions resulting from the *Whittaker v. Kauer* case were unauthorized.

R. 278. With this clarification, there is a specified timeframe that the Hearing Officer designated, and it is after 2014 (post-SRBA) when Whittaker's use is asserted to be unauthorized. As to the pre-2014 diversions and watershed changes, the Hearing Officer was clear—he did not determine that "Whittaker's actions resulting from the *Whittaker v. Kauer* case were unauthorized." *Id*.

The *IDWR Response* also acknowledges the pre-2014 and post-2014 distinction: "[T]he Department determined in 2014 that McConnell was not authorized to continue the historical practice of conveying Stroud Creek water to the Right Fork of Lee Creek via the Kauer Ditch, as described in the *Whittaker* case." *IDWR Response* at 9. Nevertheless, the Department argues that:

> The Hearing Officer determined the confluence is where Stroud Creek naturally flowed, and naturally would flow, into Lee Creek **but for Whittaker's unauthorized diversion of Stroud Creek at the West Springs Ditch**.

IDWR Response at 16 (emphasis added).

This is simply not accurate. As already explained, prior to 2014, any excess Stroud Creek water (above what Whittaker was entitled to at the Whittaker Diversion) was diverted to Lee Creek through the Kauer Ditch (at its heading located upstream of the Whittaker Diversion) for McConnell's benefit. Whittaker did not use the Stroud Creek water diverted through the Kauer Ditch in any way. More specifically, prior to 2014, if the flow in Stroud Creek exceeded 4.40 cfs (or 2.40 cfs when water rights junior to May 12, 1883 were curtailed) at the Whittaker Diversion, the excess flows in Stroud Creek were diverted through the Kauer Ditch located upstream of the Whittaker Diversion to satisfy downstream rights on Lee Creek (including McConnell's) as described in *Whittaker v. Kauer*. *See also*, Tr. p. 401, LL. 15 through p. 403, LL. 4 (testimony of James Whittaker). The Idaho Supreme Court affirmed the legality of this arrangement, and it is the courts that have the final say on what the law is and what the legal rights of parties are, not the Department. *See, e.g.*, *3G* at 20 (quoting *Marbury v. Madison*, 5. U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.") and *Mead v. Arnell*, 117 Idaho 660, 669, 791 P.2d 410, 419 (1990) ("The Constitution gives both the power and a clear directive to this Court to interpret the law and to determine what administrative rules 'do or do not conflict with statutory law.'").

Against the plain language of the *Reconsideration Order* that no determination of unauthorized use was made as to the pre-2014 use of the Kauer Ditch and whether the water users were authorized to use the Kauer Ditch, which the *Order* adopts, as well as the Idaho Supreme Court's opinion in *Whittaker v. Kauer*, it is simply incorrect to claim that Whittaker's pre-2014 activities in the Stroud Creek drainage were unauthorized and/or illegal. Furthermore, the alterations to the Stroud Creek drainage (*i.e.*, the construction of the berm that replaced the flume, distribution of water based on agreement *Whittaker v. Kauer*, including use of the Kauer Ditch,

etc.) that may have contributed to the change in location from the historic confluence to the confluence were accomplished long before 2014 and were authorized as described in *Whittaker v. Kauer* (issued in 1956). On this point, Merritt Udy testified that the West Springs ditch "looks like it's been there forever." Tr. p. 285, LL.6-9; *see also IDWR Response* at 10 (quoting the same). There is no evidence in the record indicating otherwise.

Based on the foregoing, IDWR's assertions that Whittaker's pre-2014 water use on Stroud Creek was unauthorized is contrary to evidence in the record because is not supported by **any** evidence in the record. Similarly, there is no factual basis for the Department to base its conclusion under the stated basis that the change in confluence location was caused by post-2014 unauthorized water diversions by Whittaker. As described above, the hydraulic changes to the Stroud Creek drainage were in place long before 2014. IDWR's claims otherwise must be rejected.

D. Contrary to assertions made by the Department and McConnell, Whittaker's interest has always only been to protect water from West Springs under WR 74-157, not to protect any alleged right to also divert Stroud Creek water in excess of what Whittaker is legally entitled.

As described above, excess Stroud Creek water (above what the Whittaker Diversion was entitled to receive) was diverted through the Kauer Ditch to Lee Creek under the oversight of the Water District 74Z watermaster up until 2014. Accordingly, since at least 1932, the West Springs Ditch was not historically used to ever divert Stroud Creek water because the Kauer Ditch was in use and any excess flows from Stroud Creek were diverted at the Kauer Ditch for injection into Lee Creek above McConnell's Upper Diversion. Claims that Whittaker has historically illegally diverted Stroud Creek water prior to 2014 at the West Springs Ditch are simply untrue.

As to post-2014 water use in the Stroud Creek drainage, as is to be expected, the curtailment in use of the Kauer Ditch has led to a period of uncertainty because the Kauer Ditch had been in place and used for over 80 years. Even post-2014, however, the watermaster regulated what

Whittaker could divert at the Whittaker Diversion, and any excess flows would disperse through what the Department has now determined are Whittaker's private ditches that eventually discharge into a swampy area upstream of the West Springs Ditch. Tr. p. 403, LL. 7-14 (Testimony of James Whittaker in response to questions from the Hearing Officer). And this 2014 time period is also when the SRBA was completed. Eventually, questions were raised as to whether McConnell was entitled to water through the Stroud Creek drainage because the Kauer Ditch was not described as an authorized point of diversion under any SRBA-decreed water rights.

Over time and after investigation by IDWR officials, Whittaker was asked to allow excess Stroud Creek flows to go past the Whittaker diversion, through Whittaker's private ditch system, through the hilltop split, down the Stroud Creek drainage, and into Lee Creek at its current confluence. Whittaker cooperated with the local watermasters, even though this release of water in 2020 led to erosion issues with the historic water channels below the Whittaker Diversion as documented in Bryce Contor's reports. R. 692-747. These actions to run water down the Stroud Creek drainage are described in the *IDWR Response* at 8-10 (under the heading "Post-decree Administration of Lee Creek Water Rights"), which continued until it was discovered that McConnell's Lower Diversion was not an authorized point of diversion that could lawfully divert water released through the Stroud Creek drainage. Further, Whittaker installed measuring devices and took other actions requested by the watermaster to comply with measurement orders and other watermaster directives. R. 757-62 (photos of headgates and weirs). Even McConnell's Upper Diversion did not have a measuring device installed in it before 2021, R. 184, but that does not mean McConnell's use of water was illegal or that he has unclean hands. IDWR's practice is to work with water users to bring them into compliance, particularly with measuring devices and water regulation.

Nevertheless, IDWR attempts to paint Whittaker as one with "unclean hands." *IDWR Response* at 36. However, there is no evidence in the record that Whittaker was the subject of any notice of violation proceedings before IDWR. In this case, Whittaker is waiting to see what the ramifications will be once this Court (or, if necessary, the Idaho Supreme Court on appeal) issues a decision and how that decision relates to matters in the *Order* not appealed in this matter. Whittaker's interest in 84441 is to protect use of water from West Springs under WR 74-157 from any injury. Whittaker is not claiming, nor has it ever claimed, that it should be entitled to divert or use more Stroud Creek water than it is legally entitled to. Whittaker's protest and participation in this matter has been about protecting the water supply authorized for diversion under WR 74-157. For example, in the 2020 email from Whittaker's counsel to IDWR, he identified "West Springs water" (the source of water under WR 74-157) multiple times in terms of the interest Whittaker sought to protect. R. 504. At the hearing, Jordan Whittaker testified specifically about protecting WR 74-157. Tr. p. 316, LL. 14-24 (specifically identifying WR 74-157). In briefing before IDWR and this court, Whittaker has consistently represented that it does not have an issue with approval of 84441, provided there is subordination protection to WR 74-157 out of West Springs. Never has there been a request to also subordinate McConnell's water rights to a diversion of Stroud Creek in excess of what Whittaker is legally entitled. As a practical matter, a final decision in this matter will dictate several of the legal rights of the parties, and we fully anticipate that there will be follow up from the Department and/or watermaster on what actions, under Idaho law, the Department believes need to be accomplished by various parties depending on the outcome of this appeal.

In this case, IDWR acknowledges—and Whittaker agrees—that "the proceedings are limited to the evaluation of McConnell's transfer application against the criteria of Idaho Code §

42-222(1)." *IDWR Response* at 35. What that means in terms of administration remains to be seen, but Whittaker has every right to argue for an injury and enlargement evaluation based on the current confluence location in this matter as opposed to the historic confluence location. The Department's and McConnell's attempts to paint Whittaker's protest as anything else is not accurate.[4]

E. In addition to and/or in the alternative to the arguments raised above, the Department erred by not applying the equitable doctrine of laches and the Court should now apply this equitable doctrine.

The equitable doctrine of laches has been applied in water cases, and in addition and/or in the alternative to the arguments raised above, should be applied in this matter. Whittaker's position is that this equitable doctrine should have been considered and factored into the Department's decision of whether to subordinate McConnell's water rights to Whittaker's WR 74-157. In other words, the legal doctrine of laches should have been applied against McConnell in this case, not the Department. Because the Department declined to do so, this Court should on appeal.

In response, the Department claims "Whittaker argues the Department should have rejected Transfer 84441 based on the species of equitable estoppel known as laches." *IDWR Response* at 33. This is not accurate. Whittaker has never advocated for a denial of 84441 and has always been in favor of McConnell being able to add the Lower Diversion to his water rights to capture available water at that location for irrigation use, provided that ability is subordinated to Whittaker's WR 74-157. This has been repeated over and over in this matter, most recently in *Petitioners' Opening Brief* at page 40 ("this Court should reverse the *Order* and remand the matter back to the Department with instructions to approve 84441 to authorize McConnell's use of the

[4] For example, McConnell's opening sentence in its response brief is that Whittaker's involvement is "an attempt to sanction their illegal diversion of water tributary to Lee Creek." *McConnell Response* at 1. The Department similarly claims "the historical practices Whittaker seeks to protect—including Whittaker's diversion of Stroud Creek at the West Springs Ditch without a water right . . ." *IDWR Response* at 35.

Lower Diversion, but with an additional condition of approval to subordinate McConnell's use of the Lower Diversion to Whittaker's WR 74-157 . . .").

The Department next asserts that the APA limits this Court's options, including the application of equitable doctrines. *IDWR Response* at 33. The Department cites to a prior administrative case (the *Tanner Lane Ranch, LLLP* matter) that did not involve a transfer, but was a licensing matter involving only the Department and a water right permit holder as the parties to that contested case. *Id*. In that case, the court declined to apply laches against the Department where the case presented a set of facts that are not present in this matter. In this matter, Whittaker's position is that laches should be applied against McConnell, not against the Department, to determine whether subordination is appropriate. This is certainly within Idaho Code § 42-222's broad directive for the Director to "examine all the evidence and available information," a standard that the Idaho Supreme Court examined and affirmed in the *3G* case. *3G* at 13 ("The transfer statute begins with an overarching requirement that IDWR 'shall' examine and consider 'all the evidence and available information' relevant to the transfer application."). Accordingly, it was an error for the Department to not apply laches considering McConnell's inactions as previously briefed and described by Whittaker (*Petitioners' Opening Brief* at 33-36), which are incorporated by reference here. Failure to do so was an abuse of discretion. On appeal, and in the event this court does not find Whittaker's arguments concerning the correct legal standard to apply to be availing, this court should consider and apply laches on the question of subordination of McConnell's rights to Whittaker's WR 74-157.

In *Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994), the Idaho Supreme Court held:

> This Court has previously held that when owners of water rights who, with full knowledge of all the facts, have long acquiesced in the water rights claimed by

> another party so that the party had incurred indebtedness on the strength of title to the water, the owners may be estopped by laches from questioning the rights claimed, even if the claimed rights were originally questionable. *Devil Creek Ranch v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994) (citing *Johnson v. Strong Arm Reservoir Irrigation Dist.*, 82 Idaho 478, 486-487, 356 P.2d 67, 72 (1960); *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 57 Idaho 403, 408-409, 66 P.2d 115, 117 (1937)).

Id. In response, IDWR asserts that this case provides that only the SRBA Court has subject matter jurisdiction to apply laches and limit water rights. *IDWR Response* at 34. However, this position is the result of a too-narrow reading of this case. Certainly, laches can be applied in an adjudication setting, but *Devil Creek Ranch* does not limit the application of laches to only adjudication cases. Where there is a general adjudication, then the adjudication court is the only court with subject matter jurisdiction. In the matter before this court, we are dealing with a transfer application, not an adjudication proceeding. Accordingly, application of laches remains a consideration in this matter for the reviewing district court and is not prohibited as asserted by the Department. As to the Department's decision not to apply laches, the facts supporting Whittaker's position that it should be applied are described in *Petitioners' Opening Brief* without the need to be restated here. The Department's decision to not properly address this issue is an abuse of discretion that should be reversed on appeal.

F. Whittaker maintains its prior position and arguments and has nothing new to add on the petition to re-open the hearing, petition for site visit, and violation of Whittaker's substantial rights.

Whittaker previously addressed the petition to re-open the hearing, petition for site visit, and violation of Whittaker's substantial rights in *Petitioners' Opening Brief* at pages 36-39. There is nothing new to add on these issues in reply to the responses.

G. McConnell's request for attorney fees under Idaho Code § 12-117 should be denied because Whittaker's appeal in this matter is reasonable.

The Director twice delayed issuing the *Order* because he described this matter as one that involves "important legal and policy issues that require careful consideration . . ." R. 339, 342. Nevertheless, despite this objective determination by the Director that this matter involves important legal and policy issues, McConnell has requested an award of fees pursuant to Idaho Code § 12-117, arguing the appeal is not "reasonable." *McConnell Response* at 37-38.[5] As described below, the court should deny McConnell's request for attorney fees because Whittaker's appeal is clearly reasonable.

In support of McConnell's request for fees, McConnell incorrectly characterizes Whittaker's positions in this matter as merely asking this court to reweigh the evidence, arguing that private ditches that intercept Stroud Creek and spring water are entitled to take water ahead of McConnell, and asking the Court to apply *Whittaker v. Kauer* to SRBA partial decrees. *McConnell Response* at 37. However, as described by the Department, "the proceedings are limited to the evaluation of McConnell's transfer application against the criteria of Idaho Code § 42-222(1)." *IDWR Response* at 35.

Whittaker's position is not fairly represented by McConnell. Whittaker's position is that the Department did not apply the correct legal standard under the injury and enlargement criteria relative to the question of whether these evaluations must be based on current conditions, including the current confluence location. Whittaker has provided legal authority in support of this position, including why the correct legal standard for "injury"—which is not defined by statute or rule—in this context should be informed on the question of stream confluence location by an administrative rule of the Department (IDAPA 37.03.07.010.15) that is directly on point. Application of this

[5] IDWR has not requested an award of attorney fees in this matter.

correct legal standard necessarily leads to the subordination of McConnell's water rights to Whittaker's WR 74-157, which is what Whittaker has requested. Without subordination, Whittaker's exercise of WR 74-157 will be disrupted, which Whittaker presented at the hearing. McConnell's characterization of Whittaker's protest and participation in this matter is not accurate. Asking for review on issues such as these, particularly where there are no specific rules, or statutes that address them, is clearly reasonable as explained by the Idaho Supreme Court in *3G*. *3G* at 20. This is particularly the case where IDWR maintains a single exception (relating to stream channel confluence location) to the general principle that "the injury and enlargement analyses for Transfer 84441 must be based on *current* conditions." *Id*. at 29.

McConnell primarily relies upon the case of *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017) in support of an award of fees under Idaho Code § 12-117. *McConnell Response* at 38. However, the decision to award fees in that case relied entirely upon a legal standard for an award of fees articulated in the case of *Rangen, Inc. v. Idaho Department of Water Resources*, 160 Idaho 251, 371 P.3d 305 (2016), which is that the arguments before the agency and district court were the same, and therefore, an award of fees was proper. "Here, the City has asserted the same arguments on appeal as it did before the Director and the district court." *City of Blackfoot*, 162 Idaho at 310-11, 396 P.3d at 1192-93. This attorney fees standard in *Rangen* has now been abandoned by the Idaho Supreme Court as set forth in the *3G* case.

In *3G*, the Department and Surface Water Coalition requested an award of attorney fees under Idaho Code § 12-117. The Idaho Supreme Court rejected *Rangen*'s standard (used in the *City of Blackfoot* case described above) of awarding fees if the arguments made on appeal are the same or substantially the same as the arguments made below. *3G* at 19. *Rangen* stood for the proposition that "repeating the same arguments on appeal, regardless of their basis in law or fact,

was enough to conclude Rangen was acting without any 'reasonable basis in fact or law.'" *Id*. The Idaho Supreme Court went on to "distinguish the *Rangen* standard because it is inconsistent with the plain language set out in Idaho Code section 12-117(1)." This is because "[t]he *Rangen* standard incorrectly renders every nonprevailing legal argument per se unreasonable, regardless of its merits, if it is repeated from the agency level through to this Court." *Id*. at 19-20. The Idaho Supreme Court has returned to the standard where "[t]he reasonableness of a challenge to an agency's conclusions of law, when considering fees under section 12-117(1), turns on the substance of the nonprevailing party's legal arguments." *Id*. at 20.

The 3G court went on to explain why 3G's appeal in that case was reasonable, and these same reasons are present in the appeal before this court:

> In this case, there is no definition of "enlargement" by statute or administrative rule. Moreover, IDWR has not promulgated any rules setting out how it will deal with transfer applications under Idaho Code section 42-222(1) that seek to unstack overlapping water rights. IDWR has issued a Transfer Memo describing a presumption of "enlargement" when unstacking water rights, but this is a non-binding interpretation of section 42-222(1). It does not have the "force of law" on the issue of unstacking and enlargement like the procedure provided by statute in *Castrigno*. *See Asarco Inc. v. State*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003) ("[A]n agency action characterized as a rule must be promulgated according to statutory directives for rulemaking in order to have the force and effect of law."). Although *Barron* provides the correct "enlargement" analysis, the LLC is correct that IDWR's action of imputing a "single combined beneficial use" limit against a fully licensed water right—that does not expressly contain such a limit—has never been specifically addressed by this Court. Although the LLC has not prevailed, it is reasonable to argue that imposing such a limit during a transfer evaluation is an impermissible collateral attack on a fully licensed water right contrary to our decision in *City of Blackfoot*.
>
> **Legal challenges to the conclusions of law made by an agency, when not preordained by statute, case law, or rule, is a healthy impetus to motivating agencies into promulgating more helpful and gap-filling rules.** As the LLC explains, "[t]he resolution of the issues raised in this appeal [is] important because it will provide clear answers for the regulated community and the attorneys and consultants that represent them." While the LLC's legal arguments did not prevail, the LLC still brought an appeal that had a reasonable basis in law. Accordingly,

> IDWR and the Coalition are not entitled to attorney fees under Idaho Code section 12-117(1).

3G at 20-21 (emphasis added). In the matter before this court, this legal challenge is to challenge the conclusions of law made by an agency—IDWR—concerning standards that are not preordained by statute, case law, or rule. This court should not disincentivize the "healthy impetus" for such appeals by awarding fees in this case.

The decision for an IDWR hearing officer to vary from the established principles that a transfer application is to be evaluated based on current conditions and not past conditions is unprecedented. There are no statutes, cases, or rules that expressly provide the Department with that authority. Indeed, Whittaker's position is that an applicable IDWR rule establishes a legal standard that *prohibits* what the Department has done. It is obviously unknown who will prevail in this appeal, but that is beside the point when it comes to a request for an award of attorney fees under Idaho Code § 12-117. The question is whether the appeal, even if unsuccessful, is reasonable. Given the standards articulated in *3G*, and the similar situation the matter before this court has to the *3G* matter, McConnell's request for fees under Idaho Code § 12-117 must be denied because Whittaker's appeal is reasonable.

III. CONCLUSION

For the reasons set forth above, this Court should reverse the *Order* and remand the matter back to the Department with instructions to approve 84441 (which will authorize McConnell's use of the Lower Diversion), but with an additional condition of approval to subordinate McConnell's use of the Lower Diversion to Whittaker's WR 74-157 just like the Department did for Steven Johnson's water right (Water Right No. 74-1831). Alternatively, the Court should reverse the Department's decision not to re-open the hearing and for a site visit and remand the matter to the Hearing Officer for further proceedings consistent with the Court's opinion. Finally, this Court should deny McConnell's request for attorney fees under Idaho Code § 12-117.

Respectfully submitted this 2nd day of June, 2022.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2022, one true and correct electronic copy of *Petitioners' Opening Brief* was served via iCourt electronic service, pursuant to the Idaho Rules for Electronic Filing and Service, and email on the following:

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EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 48769

3G AG LLC, an Idaho limited liability company,	)	
Petitioner-Appellant,	)	
v.	)	
IDAHO DEPARTMENT OF WATER RESOURCES,	)	
Respondent,	)	
and	)	**Boise, February 2022 Term**
A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY,	)	**Opinion filed: May 18, 2022**
Intervenors-Respondents.	)	**Melanie Gagnepain, Clerk**
IN THE MATTER OF APPLICATION FOR TRANSFER NO. 83160 IN THE NAME OF JEFFREY AND CHANA DUFFIN.	)	

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bingham County. Eric J. Wildman, District Judge.

The judgment of the district court is affirmed.

Holden Kidwell Hahn & Crapo, P.L.L.C. Idaho Falls, for Appellants. Robert L. Harris argued.

Lawrence G. Wasden, Idaho Attorney General, Boise, for Respondent Idaho Department of Water Resources. Michael C. Orr argued, and Garrick L. Baxter appeared.

Baker Rosholt & Simpson, LLP, Twin Falls, for Intervenors A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

Fletcher Law Office, Burley, for Intervenors American Falls Reservoir District #2 and Minidoka Irrigation District. William Kent Fletcher argued.

STEGNER, Justice.

This appeal concerns the denial of an application to transfer a ground water right that currently benefits 53.9 acres which also has an entitlement to surface water rights. The transfer application sought to unstack these two overlapping rights by transferring the ground water right to irrigate a different property, which would double the number of acres being irrigated. The Idaho Department of Water Resources ("IDWR") denied the transfer because, among other reasons, approving it would cause an "enlargement" in the use of water as proscribed by Idaho Code section 42-222(1). On judicial review, the district court agreed with the denial and affirmed. We affirm the decision of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal centers around IDWR's denial of Application 83160, brought by Jeffrey and Chana Duffin ("Duffin"), to transfer the licensed ground water right 35-7667 (the "ground water right" or "35-7667") to a different parcel of land. During the appeal of this case, 3G AG LLC ("the LLC") "purchased from Duffin the property where water right 35-7667—the water right subject to Transfer No. 8316 which is the subject of this appeal—is located." As a result of the transfer of ownership, the LLC sought to substitute itself for Duffin. Because there was no objection to the substitution, it was allowed.[1] The material facts leading up to the denial are undisputed.

In 1977, IDWR granted a ground water permit for 35-7667 to irrigate the existing place of use in this appeal (i.e., the 53.9 acres). The application for the permit reported that there were no other water "rights" used for the "same purposes" at this place of use. IDWR's analysis of the application reached the same conclusion. The then owner of the 53.9 acres eventually submitted proof of beneficial use for the ground water permit on June 11, 1992. That date became the priority

[1] Pursuant to our authority under Idaho Appellate Rule 6 to amend the caption of an appeal, we have amended the caption in this case to reflect the substitution of Duffin by the LLC.

date, and four years later, IDWR examined whether the permit for 35-7667 should be processed into a licensed ground water right. During this time, IDWR's field exam notes explained that the same place of use for 35-7667 (the 53.9 acres) was also benefited by a surface water entitlement through 60 shares in the Aberdeen-Springfield Canal Company (the "surface water entitlement"). Nevertheless, IDWR's field report later documented that there were no overlapping water "rights" benefiting the 53.9 acres.

In 1993, IDWR ordered a moratorium on processing applications for new surface or ground water diversions in the Eastern Snake River Basin—the same area where the 53.9 acres is located. The moratorium, which is still in effect today, explains that

> [g]round water aquifers have become stressed by the reduction in natural recharge due to changes in diversion and use of surface waters throughout the basin and by the increased volume of pumping occurring to augment scarce surface water supplies during the drought period. The lowered water levels in the aquifers across much of the Snake River Basin in southern Idaho have resulted in numerous wells, often those used for domestic and municipal water supply purposes becoming unusable. Lowered ground water levels also reduce spring and base flow discharge needed to maintain stream and river flows.

In 2001, IDWR granted a license for the ground water right. The license stated, among other things, that it had a maximum diversion rate of 1.1 cubic feet per second; it had a maximum diversion volume of 220-acre feet; the source was ground water; and the beneficial use was irrigation. The license also contained a condition that "[t]his right when combined with all other rights shall provide no more than 0.02 [cubic-feet per second] per acre nor more than 4.0 [acre-feet annually] per acre at the field headgate for irrigation of the lands above."

Seven years later, in 2008, the Idaho Legislature adopted IDWR's comprehensive management plan for the Eastern Snake Plain Aquifer ("the ESPA"). This plan was prepared by IDWR in response to "declining aquifer levels and spring discharges and changing Snake River flows that resulted in insufficient water supplies to satisfy existing beneficial uses." One objective of the plan is to "reduce the withdrawals" from the ESPA. Another objective is to "increase recharge" to the ESPA. Most of the recharge water comes through the Snake River, or its tributaries. This includes surface water recharge through the Aberdeen-Springfield Canal Company's water entitlements. In sum, the plan governs roughly 2.1 million irrigated acres on top of the ESPA. Of these acres, approximately 871,000 acres are irrigated from surface water, 889,000 acres are irrigated from ground water, and 348,000 acres are irrigated from both sources.

One year after implementing the plan, IDWR issued a guidance document for processing water right transfers under Idaho Code section 42-222(1) (the "Transfer Memo"). The Transfer Memo explains that a transfer application, under section 42-222(1), is required whenever a water right holder desires to change one, or multiple, water right "elements" on a licensed or decreed right. This includes changes to the point of diversion or place of use. The Transfer Memo goes on to explain the requirements for an acceptable transfer application. It also elaborates upon what may constitute "enlargement" in use of a water right. Part of its guidance as to whether approving a transfer will enlarge the use of a water right addresses "stacked" or overlapping water rights benefiting the same place of use.

In 2012, Duffin acquired ownership of the property to which the ground water right and surface water entitlement attached. Three years later, in 2015, IDWR approved Duffin's application to divide the ground water right so that the place of use was identified as the 53.9 acres that the right presently benefits. The license was amended to reflect this change, but otherwise remained the same. Five years after that, in 2017, Duffin ceased using the ground water right to irrigate the 53.9 acres and instead began exclusively using the surface water entitlement.

Two years later, in 2019, Duffin submitted Transfer Application 83160 to change the point of diversion and place of use for the ground water right to benefit a different property. In the application, Duffin reported that the existing place of use (the 53.9 acres) would still be irrigated with the surface water entitlement if the transfer were approved. The local watermaster did not oppose the proposed transfer. However, a notice of protest to the transfer was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively "the Coalition"). The Coalition objected to the transfer, arguing that approving it would cause an enlargement in use of the ground water right and injure existing water rights.

After numerous status conferences, Duffin and the Coalition agreed that an evidentiary hearing was not needed because the material facts were not in dispute. Subsequently, the parties filed a statement of stipulated facts. From this, the hearing officer requested briefing on how to resolve the sole legal question: whether Duffin's application satisfied the transfer criteria set forth in Idaho Code section 42-222(1) such that the transfer must be approved. After the parties

submitted their briefing, the hearing officer issued a preliminary order denying Duffin's application to transfer the ground water right.

Duffin petitioned for reconsideration. The hearing officer granted the petition in part and issued an amended preliminary order. However, this order still denied Duffin's transfer application. In August of 2020, the amended preliminary order became final after it was adopted in whole by the director of IDWR (the "Final Order"). The Final Order made the following findings, among others, based on the stipulated facts: the ground water right has been exclusively used to irrigate the existing place of use (the 53.9 acres) since at least April 1, 1980; the same place of use is also benefited by a surface water entitlement that has been appurtenant to it since at least 1970; the two rights have never been used together in the same year to irrigate the existing place of use; the ground water right has been used to irrigate the existing place of use up to 2017; and from 2017 to the present day, the surface water entitlement has been used to irrigate the place of existing use.

The Final Order applied these facts to this Court's discussion of the term "enlargement" in *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001). *Barron* dealt with a transfer application proposing to unstack overlapping ground and surface water rights. As discussed below, the Final Order reasoned that, under *Barron*, approving the transfer would cause an enlargement in use of the ground water right and injury to other water rights. In addition, approval was not consistent with the conservation of water resources in Idaho or the local public interest. From this, the Final Order concluded that the transfer must be denied because the criteria in Idaho Code section 42-222(1) had not been met.

Roughly one month later, in September 2020, Duffin petitioned the district court for judicial review of the Final Order. Pursuant to a December 9, 2009, administrative order from this Court, the matter was assigned to the district judge presiding over the Snake River Basin Adjudication. The district court permitted the Coalition to intervene in Duffin's petition, and in February of 2021, the court held oral argument. Approximately two weeks later, the district court issued a memorandum decision affirming the Final Order and IDWR's decision to deny Duffin's transfer application. The district court, among other things, agreed with the Final Order's reliance on *Barron* as dispositive and found that approval of the transfer would cause an "enlargement" in use of the ground water right and injury to other water rights. Thus, the district court concluded

that Duffin's application for transfer under Idaho Code section 42-222(1) was appropriately denied by IDWR.

Duffin timely filed a notice of appeal.

II. STANDARD OF REVIEW

Judicial review of a final decision or order from the director of IDWR is authorized by Idaho Code section 42-1701A(4) and governed by the provisions and standards under the Idaho Administrative Procedure Act ("IDAPA"). *See* I.C. §§ 67-5201 to -5292.

In an appeal from the decision of a district court acting in its appellate capacity under IDAPA, we review the agency record independently of the district court's decision. *A & B Irr. Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012). We will not "substitute [our] judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). However, we exercise *de novo* review over questions of law. *In Re SRBA Case No. 39576 Sucbase No. 37-00864*, 164 Idaho 241, 248, 429 P.3d 129, 136 (2018).

When an agency is required by the provisions of IDAPA, or by other provisions of law, to issue an order, a reviewing court shall affirm the agency action unless the court finds that the agency's "findings, inferences, conclusions, or decisions" are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3).

If the reviewing court does not affirm the agency action, "it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." *Id*. However, even if one of the conditions in section 67-5279(3)(a)-(e) is met, a reviewing court should still affirm the agency action "unless substantial rights of the appellant have been prejudiced." *A & B Irr. Dist.*, 153 Idaho at 505–06, 284 P.3d at 230–31 (quoting I.C. § 67-5279(4)).

III. ANALYSIS

This appeal hinges on the interpretation of "enlargement" under Idaho Code section 42-222(1) as it relates to a transfer application proposing to unstack overlapping ground and surface water rights. The LLC, which substituted for Duffin, maintains that IDWR's decision to deny the transfer application violates applicable statutory provisions and is in excess of its statutory

authority. *See* I.C. § 67-5279(3)(a), (b). All material facts are undisputed. Accordingly, the LLC's challenge to the denial of its transfer application presents a pure question of law.

A. Approving the transfer application would cause an "enlargement in use" of the ground water right under Idaho Code section 42-222(1) and *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001).

Idaho Code section 42-222(1) sets forth the criteria used by IDWR to evaluate applications to transfer water rights whenever a right holder desires to change a water right's "point of diversion, place of use, period of use[,] or nature of use[.]" IDWR must furnish the form required to complete a transfer application. I.C. § 42-222(1). When evaluating an application, the statute instructs IDWR to, among other things, examine "all the evidence and available information" and to approve the application *unless* approval would: (1) injure other water rights; (2) constitute an "enlargement in use of the original right"; (3) be contrary to the conservation of water resources within the state of Idaho; or (4) be contrary to the "local public interest[.]" *Id*.; *see also* I.C. § 42-202B(3) (defining "local public interest"). IDWR may consider "consumptive use" as one factor in its "enlargement" evaluation. I.C. § 42-222(1); *see also* I.C. § 42-202B(1) (defining "consumptive use").

In this case, IDWR, in its Final Order, denied the application to transfer the ground water right after concluding approval of the transfer would: (1) constitute an enlargement in use of the ground water right; (2) injure other water rights in either the Upper Snake River system or the ESPA; (3) be contrary to the conservation of water resources in the state of Idaho; and (4) be contrary to the local public interest as the proposed point of diversion is within the 1993 moratorium aimed at recharging the ESPA and concomitantly reducing withdrawals. The linchpin of IDWR's decision is that approval of the transfer would constitute an "enlargement" under this Court's enlargement and unstacking analysis in *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001).

On appeal, the LLC rejects the theory of enlargement in *Barron* as *dicta* and advances its own theory of what an "enlargement" analysis should look like under Idaho Code section 42-222(1). Under the LLC's theory, the plain language of section 42-222(1) limits IDWR to examining the four corners of the license or decree of the water right to be transferred (the "original right") when determining whether approving the transfer will cause a prohibited enlargement. The LLC maintains that IDWR erred by examining all relevant water rights or entitlements implicated

by the transfer, and imputing limitations or conditions on the right to be transferred that do not appear on the face of its license.

The LLC points out that the license for the ground water right does not contain any express limitations on its beneficial use apart from a limitation memorializing the "duty of water" under Idaho Code section 42-220. From this, the LLC maintains that IDWR improperly added a "single combined beneficial use" limit to the ground water right, in its relationship to the surface water entitlement, that does not exist within the four-corners of the ground water right's license. If this "error" is corrected, the LLC argues that unstacking the ground water right and transferring it to a new parcel will not cause an "enlargement" under section 42-222(1). This is because the ground water right, without any limitations on its face to combine it with the surface water entitlement, is a stand-alone right that can be freely transferred.

In other words, the LLC maintains that whether the ground and surface water rights are *in fact* stacked and benefit the same 53.9 acres is not relevant to the "enlargement" analysis under section 42-222(1) because the license for the ground water right does not provide that this overlap limits the ground water right in any way. The LLC claims that holding otherwise would collaterally add limits to a previously licensed water right. In addition, the LLC points to the Transfer Memo as supporting its theory of enlargement and argues the Transfer Memo was improperly denied "considerable weight" as an agency interpretation of Idaho Code section 41-222(1).

In response, IDWR and the Coalition advance essentially the same position they did below: that *Barron* provides the correct "enlargement" analysis in this context, and that it was properly applied. For the reasons discussed below, we reject the LLC's new theory of enlargement as contrary to the plain language of Idaho Code section 42-222(1) and our decision in *Barron*. Accordingly, we affirm the district court's decision that the Final Order correctly denied the proposed transfer.

To begin, the meaning of "enlargement" under Idaho Code section 42-222(1) is not defined by statute or rule. *See* I.C. §§ 42-201 to -250; IDAPA 37.01.01.000–.999. In *Fremont-Madison Irrigation District & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, we defined "enlargement" in the context of water right transfers under Idaho Code section 42-1425(2). 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996). "Section 42-1425(2) of the Idaho Code provides for a transfer of an existing water right for any change made prior to the date of commencement of the [Snake River Basin Adjudication], regardless of compliance with sections 42-108 and 42-222,

'provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.'" *Id*.

In *Fremont-Madison*, we noted that section 42-1425(2) did not define the term "enlargement." *Id*. Nevertheless, we said "enlargement" is understood "to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means." *Id*. (citing I.C. § 42-1426(1)(a)). An "enlargement" can also include an "increase in the volume of water diverted" as a result of the transfer. *Fremont-Madison Irr. Dist. & Mitigation Grp.*, 129 Idaho at 458, 926 P.2d at 1305. Thus, there are two types of enlargement: (1) "an increase in the number of acres irrigated"; and (2) "an increase in the rate of diversion or duration of diversion." *Id.* Although *Fremont-Madison* dealt with "enlargement" in the context of transferring water rights under section 42-1425(2) and not section 42-222(1), there is no language in either statute that suggests the Idaho Legislature intended "enlargement" to mean something different as between these two transfer statutes.

In *Barron*, we specifically addressed both types of "enlargement" in the context of a transfer under section 42-222(1). 135 Idaho at 419–20, 18 P.3d at 224–25. In that case, Barron proposed to transfer a surface water right by unstacking it from an overlapping ground water right at the existing place of use, and then establishing two new points of diversion—one fifteen miles upstream and the other eighty miles downstream. *Id*. at 415, 18 P.3d at 220. At the place of existing use, the surface water right overlapped with, and benefited, the same 311 acres as the ground water right. *Id*. The two "enlargement" issues in *Barron* were whether: (1) the transfer would cause an increase in the rate or duration of diversion at the two proposed points of diversion; and (2) whether unstacking the overlapping surface and ground water rights would cause an increase in the total number of acres irrigated, i.e., an increase in overall beneficial use. *Id*. at 419–420, 18 P.3d at 224–25. Under the first issue, we affirmed the decisions below that Barron failed to provide any meaningful evidence regarding the period of use, amount of water to be diverted or consumed, or whether and to what extend the ground water right was used to supplement the surface water right. *Id*. at 419, 18 P.3d at 224. Thus, *one* reason for the denial was because Barron did not carry his burden to show that approving the transfer would not cause an increase in the rate of, or duration of, overall diversion. *Id*.

Under the second issue, which is relevant to this case, we also affirmed the decisions below that, as a matter of law, unstacking the overlapping water rights would cause an "enlargement" if

the result is that the two rights would irrigate more acres than are benefited at the existing place of use. *Id*. at 420, 18 P.3d at 225. Barron did not challenge this theory of "enlargement" under Idaho Code section 42-222(1). *See id*. Instead, Barron contended that he provided sufficient evidence that the surface water right was a "stand alone" right and that the existing place of use, the 311 acres, would be "farmed as dry land" to prevent any enlargement once the surface water right was transferred to the proposed place of use. *Id*. However, we rejected this argument because Barron did not own or exercise control over the existing place of use he claimed would be relegated to dry farming after the transfer. *Id*. Barron's proposal was "in reality an attempt to shift the burden of preventing enlargement to [] IDWR, yet it is Barron and not [IDWR] who bears this burden." *Id*.

Due to the relationship of the stacked rights, *Barron* held that the surface water right was subject to the overlapping ground water right's "utilization." *Id*. We concluded Barron did not provide sufficient evidence to show unstacking these rights would not cause an enlargement through an increase in total acres irrigated. *Id*. From this, we affirmed the denial of Barron's transfer application after reaching the merits of *both* enlargement issues under Idaho Code section 42-222(1). *Id*. Accordingly, IDWR and district court were correct to conclude *Barron* provides precedent for a transfer application seeking to unstack overlapping water rights. Contrary to the LLC's arguments, *Barron*'s theory of enlargement under section 42-222(1) in the context of unstacking is not *dicta*. Even if it were, we conclude that it is a correct statement of law.

In applying *Barron* to the transfer application in this case, the Final Order concluded that the proposed change to the ground water right would result in "an increase in the number of acres irrigated, which is an enlargement" because the ground water right and surface water right would provide irrigation for 107.8 acres, which would double the number of acres currently being irrigated with the "stacked" rights:

> The proposed change to water right 35-7667 [ground water right] will result in an increase in the number of acres irrigated, which is an enlargement, as noted above. Currently, water right 35-7667 [ground water right] and the ASCC shares [surface water entitlement] 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 [ground water right] and the ASCC shares [surface water entitlement] 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 [ground water right] and must be denied pursuant to Idaho Code § 42-222(1).

(Italics added.)

The Final Order also concluded that the dispute over whether the ground water right should be considered a "primary" or "supplemental" water right (i.e., secondary to the surface water right) does not need to be resolved because the "enlargement analysis would be identical in either case." This is because the ground water right and the surface water right "each represented a full water supply for the irrigation of the existing 53.9-acre place of use, but the total combined beneficial use for the two sources has always been no more than 53.9 irrigated acres." If the transfer application is approved, the LLC would be authorized to exercise its "water rights in a way that will result in 107.8 acres being irrigated for the full irrigation season, instead of the 53.9 acres which are currently irrigated under the rights." Because the transfer application did not propose to divide the existing beneficial use between the ground water right and surface water entitlement, IDWR concluded "there is no need for an analysis of the historical primary or supplemental use under the rights."

On judicial review, the district court agreed, reiterating IDWR's position that approving the transfer would necessarily result in doubling the existing beneficial use as authorized between the stacked rights:

> Simply stated, the transfer would permit the Duffins to do what they cannot do now—use the full water supply under each overlapping water right at the same time for purposes of irrigation. The ability to use the full amount authorized under the ground water right for irrigation *even if* they are also irrigating the original place of use with their ASCC shares is an enlargement of the ground water right. Without the transfer, the Duffins would be precluded from using the ground water right in this fashion due to (1) the duty of water limit, and (2) the right's conditional remark. With the transfer, these limitations are removed, with the result that each right may be used simultaneously to irrigate 107.8 total acres as opposed to 53.9. Irrigating additional acres in this fashion would necessarily result in an increase in consumptive use and reduce return flows to the system. Therefore, the [c]ourt finds [IDWR] correctly concluded the proposed transfer would result in an enlargement in use of the ground water right. It follows the [Final Order] must be affirmed.

(Italics in original.)

We agree with the analysis and conclusion of the district court. The *Barron* theory of enlargement under section 42-222(1) controls and the district court correctly applied *Barron* in denying the transfer application. In this case, approving the transfer application would permit

concurrent use of the ground water right with the surface water right, allowing irrigation of 53.9 acres at two separate locations. Currently, the two rights may only irrigate 53.9 acres at one location. After transfer, the rights would double the number of irrigated acres. Accordingly, there would be an increase in total irrigated acres if the transfer were approved. This would result in an "enlargement" under Idaho Code section 42-222(1) and *Barron*. Thus, the transfer application was appropriately denied. The LLC's arguments to the contrary are unpersuasive.

1. The plain language of Idaho Code section 42-222(1) requires IDWR to examine the relationship between stacked water rights before authorizing a transfer.

The LLC's new theory of enlargement is contrary to the plain language of Idaho Code section 42-222(1). The plain language of section 42-222(1) requires IDWR to examine the *relationship* between stacked water rights that provide beneficial use to the same place of existing use when deciding whether transferring one of the stacked rights will result in an enlargement.

This Court exercises free review over statutory interpretation because it is a question of law. *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013). The standard for statutory interpretation is well-settled:

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

Melton v. Alt, 163 Idaho 158, 162–63, 408 P.3d 913, 917–18 (2018) (quoting *Dunlap*, 155 Idaho at 361–62, 313 P.3d at 17–18).

Here, the LLC disputes *Barron*'s theory of "enlargement" by proposing a new interpretation of Idaho Code section 42-222(1). The statute provides in relevant part:

> Any person . . . . who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change . . . . 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 [1] no other water rights are injured thereby, [2] *the change does not constitute an enlargement in use of the original right*, [3] the change is consistent with the conservation of water resources within the state of

> Idaho and [4] is in the local public interest as defined in section 42-202B . . . . 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.

I.C. § 42-222(1) (italics added).

The LLC's interpretation suggests the statute's "original right" language limits IDWR's examination to only the language within the four corners of the license to be transferred when determining if approving a transfer will cause an enlargement. On the other hand, IDWR and the Coalition argue the LLC's interpretation fails to give effect to *all* the words in the statute and is contrary to the plain language of the statute. We agree with IDWR and the Coalition.

The transfer statute begins with an overarching requirement that IDWR "shall" examine or consider "all the evidence and available information" relevant to a transfer application. I.C. § 42-222(1). Indeed, IDWR is tasked with providing the transfer form that requests such relevant evidence and information from an applicant. *See id*. We cannot read the "original right" language in isolation as the LLC suggests. *See Melton*, 163 Idaho at 162–63, 408 P.3d at 917–18. Read as a whole, section 42-222(1) requires IDWR to consider whether transferring the "original right" will cause an enlargement "*in use*" of that right when considering "*all the evidence* and available information[.]" I.C. § 42-222(1) (italics added). This broad mandate is supported by Idaho's longstanding principle that individual water right holders cannot "waste" or "unnecessarily hoard" water without putting it to beneficial use. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007). Consistent with Article XV, section 3, of the Idaho Constitution, it is well-settled that

> no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration.

Wash. State Sugar Co. v. Goodrich, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915); *see also* IDAHO CONST. art. XV, § 3.

Moreover, "all ground water pumpers impact all hydraulically connected surface water users in the same aquifer and [] all users of hydraulically connected surface water are hydraulically impacted by all ground water users." Gary S. Johnson, *Hydrologic Complications of Conjunctive Management*, 47 IDAHO L. REV. 205, 215 (2011). Thus, in examining "all the evidence" in a transfer application, IDWR must stay mindful of its duty to conjunctively manage the waters of

the Upper Snake River system and the ESPA. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011). Indeed, "[c]onjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication." *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997).

From this, it follows that examining the relationship, if any, between the right to be transferred and any overlapping or stacked water rights is crucial to determining whether enlargement in consumptive use would occur as a result of a transfer (e.g., increase in total acres irrigated than before the transfer). This necessarily requires IDWR, consistent with *Barron*, to examine the relationship of the right to be transferred with other stacked rights before approving or denying a transfer application under Idaho Code section 42-222(1). The LLC's argument would tie IDWR's hands and prohibit the analysis that section 42-222(1) requires.

2. IDWR's transfer evaluation under Idaho Code section 42-222(1) did not collaterally attack the previously licensed ground water right.

The LLC next argues that allowing IDWR to read in new limits or conditions on a previously licensed water right during a transfer evaluation is an impermissible collateral attack on that licensed right. We disagree. In examining the interrelationship between the ground and surface water rights, the Final Order does impose a "single combined beneficial use" limit to describe the overlapping rights. However, this is not analogous to an impermissible collateral attack on a previously adjudicated or licensed water right.

In *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources*, we explained that imposing new conditions or limits when evaluating the relationship between water rights at issue in a delivery call is not a collateral "re-adjudication" of the water rights themselves. 143 Idaho at 876–77, 154 P.3d at 447–48. Adjudicating a water right determines, among other things, the water source, quantity, priority date, point of diversion, place, and period and purpose of use. *Id.* (citing I.C. § 42-1411(2)(a)–(j)). Conversely, the question presented in a delivery call, namely the "reasonableness" of a diversion in the administration of water rights, is not a re-adjudication of these elements because the "reasonableness" limit or condition is not one of the previously determined elements. *Am. Falls Reservoir Dist. No. 2,* 143 Idaho at 876–77, 154 P.3d at 447–48. We explained that a partial decree "need not contain information on how *each water*

right on a source physically interacts or affects *other rights on that same source*." *Id*. (Italics added.)

Here, the same reasoning applies. When IDWR imposes relationship-based conditions or limits on water rights in denying a transfer application, this is not a collateral re-adjudication of the water rights themselves. Like the unique question presented in a delivery call, the question presented in an enlargement evaluation cannot always be easily answered by, and is not necessarily part of, the elements of a water right as licensed or decreed. Thus, when IDWR reads in a "single combined beneficial use" limit on overlapping or stacked water rights in denying a transfer application—that is not a re-adjudication of the water right's elements. Such a limit is not an "element" of a water right as enumerated under Idaho Code section 42-1411(2)(a)–(j).

To be sure, sub-sections 42-1411(2)(i) and (j) indicate that "conditions" on the "exercise of any water right" or "remarks and other matters as are necessary for the definition of the right" should be included together with the water right elements listed in subsections (2)(a) through (h). However, such "conditions" typically relate to those elements already expressed on the license or decree. As in *American Falls*, a decree or license is not required to enumerate every possible condition or limitation as to how that water right does or does not interact with other water rights involving a subsequent transfer application. The LLC's four-corners theory of enlargement would essentially require IDWR to prophetically answer every question of enlargement on every license or decree before it is issued.

In support of its "four corners" theory and collateral attack argument, the LLC relies heavily on our decision in *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017). However, the LLC's reliance is misplaced. In *City of Blackfoot*, the city applied to appropriate a new diversion of groundwater. *Id*. at 304, 396 P.3d at 1186. To offset injury to other water rights holders resulting from a new appropriation, the city proposed to use mitigation credit resulting from seepage under its surface water right. *Id*. at 305, 396 P.3d at 1187. However, IDWR determined, and we agreed, that the city's decreed surface water right could not be used for mitigation credit because the decree did not list "recharge" as one of the right's purposes of use. *Id*. at 307, 396 P.3d at 1189. "[P]urpose of use" is a water right element listed under Idaho Code section 42-1411(2)(f) that must appear on the face of a decreed water right. *Id*. at 306–07, 396 P.3d at 1188–89. Changing this element, for example by adding a new purpose of use, requires a transfer application under Idaho Code section 42-222(1). *Id*. at 308, 396 P.3d at 1190. Accordingly, in *City*

of Blackfoot, we held that if the city wanted to use its surface water right for "recharge" in support of its appropriation application, the city had to first apply to change the right's purpose of use under section 42-222(1). *Id*. The city's attempt to add a new purpose of use element without this application, and without an appeal from the right at the time it was decreed, was an impermissible collateral attack on a conclusively decreed water right. *Id*.

In this case, as explained above, the "single combined beneficial use" limit imposed on stacked surface and ground water rights is not adding an "element" to the licensed ground water right. The limit is neither an element, nor a condition on an element under Idaho Code section 42-1411(2). Instead, the limit is the byproduct of evaluating the *relationship* between the overlapping ground and surface water rights during the transfer request process—a question that a four-corners analysis of *one* license or decree necessarily cannot answer. Accordingly, our holding in *City of Blackfoot* does not apply under these facts.

3. Contrary to the LLC's argument, the Transfer Memo is consistent with our interpretation of enlargement set out in *Barron* and supports the denial of the LLC's transfer application.

Finally, the LLC argues that the Transfer Memo was not given "considerable weight" as an agency interpretation of section 42-222(1). IDWR responds that the LLC's argument is foundationally flawed because the Transfer Memo is *consistent* with the theory of enlargement under *Barron*. Therefore, whether the Transfer Memo was not given "considerable weight" is immaterial because it does not support the LLC's "four-corners" theory of enlargement.

An agency interpretation may be afforded a particular level of deference based on our jurisprudence. *See Duncan v. State Bd. of Acct.*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010); *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998); *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862–63, 820 P.2d 1206, 1219–20 (1991). "Considerable weight" is one level of deference. *See J.R. Simplot Co.*, 120 Idaho at 862–63, 820 P.2d at 1219–20. However, here, even if the Transfer Memo is granted considerable weight, such weight militates in favor of denying the transfer application consistent with *Barron*.

The Transfer Memo contains an "Enlargement of Use" section providing guidance on how to evaluate a transfer application that proposes to change the place of use for a water right that is stacked with other water rights:

> (3) Stacked Water Rights. Water rights are "stacked" when two or more water rights, generally of different priorities and often from different sources, are used for

> the same use and overlie the same place of use. Water rights for irrigating a permissible place of use are not necessarily stacked when the water rights in total provide for irrigating up to the maximum acreage authorized within a permissible place of use. *An application for transfer proposing to "unstack" one or more water rights used for irrigation or other use, without changing all the rights for the same use, is presumed to enlarge the water right.* However, the place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right at a different place of use without, by definition, enlarging the original right or the supplemental right proposed for transfer, so long as the primary rights at the original and proposed places of use provide comparable water supplies. In other words, use of the supplemental right at the proposed place of use cannot materially exceed use of the supplemental right at the current place of use.

(Italics added.)

The Transfer Memo's presumption that unstacking overlapping water rights will result in an enlargement under section 42-222(1) is consistent with the enlargement theory we set out in *Barron*. Here, it is undisputed that the transfer application will result in a *doubling* in the number of irrigated acres. Consequently, like the analysis in *Barron*, and set out in the Transfer Memo, approving the transfer would result in an enlargement. The other sections in the Transfer Memo that the LLC points to do nothing to change this result or analysis. Accordingly, we agree with IDWR that whether the Transfer Memo was given "considerable weight" is immaterial because it does not support the LLC's "four-corners" theory of enlargement.

B. Approving the transfer application would cause injury to other water rights holders.

After the enlargement issue, the district court only reached, and affirmed, the conclusions in the Final Order that (1) the proposed transfer would result in injury to other water rights holders; and (2) denying the transfer would not prejudice Duffin's substantial rights. (Duffin was still the real party in interest when the district court affirmed the Final Order.) We affirm.

First, "there is a *per se* injury to junior water rights holders anytime an enlargement receives priority." *A&B Irrigation Dist. v. Aberdeen–American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005). "Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder." *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (quoting *Jenkins v. Idaho Dep't of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982)). Here, as explained above, transferring the ground water right would cause an enlargement. Thus, the district court correctly affirmed the

conclusion in the Final Order that approving the transfer application would *per se* injure other existing water rights.

Second, to prevail on judicial review of an agency action, a party must establish that the agency erred for one of the reasons provided under Idaho Code section 67-5279(3), *and* that such error(s) resulted in at least one of the complaining party's "substantial rights" being prejudiced. *See* I.C. § 67-5279(4). The use of "and" in the statute means that this test is conjunctive. *See Hungate v. Bonner Cnty.*, 166 Idaho 388, 393–94, 458 P.3d 966, 971–72 (2020). Here, the LLC did not show IDWR acted in violation of any statutory provisions or in excess of its statutory authority under Idaho Code section 67-5279(3). The LLC failed to show the transfer would not result in an enlargement or injury to other water rights, and IDWR was within its statutory authority to deny the LLC's application under Idaho Code section 42-222(1). Accordingly, we need not reach whether the denial prejudices the LLC's substantial rights. *See Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 812, 367 P.3d 193, 207 (2016) (affirming the district court's decision that IDWR did not err under section 67-5279(3) without ever reaching whether Rangen's substantial rights were prejudiced).

C. IDWR and the Coalition are entitled to costs as prevailing parties on appeal, but not their attorney fees.

Both IDWR and the Coalition request attorney fees as the prevailing parties on appeal under Idaho Code section 12-117(1). The Coalition also requests attorney fees under Idaho Code section 12-121. For the reasons set forth below, we grant IDWR and the Coalition their costs, but we deny them attorney fees on appeal.

Section 12-117(1) provides in relevant part:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency . . . and a person, . . . the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees . . . if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117(1).

IDWR argues it is entitled to fees under section 12-117(1) because the LLC has not raised an issue of first impression; has not made a facially plausible legal argument; and has no reasonable basis to doubt *Barron*'s interpretation of "enlargement" under Idaho Code section 42-222(1). The Coalition, relying on *Rangen, Inc. v. Idaho Department of Water Resources*, 159 Idaho 798, 367

P.3d 193 (2016), maintains that attorney fees are appropriate because the LLC has "advanced ostensibly the same, failed arguments at every turn." The LLC responds that fees are not appropriate because they have presented a "legitimate question for this Court to address." In particular, the LLC points out that this is the first time IDWR has been challenged on its practice of imputing a "single combined beneficial use" limit against stacked water rights during a transfer evaluation—an issue that is not dictated by statute or explained by rule.

In *Rangen*, this Court set out a standard for granting fees to the prevailing party under Idaho Code section 12-117(1). 159 Idaho at 812, 367 P.3d at 207. Quoting our decision in *Castringo v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005), *Rangen* explained that fees are appropriate when the nonprevailing party "continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision." 159 Idaho at 812, 367 P.3d at 207. Applying this standard, and without examining whether the substance of Rangen's arguments were unreasonable, we awarded fees because Rangen "asserted substantially the same arguments on appeal as it did before the district court on judicial review and failed to add significant new analysis or authority to support its argument." *Id*. In other words, repeating the same arguments on appeal, regardless of their basis in law or fact, was enough to conclude Rangen was acting without any "reasonable basis in fact or law." *Id*. We now distinguish the *Rangen* standard because it is inconsistent with the plain language set out in Idaho Code section 12-117(1).

Section 12-117(1) permits an award of fees only if the nonprevailing party "acted without a reasonable basis in fact or law." Determining whether the nonprevailing party had a "reasonable" argument in law requires, at a minimum, examining the legal arguments made, i.e., the *substance* of the nonprevailing party's arguments. When it comes to questions of law, like the one presented in this case, an argument is not "unreasonable" under section 12-117(1) simply because it was repeated on appeal after being rejected by the agency and district court below. Moreover, even if the nonprevailing party does not provide new authority in support of its repeated legal argument—this has no connection to whether the argument has a "reasonable" basis in law.

Holding otherwise, and continuing the *Rangen* standard, places a higher burden on litigants seeking to challenge questions of law—which this Court reviews *de novo*—than the language of section 12-117(1) supports. The *Rangen* standard incorrectly renders every nonprevailing legal argument *per se* unreasonable, regardless of its merits, if it is repeated from the agency level

through to this Court. Moreover, the *Rangen* standard discourages litigants from challenging conclusions of law made by agencies because doing so *would* require litigants to repeat the same legal argument until they receive a final answer from this Court. Discouraging litigants from challenging the legal conclusions of an executive agency necessarily stunts our power to effectuate *de novo* review and determine what the law is with finality. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also Mead v. Arnell*, 117 Idaho 660, 669, 791 P.2d 410, 419 (1990) ("The Constitution gives both the power and a clear directive to this Court to interpret the law and to determine what administrative rules 'do or do not conflict with statutory law.' ").

The reason for awarding attorney fees under section 12-117(1) in *Castringo*, on which *Rangen* relies, was that the nonprevailing party failed to follow well-defined "statutory procedures" for appealing separate appraisals. *See* 141 Idaho at 98, 106 P.3d at 424. Although we noted in *Castringo* that the nonprevailing party repeated the same arguments on appeal as made below, this merely buttressed our decision to award fees. Instead, our decision focused on the substance of the nonprevailing arguments to conclude they had no "reasonable basis" in law because statutory procedure *clearly* dictated the result of the case and supported the district court's decision. *See id*. We return to the standard used in *Castringo* as consistent with the preconditions for awarding fees under section 12-117(1). The reasonableness of a challenge to an agency's conclusions of law, when considering fees under section 12-117(1), turns on the substance of the nonprevailing party's legal arguments—not on whether the arguments were merely repeated or repackaged from below.

In this case, there is no definition of "enlargement" by statute or administrative rule. Moreover, IDWR has not promulgated any rules setting out how it will deal with transfer applications under Idaho Code section 42-222(1) that seek to unstack overlapping water rights. IDWR has issued a Transfer Memo describing a presumption of "enlargement" when unstacking water rights, but this is a non-binding interpretation of section 42-222(1). It does not have the "force of law" on the issue of unstacking and enlargement like the procedure provided by statute in *Castringo*. *See Asarco Inc. v. State*, 138 Idaho 719, 723, 68 P.3d 139, 143 (2003) ("[A]n agency action characterized as a rule must be promulgated according to statutory directives for rulemaking in order to have the force and effect of law."). Although *Barron* provides the correct "enlargement" analysis, the LLC is correct that IDWR's action of imputing a "single combined beneficial use"

limit against a fully licensed water right—that does not expressly contain such a limit—has never been specifically addressed by this Court. Although the LLC has not prevailed, it is reasonable to argue that imposing such a limit during a transfer evaluation is an impermissible collateral attack on a fully licensed water right contrary to our decision in *City of Blackfoot*.

Legal challenges to the conclusions of law made by an agency, when not preordained by statute, case law, or rule, is a healthy impetus to motivating agencies into promulgating more helpful and gap-filling rules. As the LLC explains, "[t]he resolution of the issues raised in this appeal [is] important because it will provide clear answers for the regulated community and the attorneys and consultants that represent them." While the LLC's legal arguments did not prevail, the LLC still brought an appeal that had a reasonable basis in law. Accordingly, IDWR and the Coalition are not entitled to attorney fees under Idaho Code section 12-117(1).

Furthermore, we deny the Coalition's request for attorney fees under Idaho Code section 12-121. Attorney fees under section 12-121 are available in civil actions where a complaint is filed—not in proceedings initiated by a petition for judicial review of an agency's final order. I.C. § 12-121; *Travelers Ins. Co. v. Ultimate Logistics* (*In re Idaho Workers Comp. Board*), *LLC*, 167 Idaho 13, 24, 467 P.3d 377, 388 (2020). Here, the LLC's appeal originates from Duffin's petition for judicial review of a final order from IDWR denying Duffin's transfer application. A complaint did not initiate this case. Thus, the Coalition is not entitled to attorney fees under section 12-121.

IV. CONCLUSION

We affirm the district court's judgment that IDWR was within its statutory authority, and did not violate any statutory provisions, when it denied Transfer Application 83160. As IDWR and the Coalition are the prevailing parties on appeal, they are entitled to costs as a matter of course under Idaho Appellate Rule 40.

Chief Justice BEVAN, Justices MOELLER, ZAHN, and HORTON, J. Pro Tem, CONCUR.