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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR TRANSFER NO. 83160 IN THE NAME OF JEFFREY AND CHANA DUFFIN	**APPLICANT'S PETITION FOR RECONSIDERATION**

Applicant Jeffrey and Chana Duffin (collectively "Applicant" or "Duffin"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., pursuant to the *Explanatory Information to Accompany a Preliminary Order*, the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), and Rule 11.2(b) of the Idaho Rules of Civil Procedure, Duffin hereby requests reconsideration of the Hearing Officer's *Preliminary Order Denying Transfer* dated July 24, 2020 issued in the above-entitled matter (the "*Preliminary Order*"). This brief is also supported by the *Declaration of Robert L. Harris in Support of Applicant's Petition for Reconsideration* submitted contemporaneously herewith (the "*Harris Declaration*").

Duffin filed application for transfer no. 83160 ("83160") to move WR 35-7667 off property owned by Duffin to be utilized on property owned by Lava Rock Ranch, LLC. If 83160 is approved, then WR 35-7667 will be sold to Lava Rock Ranch, LLC. 83160 was protested by the A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, and Minidoka Irrigation District, a collective group of large canal companies and irrigation districts self-referred to as the Surface Water Coalition (the "Coalition").

IDAPA 37.01.01 "contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of Idaho." Rule 001.02.[1] The above-entitled matter is a contested case before the Idaho Department of Water Resources ("IDWR" or "Department"). James Cefalo is the hearing officer (hereinafter, the "Hearing Officer"). It was determined by the parties at a prehearing conference that there are several questions of law associated with 83160, and the Coalition's concerns about 83160 may be addressed through stipulated facts and legal briefs. Rule 557 provides that parties to a contested case may stipulate among themselves to any fact at issue in the contested case and Rule 564 permits the Hearing Officer to request briefs from the parties to a contested case setting forth arguments and positions on any questions of law in the case. Duffin and the Coalition drafted and submitted a *Stipulated Statement of Facts* (hereinafter simply "*Facts*"), and thereafter, the hearing officer issued a *Request for Briefs* on May 26, 2020, in order to address the following question:

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

[1] Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

Request for Briefs at 2.

In addition to the *Facts*, the Hearing Officer included in the *Request for Briefs* certain documents associated with Application for Permit 35-9000, WR 37-2801 (and its progeny rights), and WR 37-7295. The Hearing Officer indicated that these documents "may be relevant to the issues raised in the pending contested case."

The transfer review criteria are:

ISSUES

Applications for transfer are filed for the purpose of changing a point of diversion, purpose of use, period of use or nature of use of all or part of a licensed, decreed or statutory water right. Section 42-222, Idaho Code, identifies the following potential issues that the department can consider in connection with an application for transfer:

1. Will the proposed transfer reduce the quantity of water under existing Water Rights?
2. Will the proposed transfer constitute an enlargement in use of the original right?
3. Will the proposed transfer be contrary to the conservation of water resources within the State of Idaho?
4. Will the proposed transfer conflict with the local public interest, where local public interest is defined as interests that the people in the area directly affected by a proposed water use and its potential effects on the public water source?
5. Will the proposed transfer adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates?
6. If the proposed transfer is for a municipal use, is it necessary to provide reasonably anticipated future needs for a municipal service area and is the planning horizon consistent with Sections 42-222 and 42-202B, Idaho Code?
7. Will the proposed transfer change the nature of use from an agricultural use, and would such a change significantly affect the agricultural base of the local area?

Facts at ¶12. The Coalition has agreed that the issues described under subparts (1), (5), (6), and (7) are not at issue in this contested case, but the following questions categorized under subparts 3, 4, and 5 are at issue:

> 32.1 (No. 2 above): Does the proposed transfer constitute an enlargement of the original right? More specifically, is 35-7667 a supplemental ground water right or otherwise limited in its exercise and cannot be used as a primary ground water right

at the new proposed place of use?

32.2 (No. 3 above): Is the proposed transfer contrary to the conservation of water resources within the State of Idaho?

33.3 (No. 4 above): Will the proposed transfer conflict with the local public interest? What is the potential effect of the proposed water use on the public water source?

Facts at 12 (¶32).

These questions were addressed by Duffin and the Coalition in briefs each submitted to the Hearing Officer. One week after submittal, the Hearing Officer issued the *Preliminary Order* holding that the transfer should be denied. The *Preliminary Order* is divided under the following headings:

1. *Barron v. Idaho Dep't of Water Resources*;
2. Enlargement Analysis;
3. Supplemental Nature of Water Right 35-7667;
4. Separate Sources Not Used in Same Year;
5. Combined Limit Conditions;
6. Injury to Other Water Rights;
7. Conservation of Water Resources; and
8. Local Public Interest.

As stated above, a party in this proceeding has a right to petition the Hearing Officer for reconsideration within 14 days of the issuance of a preliminary order, which in this case is on or before August 7, 2020. Therefore, the *Applicant's Petition for Reconsideration* is timely.

Rather than address each of the Hearing Officer's sections individually, because of overlapping concepts and blending of issues where we believe the Hearing Officer erred, we will not address each of these sections in order. Rather, we will address all the issues collectively below.

I. ARGUMENT.

At the outset, it is critical to recognize that WR 35-7667, a ground water right, is the **only** water right subject to proposed changes under 83160. This right is owned by Duffin.

The water rights and other water entitlements (WR 01-23B, WR 01-297, and storage water owned by Aberdeen-Springfield Canal Company ("ASCC")) that yield water to ASCC are not owned by Duffin. The water rights and entitlements that yield water to the ASCC shareholders are owned by the ASCC, not Duffin. As an ASCC stockholder, Duffin is only entitled to a proportionate share of the water and obliged to pay a proportionate share of the operating company's maintenance costs, "regardless of whether such water is used or not . . . ." Idaho Code § 42–2201.

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

Peipers' argument were valid, ASCC could only watch helplessly while its water right was lost.) (emphasis added; citations omitted).

Turning now to the *Preliminary Order*, our first concern is that the Hearing Officer dismissed the significance of whether WR 35-7667 is or is not supplemental to water allocated to ASCC shares associated with he same property covered by the place of use element of WR 35-7667: "In their respective briefs, the parties provided extensive argument about whether water right 35-7667 should be considered a primary water right or a supplemental (secondary) water right. The enlargement analysis would be identical in either case." *Preliminary Order* at 5. In our view, the determination of whether WR 35-7667 is or is not supplemental is the critical initial inquiry before embarking on an enlargement analysis.

Duffin provided significant discussion of legal authority in support of our position that a plain interpretation of the elements of WR 35-7667 results in a conclusion that it is not supplemental to any other water source, including to water allocated to shares in a canal company with water rights owned by the canal company that yield water to those shares. See *Applicant's Argument Brief* at 4-11. There is no response or other analysis in the *Preliminary Order* on this legal authority addressing the question of whether WR 35-7667 is supplemental or not. We believe this is reversible error, and request that the Hearing Officer reconsider the water right interpretation legal authority previously provided. Within that legal authority, the law is clear under *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184 (2017), that the Hearing Officer cannot go beyond the four corners of the water right decree or license when interpreting a water right:

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

> a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own words."). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf. Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 850, 367 P.3d 228, 245 (2016) ("Where terms of a contract are 'reasonably subject to differing interpretations, the language is ambiguous....'" (quoting *Clark v. Prudential Prop. and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003))). Whether ambiguity exists in a decree "is a question of law, over which this Court exercises free review." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)).
>
> Water rights are defined by elements. *See* I.C. §§ 42-1411(2); *see also City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012) ("The elements listed [in section 42-1411(2)] describe the basic elements of a water right."); *Olson v. Idaho Dep't of Water Res.*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). Idaho Code sections 42-1411(2) and 42-1411(3) comprise a list of elements that define a water right. Under Idaho Code section 42-1412(6), a water decree "shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable." ... Thus, a water decree must either contain a statement of [each element] or incorporate one, but not both. *Markel Int'l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 (2012) ("The word 'or' ... is '[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.' "); *In re Snook*, 94 Idaho 904, 906, 499 P.2d 1260, 1262 (1972) ("The word 'or' ... is given its normal disjunctive meaning that marks an alternative generally corresponding to 'either'....").

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

There is no element of WR 35-7667 indicating it is supplemental or otherwise limited or combined with the water allocated to canal company shares associated with the same property covered by the place of use of WR 35-7667. This should end the inquiry as to whether there is any combined limit or connection with surface water allocated to Duffin's ASCC shares. If there are no words combining these rights (the water right elements, conditions, or other language in the water right), then no combination exists. The *City of Blackfoot* case makes it clear that the absence of words in water right decrees (and by extension, water right licenses) has meaning. In that case, even with a recorded water right agreement referenced an explanatory remark in the decree itself

(which provided ground water recharge authorization under WR 01-181C), the court focused on the absence of the word "ground water recharge" under the beneficial use heading of the decree, and held that recharge was not authorized:

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

Id. at 308, 396 P.3d at 1190 (2017) (emphasis added). By reading in aspects of the water right that are not expressly written, the Idaho Supreme Court held that this "would impermissibly muddy the decree." *Id.*

The Hearing Officer has read into WR 35-7667 a "single, combined beneficial use" limitation, which is really reading in a consumptive use element to this water right as evidenced by the following sentence contained in the *Preliminary Order* after the Hearing Officer introduced this new concept: "If these two rights were separated or unstacked, the consumptive use associated with the water rights would double." *Preliminary Order* at 5. The rationale for this approach is because these water entitlements have places of use that overlap: "The question of whether two water rights represent a single, combined beneficial use is determined by the place of use descriptions for the rights, not by the existence of or absence of water right conditions." *Id.* at 7.

There are four major flaws with the Hearing Officer's conclusion. First, it reads in a limitation on the water right that is not written anywhere on the water right. This is wholly

improper under the *City of Blackfoot* holding, as it impacts the "certainty and finality" of perfected water rights which "would impermissibly muddy the [water right]."

Second, combined limits are easily added at the water right licensing stage and in adjudication proceedings. If the exercise of WR 35-7667 was truly supposed to be limited along with surface water allocated to ASCC shares to a combined consumptive use, then a condition could have been easily added when WR 35-7667 was licensed or when ASCC's water rights were decreed in the SRBA. If combined consumptive use conditions were not added, then the Hearing Officer should not relitigate a question that should have been easily addressed with the insertion of a condition at licensing or in the SRBA. In the context of interpreting water right decrees, the Idaho Supreme Court has explained:

> Absent BCID undertaking appropriate proceedings to set aside a final judgment under Idaho Rule of Civil Procedure 60(b), we emphasize that the decrees are conclusive and final, which comports our general reluctance to allow already-decreed water rights to be relitigated. *See, e.g., City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017) ("Furthermore, it is equally clear from the plain language of the decree that recharge is not listed as an authorized use under the purpose of use element of 181C. Claiming, at this stage, that recharge is an authorized use of 181C, is nothing more than an impermissible collateral attack...."); *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016) ("Allowing IGWA to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process."); *Rangen*, 159 Idaho at 806, 367 P.3d at 201 ("Any interpretation of Rangen's partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself."); *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998) ("Finality in water rights is essential."). Finality is for good reason, especially in water law; otherwise, the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures. *See* Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 56 (2016).

In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532, 163 Idaho at 155, 408 P.3d at 910. Implicitly imposing a restriction on a water right that could easily have been made express

in the licensing of WR 35-7667 or issuance of partial decrees to ASCC's water rights would inject significant uncertainty into what rights water users received at the end of the statutory permitting process or adjudication process. Such a restriction on the use of water rights must necessarily be express, and if it is not, to paraphrase Judge Wildman, it would constitute serious turmoil and confusion. *Memorandum Decision and Order on Challenges Final Order Disallowing Water Right Claims*, p. 5 (Twin Falls County, Fifth Jud. Dist. – *SRBA, In Re SRBA Case No. 39576, Subcase Nos. 65-23531 and 65-23532*, Oct. 7, 2016). Relitigation will ensue as water users seek to know whether their rights are subject to any implied condition which could easily have been included on their water rights.

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

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

Idaho Code § 42-202B(1); *see also* 2004 Idaho Sess. Laws 258 (the addition of language that consumptive use is not an element of a water right was made in 2004).

Further, the principle that there must be an express condition limiting consumptive use before such limitation can be enforced (and only then may be subject to a transfer) is supported by the Department's *Administrator's Memorandum, Transfer Processing No. 24*, dated December 21, 2009 (*available at* https://idwr.idaho.gov/files/water-rights/transfer-process-24-transfer-

processing-policies-and-procedures.pdf) (hereinafter the "*Transfer Memo*"). Under the section entitled "When a Transfer is not Required," it provides:

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

As described, consumptive use is an issue and part of the enlargement analysis when there is a proposal to change the nature or purpose of use. With 83160, there is no proposal to change the nature or purpose of use—WR 35-7667 is authorized for irrigation, and it will continue to be used for irrigation if 83160 is approved.

Fourth and finally, the Hearing Officer's rationale that overlapping places of use imply a combined use is directly contrary to Jeff Peppersack's testimony, who testified in a separate proceeding in a similar case as a designated Department representative, as set forth in *Applicant's Brief on Legal Issues* at pages 15-16:

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

Recall that the Hearing Officer's rationale for reading "a single, combined beneficial use" is as follows: "The question of whether two water rights represent a single, combined beneficial use **is determined by the place of use descriptions for the rights, not by the existence of or absence of water right conditions**." *Preliminary Order* at 7 (emphasis added). This rationale is contrary to what Mr. Peppersack explained: "So, if it's demonstrated that they really weren't, **even though they might reside on the same place of use**, then we might decide that it's not an enlargement because they haven't been used together to, you know, provide a full water supply for the place of use." (emphasis added). It is evident that the Hearing Officer is ascribing more legal significance to overlapping places of use than (1) the existence or absence of express conditions; and (2) the actual use of water relative to both water sources (even if WR 35-7667 is considered to be stacked or supplemental to ASCC water).

Duffin's situation is simply that he has two sources of water to irrigate his property: ground water under WR 35-7667 and surface water allotted to his ASCC shares. The separate nature of WR 35-7667 and Duffin's entitlement to surface water allotted to his ASCC shares is further evident by the fact that these water sources were developed separately and independently from one another. The ASCC shares were issued to Vern Duffin on April 24, 1970. *Facts* at 1 (¶3). The application to develop WR 35-7667 was not submitted until February 2, 1977. *Id.* at 2 (¶5). These sources were not developed together with a common goal of developing a set amount of combined consumptive use to support an argument that they should be subject to a combined consumptive use amount. And Duffin pays separate assessments for both based on different criteria, not based on the consumptive use associated with 53.9 acres. Duffin pays assessments to the ASCC based on 60 shares he owns that are associated with the property where the place of use of WR 35-7667. For 2020, he paid $1,980 to ASCC. *Harris Declaration* at Exhibit 1. Duffin also pays assessments

to the Bingham Ground Water District for WR 35-7667 based on the cfs amount (1.08 cfs), and for 2020, he paid $968.53. *Harris Declaration* at Exhibit 2.

The Hearing Officer has not provided sufficient legal authority in support of this new water law doctrine that, without combination conditions contained in the license or decree, having two alternative sources of water associated with the same piece of property automatically legally combines such sources to have a "single, combined beneficial use of water" with an associated combined consumptive use.[2] For all the above reasons, upon reconsideration, we ask that the Hearing Officer engage in water right interpretation consistent with the above legal principles. We anticipate that if he does, the inevitable conclusion is that nothing in the plain language of the license for WR 35-7667 imposes the "single, combined beneficial use" (i.e., consumptive use) limitation or element on this water right or on ASCC's water rights.

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

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change **does not constitute an enlargement in use of the original right**, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. **The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an**

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

> **enlargement in use of the original water right**. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

These statutory provisions were not discussed by the Hearing Officer, and it is unclear why. Enlargement focuses on exceeding the elements of a water right and if those elements will unlawfully change or be expanded with what is proposed in a transfer. This is supported by the legal definition of the term "enlargement" contained in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996), which the Hearing Officer begins with in his *Preliminary Order*:

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

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

Despite the foregoing, the Hearing Officer concluded "[t]he proposed change to water right 35-7667 will result in an increase in the number of acres irrigated, which is an enlargement, as noted above [in the *Fremont-Madison* case]." *Preliminary Order* at 5. It would be an enlargement if there was an increase of irrigated acres under **the original right subject to the transfer** (in this case, WR 35-7667). However, incorrectly, the Hearing Officer interprets language from the *Fremont-Madison* case to also apply to all water entitlements associated with the place of use of WR 35-7667 being transferred—even those not owned by Duffin (in this case, those owned by

ASCC). We submit that the Hearing Officer is mistaken—the enlargement analysis spoken of under Idaho Code § 42-222 and the *Fremont-Madison* case should only be directed at WR 35-7667. In this case, there is no proposed expansion described in 83160 to the diversion rate (1.08 cfs), maximum diversion volume (215.6 acre-feet), or irrigation of 53.9 acres **with ground water** that is authorized under 35-7667. There is no express condition limiting consumptive use, where a transfer to change the express condition for consumptive use is required. *Transfer Memo* at 4. As described above, the proposed change cannot "constitute an enlargement in use **of the original right**." With the subtle addition of a single letter to this statutory language, the Hearing Officer concluded that "[t]he changes proposed in Application 83160 would result in an enlargement of the original rights and must be denied pursuant to Idaho Code § 42-222." (emphasis added). But there is only one right subject to the transfer—WR 35-7667—and the historic ground water diversion amount will be the same at the proposed new place of use. Because "[a]n increase in the volume of water diverted is an enlargement and is not allowed under I.C. § 42–1425," *City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012), then it follows that no increase in the volume of water diverted means there is no enlargement. For this clear reason alone, there will be no enlargement of WR 35-7667.

Further, there is no proposal to change the nature of use of 35-7667, which is the typical instance where consumptive use of the original water right is considered to avoid enlargement (i.e., conversion of an irrigation water right to an industrial water right).[3] In other words,

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

there will be no material change[4] in the amount of ground water diversions (and therefore pumping impacts from the diversion of such ground water) if 83160 is approved.

The Hearing Officer is bound by statute and cannot expand the statutorily prescribed enlargement analysis to other water entitlements not subject to the transfer. By doing so, the Hearing Officer's actions are "in violation of . . . statutory provisions" and "in excess of the statutory authority of the agency." Idaho Code § 67-5279(3)(a)-(b). Accordingly, the Hearing Officer should reconsider the *Preliminary Order* and approve 83160 as there is no statutory or other basis for the "single, combined beneficial use of water" set forth in the *Preliminary Order*.

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

First, the *Barron* opinion indicates that it was dealing with primary and supplemental water rights. As explained above, the plain language of Duffin's WR 35-7667 is that it is not a primary or supplemental water right—it is one of two separate water supplies for his property that is not combined with any other water right or canal company share entitlements.

Based on a review of the *Barron* transfer backfile, the water rights at issue in *Barron* were determined, without challenge from the applicant Barron, to be primary and supplemental

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

as a matter of Department policy, which the Idaho Supreme Court did not reverse, even though there is nothing in the license for WR 37-7295 providing that it is or was supplemental to WR 37-2801B. In a letter in the *Barron* transfer backfile dated April 1, 1998, Glen Saxton explained Department policy that the oldest right is considered primary and the more junior is supplemental or secondary if water rights overlap at their places of use:

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

Barron is relied upon by the Hearing Officer as one component of his legal authority for his conclusion that Duffin's WR 35-7667 and his ASCC share entitlement constitute a "combined beneficial use," even though he does not find that WR 35-7667 is a supplemental water right. However, the basis for Department's 1999 primary/supplemental policy has been superseded by the *Transfer Memo*, and in our view, the water right interpretation legal authority discussed above (including the *City of Blackfoot* case). In other words, the presumption and policy position described in Saxton's letter may have been the Department's position then, but it is not the position today.[5] The 2009 *Transfer Memo* explains that a supplemental right can be changed to a primary

[5] This letter states that "one means"—not the only means—to prevent "an enlarged use is to cease the irrigation of some land which was formerly irrigated." The Hearing Officer determined that *Barron* provides "if surface water

right if the applicant provides "convincing water use information" that the supplemental right was the only right used and there is no requirement to dry up acres:

> (4) Changing Supplemental Right to Primary Water Right. A supplemental irrigation right is a stacked water right authorizing the diversion of water for irrigation from a secondary source to provide a full supply for crops when used in combination with a primary right. A supplemental right can provide additional water in conjunction with a primary source, or at times when the primary source is unavailable. The use of a supplemental right is dependent on the supply available under the associated primary right and can be highly variable from year to year. An application for transfer proposing to change a supplemental irrigation right to a use as a primary water right for irrigation or other use will be presumed to enlarge the supplemental right. An exception is when the applicant can clearly demonstrate, using historic diversion records for the supplemental right as described in (5) below, or other convincing water use information, that there would be no enlargement of the water right being changed or other related water rights. Evidence of the quantity of water beneficially used under the primary right must be accompanied by some evidence of the quantity of water used under the supplemental right to qualify as "convincing water use information." The supplemental right must have been used on a regular basis (used more than 50 percent of the time). Insufficient data will be grounds to reject the application because the department will not be able to ascertain if the right will be enlarged.
>
> If an application proposes to change only a portion of a supplemental irrigation right to a use as a primary water right, the application is not approvable unless the extent of beneficial use under all associated rights prior to the transfer will be proportionately reduced or transferred to another place of use to avoid enlargement of the remaining portion of the supplemental right. The associated right(s) will not need to be reduced if the entire supplemental right will be changed through the transfer.

As the *Transfer Memo* provides, there is no enlargement of the water right being changed or other related rights if there is a clear demonstration, with historic diversion records, that the actual water use (as to WR 35-7667, ground water diversions) will not increase. Again, there is no discussion in the *Transfer Memo* or elsewhere of a "single, combined beneficial use" or drying up irrigated acres in this memo which is an agency memo interpreting Idaho

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right 37-2801B were diverted for irrigation at the new place of use, then ground water right 37-7295 could no longer be used to irrigate the existing place of use." *Preliminary Order* at 4. However, the Saxton letter describes this as "one means" or preventing enlargement, which means there are other ways to address enlargement without drying up irrigated acres. In our view, the *Transfer Memo*'s explanation of looking at historical use on supplemental rights to determine if actual water diversions supports a full transfer of the supplemental right is the correct analysis.

Code § 42-222 and is entitled to deference as explained in *Applicant's Argument Brief* at 12-14. Thus, even if WR 35-7667 was considered supplemental—which it is not—the *Transfer Memo* authorizes the changing of this right to a primary right because WR 35-7667 was the exclusive source of irrigation water on Duffin's property until his hard conversion to surface water in 2017. Again, there are components of the primary/supplemental analysis of the *Barron* case in the *Preliminary Order*, but those components have been superseded by the water right interpretation cases and the *Transfer Memo*. The Hearing Officer has applied the policies described in *Barron* (i.e, that *Barron* did not require the water sources to be used in the same year for there to be an enlargement; the lack of reference to 37-2801B, etc.) that are not consistent with today's Department policy. The Hearing Officer should rely upon the *City of Blackfoot* base and the Transfer Memo instead.

Further, we submit that the Hearing Officer has overstated the actual holding of *Barron*. The Hearing Officer states the "Department's enlargement analysis was based on an evaluation of the combined beneficial use authorized by water rights 37-2801B and 37-7295." *Preliminary Order* at 4. We disagree with this characterization of the Department's enlargement analysis as being based upon an evaluation of the combined beneficial use of the referenced rights. The Department was **unable** to perform an enlargement evaluation because the applicant did not provide requested historical use information, even after **five** requests, as the *Barron* opinion clearly describes:

> Barron and the IDWR subsequently exchanged correspondence concerning the transfer application. On **five separate occasions**, the IDWR requested that Barron provide additional information to address the agency's concerns. Although Barron responded in writing to each of the Department's requests, the IDWR indicated in its final letter that Barron **had still not presented sufficient information for the Department to approve his transfer application.**
>
> . . .

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

Id. at 416, 418-19, 19 P.3d at 221, 223-24 (emphasis added). In other words, it was evident that there were possible forfeiture concerns with the 1905 surface right at issue in the transfer, and no information was provided by the applicant to address those concerns. In fact, in the SRBA, the surface water right (37-2801B) was eventually decreed as disallowed based on water right forfeiture, which is evidence that the Department's concerns with historic use were well founded. See *Harris Declaration* at Exhibits 3 and 4 (final order disallowing water right claim and water right report providing that the water right was disallowed because of forfeiture).

A review of the Idaho Supreme Court opinion reveals that the Hearing Officer has misstated the primary basis for the Department's determination of enlargement. The Department

presumed enlargement because the applicant was unable and/or unwilling to provide relevant information that would allow IDWR to perform a forfeiture and enlargement analysis. This lack of information as being the primary basis of denying the transfer is supported by other statements from the water right backfile record. For example, in the preliminary order for Transfer 5116, it does not contain an analysis "based on an evaluation of the combined beneficial use authorized by water rights 37-2801B and 37-7295" as the Hearing Officer stated, rather, it summarily provides the following findings of fact and conclusions of law without any discussion of an analysis:

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

Harris Declaration at Exhibit 5.

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

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

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

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

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

Based on the foregoing, the reason the transfer was denied was because of a failure of the applicant Barron to provide information necessary for IDWR to meet its statutory obligations to analyze the transfer under Idaho Code § 42-222. This is the holding in *Barron*, and while there is further discussion in the opinion about the primary/supplemental nature of the rights at issue (and because of that described relationship, irrigation of more than 311 acres would be an enlargement),[6] as described above, this has been superseded by the *City of Blackfoot* case and other cases and the *Transfer Memo*. Furthermore, our position is that the language from the *Barron* opinion set forth in footnote 6 below that was relied up by the Hearing Officer is *dictum* because it was not essential to the decision. *Dictum* is "opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not biding even if it may later be accorded some weight." BLACK'S LAW DICTIONARY at 569, 11th Edition (definition of "judicial dictum").[7] As described above, the

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

> "Another area of concern for the Department was the potential enlargement of groundwater right 37–07295 should Barron's application be granted. As mentioned above, groundwater right 37–07295 is the supplementary right to surface right 37–02801B. The problem arising with Barron's proposed transfer is that the previously combined use of the two water rights is limited to the consumptive use on the 311 acre tract of ****225 *420** land. If water right 37–02801 is moved to another tract, (or tracts) with the result that the two rights would irrigate more than 311 acres, then there is an enlargement of the water right. Barron contends that he provided evidence to the IDWR that 37–0281B is the primary or "stand alone" right and asserts that the proposed transfer would result in the licensed place of use being farmed as dry land. Barron, however, neither owns nor exercises any control over the land upon which 37–02801 or 37–07295 is appurtenant."

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

[7] See *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 158, 408 P.3d 899, 913 (2018) ("The Court's decision did not end there, however. The Court went further, concluding that the SRBA court did not abuse its discretion in declining to address when a storage right is "filled" or when it concluded that such a determination was within the director's discretion. *See id.* at 394, 336 P.3d at 801. This portion of the Court's opinion was dicta.") (Justice Brody concurring in part and dissenting in part.). Finding *dictum* examples in response to arguments asserted on appeal is relatively common. See, *e.g.*, *State v. Dix*, 166 Idaho 851, 465, P.3d 1090 (2020); *Shubert v. Ada County*, 166 Idaho 458, 461 P.3d 740 (2020); *Phillips v. Eastern Idaho Health Services, Inc.*, 166 Idaho 731, 463 P.3d 365 (2020); *State v. Islas*, 165 Idaho 260, 443 P.3d 274 (2019).

holding in *Barron* was based upon the applicant's failure to provide information for the Department to even perform an enlargement analysis. This is described in the Idaho Supreme Court's holding from the opinion:

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

Barron, 135 Idaho at 421, 19 P.3d at 226 (emphasis added). We further note that there is no citation of discussion of *Barron* in the *Transfer Memo*. It therefore appears that the Department does not consider certain portions of this case to be binding legal precedent.

As to 83160, the proper analysis is as follows. First, interpret the water rights based on the four corners of the water right document (for WR 35-7667, the license, and for ASCC's water rights, the partial decrees) to determine if the water rights expressly combine themselves. If they do not, then they are two separate water sources for a single property and either of them can be used to irrigate the property. If it is proposed to move either of them off the property, then the right or water entitlement being proposed to be moved is subject to a forfeiture and enlargement review. As to WR 35-7667, it is not subject to forfeiture because it was used up to 2017 and placed in the Idaho Water Supply bank in 2017. *Facts* at 9-10 (¶¶26-28). Since there is no period of five years of nonuse, then WR 35-7667 has not been forfeited under Idaho Code § 42-222. Water allocated to the ASCC shares, on the other hand, was not used for decades. The water rights that yield water to the ASCC shares are therefore initially subject to forfeiture because of five years of nonuse. However, Idaho Code § 42-223(7) provides an express exception to forfeiture to ASCC's water rights:

> No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

The result of this analysis of both independent water sources is that either water supply may be used to irrigate Duffin's property independent of one another and WR 35-7667 can be moved off the property while Duffin continues to irrigate with water allocated to his ASCC shares.

While on the topic of forfeiture, it is also significant to consider that the surface water right at issue in the *Barron* case—WR 37-2801B—was eventually decreed as forfeited in the SRBA. It is evident that the Department was suspicious of this right under Transfer 5116 because movement of a possibly forfeited right is the ultimate example of enlargement, and the Department was eventually proven right. It seems clear that the non-use of the right was the reason the applicant Barron did not provide any historical use information in the first place.

Further, what is also important to note is that if *Barron* stands for the proposition that the Hearing Officer asserts it does—that water rights that share a common place of use "represent a single, combined beneficial use of water," **then WR 37-2801B should not have been decreed forfeited in the SRBA because its associated consumptive use right, WR 37-7295, did receive a partial decree in the SRBA affirming this right on the very same day that WR 37-2801B was disallowed**. *Harris Declaration* at Exhibit 6 (this right was split into an "A" portion and a "B" portion as shown on the partial decrees). The Hearing Officer's logic as to Duffin's water entitlements are that "[w]ater right 35-7667 and the ASCC shares **represent a single, combined beneficial use of water (the irrigation of 53.9 acres) regardless of whether the acres have been irrigated with ground water, surface water, or both in the same irrigation season**." *Preliminary Order* at 6 (emphasis added). Using this same logic, if beneficial use is provided

under one right, then the exercise of the other right is not necessary, and the unused right should not be forfeited. But this did not happen with WR 37-2801B. This is a concrete example in support of our position that water rights that share a common place of use without combination conditions are not combined—they are independent rights to be analyzed independently of one another. This conclusion makes further sense given that Duffin pays assessments independently for both his ground water right and his ASCC shares, and not based on the "single, combined beneficial use" of 53.9 acres. *Harris Declaration* at Exhibits 1-2. Duffin's WR 35-7667 is a real property right as described by statute. *See* Idaho Code § 55-101 (includes water rights within the definition of "real property."). Such property rights should not be infringed to limit consumptive uses of water based on policy or other considerations, no matter how well-intentioned.

Finally, because the Hearing Officer's "single, combined beneficial use of water" holding serves as the basis for the remainder of the *Preliminary Order*'s conclusions relative to injury to other water rights, conservation of water resources, and local public interest, these sections must be reconsidered in light of the arguments set forth herein. If the Hearing Officer reverses his decision relative to the "single, combined beneficial use of water" position, then it follows that these remaining portions of the *Preliminary Order* should likewise be reversed as the key holding served as the primary basis for finding that 83160 does not meet these other transfer criteria.

II. CONCLUSION.

For the reasons set forth above, the Hearing Officer should reconsider the *Preliminary Order*, and upon a proper interpretation of the water right descriptions and elements for WR 35-7667 and the water rights that yield water to the ASCC shares, as well as consideration of the other legal authorities provided herein, the *Preliminary Order* should be reversed and 83160 should be approved.

Submitted this 7th day of August, 2020.

Robert L. Harris

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

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2020, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: APPLICANT'S PETITION FOR RECONSIDERATION

ORIGINAL TO: **James Cefalo**
Hearing Officer, Idaho Department of Water Resources
900 North Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov

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Attorneys for Jeffrey and Chana Duffin

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR TRANSFER NO. 83160 IN THE NAME OF JEFFREY AND CHANA DUFFIN	**DECLARATION OF ROBERT L. HARRIS IN SUPPORT OF APPLICANT'S PETITION FOR RECONSIDERATION**

I, Robert L. Harris, state that the following is made on my personal knowledge, and that I would so testify in open court if called upon to do so.

1. I am over the age of eighteen (18) and am competent to testify to the matters contained herein.
2. I am a member of Holden, Kidwell, Hahn & Crapo, P.L.L.C., and my firm and I represent the applicants in this matter, Jeffrey and Chana Duffin.
3. Attached hereto as **Exhibit 1**, which is incorporated herein by reference, is a true and correct copy of Jeffrey and Chana Duffin's 2020 Assessment Notice from Aberdeen-Springfield Canal Company.

4. Attached hereto as **Exhibit 2**, which is incorporated herein by reference, is a true and correct copy of Jeffrey and Chana Duffin's American Falls-Aberdeen Ground Water District assessments for several water rights, including WR 35-7667.

5. Attached hereto as **Exhibit 3**, which is incorporated herein by reference, is a true and correct copy of the *Final Order Disallowing Water Right Claim* for Water Right 37-0281B dated June 24, 2008 which I obtained from the IDWR water right backfile for this right.

6. Attached hereto as **Exhibit 4**, which is incorporated herein by reference, is a true and correct copy of the Water Right Report for Water Right No. 37-2801B obtained from the IDWR website.

7. Attached hereto as **Exhibit 5**, which is incorporated herein by reference, is a true and correct copy of the *Preliminary Order* issued In the Matter of Application for Transfer No. 5116 in the Name of Charles L. Barron dated June 15, 1998 that was included in the documents provided by the hearing officer in the above-entitled matter. It is attached here for the convenience of the parties.

8. Attached hereto as **Exhibit 6**, which is incorporated herein by reference, is a true and correct copy of *Order of Partial Decrees* for Water Right Nos. 37-07295A and 37-07295B issued on June 24, 2008, which I obtained from IDWR water right backfile for Water Right No. 37-07295.

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct. Idaho Code § 9-1406; Idaho Rule of Civil Procedure 2.7.

August 7, 2020
Date

Robert L. Harris
Robert L. Harris, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2020, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: **DECLARATION OF ROBERT L. HARRIS IN SUPPORT OF APPLICANT'S PETITION FOR RECONSIDERATION**

ORIGINAL TO:

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Hearing Officer, Idaho Department of Water Resources
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EXHIBIT 1

Aberdeen-Springfield Canal Company

PO Box 857
Aberdeen, ID 83210
office@ascanal.org
Ph. (208) 397-4192 Fax (208) 246-0216

2020 Assessment Notice

P-A In Full 11-26-19

Duffin, Jeffrey T & Chana
PO Box 525
Aberdeen, ID 83210

Parcel	Legal Description	Description	Number Shares	Total Assessed Amount	Total Due	Payment Due Dates: 2020 1st Half 1/31/2020	2020 2nd Half 4/1/2020
REVIEW FOR ACCURACY- Pending transfers may not be reflected - Tenant copies have been mailed							
352	S.20 T.5S R.31E W½ NW¼ (District Shares 80) S.19 T.5S R.31E SE¼ NE¼ (District Shares 30) Shareholder: Duffin, Jeffrey T & Chana	2020 O & M	110.00	$3,630.00	$3,630.00	$1,815.00	$1,815.00
515	S.20 T.6S R.31E S½SE¼NW¼(DISTRICT SHARES 20), S½S½NE¼(DISTRICT SHARES 40) Shareholder: Duffin, Jeffrey T & Chana	2020 O & M	60.00	$1,980.00	$1,980.00	$990.00	$990.00
1538	S.32 T.5S R.31E NE¼SE¼ Shares from Schritter - Need Warranty Deed for property legal description Shareholder: Duffin, Jeffrey T & Chana	2020 O & M	5.00	$165.00	$165.00	$82.50	$82.50

2020 Assessment Due 1/31: Full Payment: $5,775.00

Installment Payments Option:

1st Installment due 1/31: $2,887.50

2nd Installment due 4/1: $2,887.50

Assessment Notice(s) for these parcel(s) have been mailed to the Shareholder(s) above.

Our records show stockholders as indicated for the above listed parcel(s). If this information is incorrect, contact the business office so our information may be updated. PLEASE NOTE: You cannot vote these shares unless they are in your name.

IF THE FIRST HALF PAYMENT IS NOT MADE BY JANUARY 31ST, INTEREST ACCRUES ON THE ENTIRE AMOUNT FROM DECEMBER 1ST OF THE PREVIOUS YEAR. IF PAYING AFTER JANUARY 31ST, PLEASE CALL THE OFFICE FOR THE ACCRUED INTEREST AMOUNT BEFORE PAYING.

A lien will be filed against the above listed property on Nov. 30th of this year for non-payment of past due accounts from previous year(s).

EXHIBIT 2

AMERICAN FALLS-ABERDEEN GROUND WATER DISTRICT

P.O. Box 70, American Falls, ID 83211
PHONE (208) 226-5914

2020 DISTRICT ASSESSMENT DETAIL

MEMBER COMPANY:
MEMBER NAME: JEFFREY & CHANNA DUFFIN
MEMBER ID: 85

BILLING DATE 15-Nov-19
ASSESSMENT YEAR 2020

Water Right Number	Assessed Priority Date	WMIS	Well Location(s)	Assessed CFS	Operation $164.08 * cfs	Mitigation $272.56 * cfs	Fish Farm Debt Retirement $142.08 * cfs	SWC Settlement Mitigation Water $254.45 * cfs	Hagerman Settlement $63.61 * cfs	Total
35-14428	6/11/1992	600444	06S 30E 26 SWSW	0.02	$3.28	$5.45	$2.84	$5.09	$1.27	$17.93
35-14429	12/9/1952	600444	06S 30E 26 SWSW	0.04	$6.56	$10.90	$5.68	$10.18	$2.54	$35.86
35-2296	1/20/1953	600473	06S 30E 34 NWNE	2.38	$390.51	$648.69	$338.15	$605.59	$151.39	$2,134.33
35-2385	8/27/1954	600443	06S 30E 26 NWSE	2.42	$397.07	$659.60	$343.83	$615.77	$153.94	$2,170.21
35-2485	11/30/1956	600399	06S 30E 15 SWSW	2.3	$377.38	$626.89	$326.78	$585.23	$146.30	$2,062.58
35-4022	11/20/1959	600444	06S 30E 26 SWSW	2.22	$364.26	$605.08	$315.42	$564.88	$141.21	$1,990.85
35-7667	6/11/1992	600524	06S 31E 20 SWNE	1.08	$177.21	$294.36	$153.45	$274.81	$68.70	$968.53
			Totals	10.46	$1,716.27	$2,850.97	$1,486.15	$2,661.55	$665.35	$9,380.29

EXHIBIT 3

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)
)

FINAL ORDER DISALLOWING WATER RIGHT CLAIM

WATER RIGHTS: 37-02801B

On March 31, 2008, a ***Special Master's Report and Recommendation*** was filed for the above water right claim, recommending said water right claim not be decreed and the claim be dismissed with prejudice. No challenges were filed to the ***Special Master's Report and Recommendation*** and the time for filing challenges has expired.

Pursuant to I.R.C.P. 53(e) (2) and ***SRBA Administrative Order 1***, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report and Recommendation*** and wholly adopts them as its own.

Therefore, IT IS ORDERED that the above water right claim is hereby **disallowed with prejudice** and shall not be confirmed in any partial decree or in any final decree entered in the SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED June 24, 2008.

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the FINAL ORDER DISALLOWING WATER RIGHT CLAIM was mailed on June 24, 2008, with sufficient first-class postage to the following:

SV RANCH LLC
C/O GREGORY VIK
PO BOX 1607
BELLEVUE, WA 98009
Phone: 425-460-2504

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Deputy Clerk

EXHIBIT 4

IDAHO Department of Water Resources

IDWR offices are open to the public and following the CDC guidelines for wearing masks and observing social distancing. For in-person visits, we encourage you to call ahead for an appointment.

WATER RIGHT REPORT

8/7/2020

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report

WATER RIGHT NO. 37-2801B

Owner Type	Name and Address
Current Owner	SV RANCH LLC GREG VIK PO BOX 1607 BELLEVUE, WA 98009-1607 4254602542
Original Owner	CHARLES L BARRON PO BOX 322 FAIRFIELD, ID 83327 2087642443

Priority Date: 08/09/1905

Basis: Decreed

Status: Disallowed

Source	Tributary
CAMAS CREEK	BIG WOOD RIVER

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION	4/01	10/15	6 CFS	
Total Diversion			6 CFS	

Location of Point(s) of Diversion:

CAMAS CREEK | SESWNE | Sec. 35 | Township 01S | Range 13E | CAMAS County

Place(s) of use:

Place of Use Legal Description: IRRIGATION CAMAS County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
02S	13E	2		NENE	20		NWNE	35		SWNE	40		SENE	36
				NENW	30		SENW	33						
				NESW	32									
				NESE	40		NWSE	40		SWSE	2		SESE	3

Total Acres: 311

Conditions of Approval:

1. P04 Forfeited/abandoned due to non-use from 1973 to 1987.
2. P14 Forfeited/abandoned: This is included for a claim based on a decree or license that is proposed to be disallowed on the basis that the water right no longer exists because forfeiture of the right by nonuse was confirmed and a defense to forfeiture was not confirmed, or because abandonment of the right was confirmed.

Dates:

Licensed Date:

Decreed Date: 06/24/2008

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Water Supply Bank Enrollment Date Accepted:

Water Supply Bank Enrollment Date Removed:

Application Received Date:

Protest Deadline Date:

Number of Protests: 0

Other Information:

State or Federal: S

Owner Name Connector:

Water District Number: 37

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Civil Case Number:

Old Case Number:

Decree Plantiff:

Decree Defendant:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

EXHIBIT 5

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5116 IN THE NAME OF)
CHARLES L. BARRON)
)

PRELIMINARY ORDER

This matter having come before the Idaho Department of Water Resources (department), the department makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On July 20, 1905, a predecessor agency of the department issued license no. 37-02801 to Relf J. Bledsoe and Lucy M. Nelson as follows:

Source:	Camas or Malad Creek
Priority:	August 9, 1909
Rate of div:	12 cubic feet per second
Point of div:	SE1/4NE1/4 Section 34, T1S, R13E, B.M.
Use:	Irrigation
Place of use:	S1/2N1/2, SW1/4, SE1/4 Section 30, N1/2N1/2 Section 31, all in T1S, R14E, B.M.

2. On October 3, 1956, the department issued transfer no. 232 as follows:

Ident. No:	37-02801B
Source:	Camas or Malad Creek
Priority:	August 9, 1905
Rate of div:	6.0 cfs
Point of div:	SW1/4SE1/4 Section 30, T1S, R14E, B.M.
Use:	Irrigation
Place of use:	S1/2NE1/4, SE1/4 Section 30, N1/2NE1/4 Section 31, T1S, R14E, B.M.

3. On March 5, 1968, the department issued transfer no. 302 as follows:

Ident. No:	37-02801B
Source:	Camas or Malad Creek
Priority:	August 9, 1905
Rate of div:	6.0 cfs
Point of div:	SW1/4SE1/4 Section 30 and NW1/4NE1/4 Section 31, T1S, R14E, B.M.
Use:	Irrigation
Place of use:	S1/2NE1/4, SE1/4 Section 30, N1/2NE1/4 Section 31, T1S, R14E, B.M.

4. On June 16, 1997, Charles L. Barron ("applicant" or "Barron") filed Application for Transfer no. 5116 ("application") with the department proposing to change the point of diversion and place of use of the license as follows:

Ident. No:	37-02801C
Source:	Chimney Creek
Priority:	August 9, 1905
Rate of div:	1.2 cfs
Point of div:	SW1/4SW1/4 Section 26, T1N, R12E, B.M., Camas County
Use:	Irrigation of 62.2 acres within a 320 acre permissible place of use.
Place of use:	W1/2SW1/4 Section 26, SW1/4NE1/4, NW1/4, NW1/4SE1/4 Section 35, T1N, R12E, B.M.

Ident. No:	37-02801D
Source:	Malad River
Priority:	August 9, 1905
Rate of div:	4.8 cfs
Point of div:	SE1/4SW1/4 Section 9, T6S, R14E, B.M., Gooding County
Use:	Irrigation of 248.8 acres
Place of use:	S1/2NE1/4, N1/2SE1/4 Section 8, SW1/4NW1/4, NW1/4SW1/4 and SE1/4SW1/4 Section 9, T6S, R14E, B.M.

5. License no. 37-07295 authorizes the diversion of groundwater and is appurtenant to the same place of use as water right no. 37-02801B.

6. The proposed transfer of part C of license no. 37-02801 to Chimney Creek would change the place of use of 1.2 cfs of the right upgradient about 15 stream miles from the licensed place of use. The proposed transfer of part D of license no. 37-02801 would change the place of use of the remainder of the license (4.8 cfs) to a location downstream from Magic Reservoir approximately 80 river miles from the licensed place of use.

7. On December 18, 1997, January 9, 1998, April 1, 1998 and on May 12, 1998, the department corresponded with the applicant or his attorney seeking input relative to deficiencies on the application, ownership of the right sought to be transferred, enlargement of use and injury to other water users.

8. The watermaster of Water District No. 37 states that the right sought for transfer is a flood water right and without stringent regulation would be damaging to decreed water rights downstream.

9. The quitclaim deeds from Ray Sabala and from Lynn E. Stevenson to the applicant do not establish that the applicant owns the water right sought for transfer.

10. The applicant has not provided information which shows the actual extent of beneficial use historically made of the water right. In addition, the applicant has not provided a thorough description of past use of the water right.

11. The applicant has not provided information to show that the proposed changes would not injure other water rights.

12. The applicant has not provided information relative to availability of water at the proposed new points of diversion.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in

use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code; ...

2. The applicant has not shown that Camas Creek provides enough water during the mid-summer months to provide a reliable source of water for the proposed place of use of right no. 37-02801C on Chimney Creek or for the proposed place of use for right no. 37-02801D which is downstream from Magic Reservoir approximately 80 miles from the licensed place of use.

3. The applicant has not provided suitable information relative to past use of right no. 37-02801, non-injury to other water rights or to non-enlargement in use to allow the department to approve the application.

4. The proposed changes will injure other water rights.

5. The proposed changes will constitute an enlargement in use of the original right.

6. The application is not in the local public interest.

7. The department should not approve the application.

ORDER

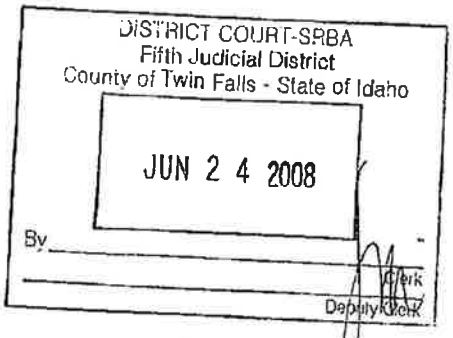
IT IS THEREFORE, HEREBY ORDERED that Application for Transfer no. 5116 in the name of Charles E. Barron is **DENIED**.

Dated this 15th day of June, 1998.

L. Glen Saxton

L. GLEN SAXTON, Chief
Water Allocation Bureau

EXHIBIT 6



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	**ORDER OF PARTIAL DECREES**
Case No. 39576	)	
	)	**Subcases: 37-07295A & 37-07295B**
	)	
	)	
	)	

On April 7, 2008, an ***Amended Special Master's Report and Recommendation*** was filed for the above-captioned water rights. No Challenges were filed to the ***Amended Special Master's Report and Recommendation*** and the time for filing Challenges has now expired.

Pursuant to I.R.C.P. 53(e)(2) and ***SRBA Administrative Order 1***, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Amended Special Master's Report*** and wholly adopts them as its own.

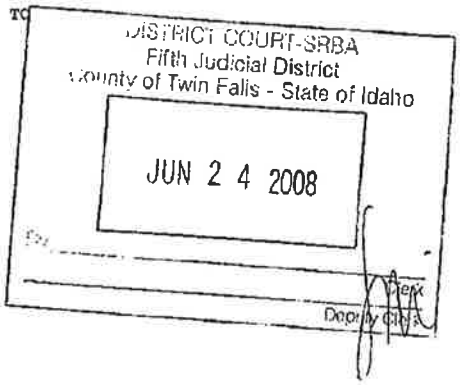
Therefore, IT IS ORDERED that the above-captioned water rights are hereby **decreed** as set forth in the attached ***Partial Decrees Pursuant to I.R.C.P. 54(b)***.

DATED June 24, 2008.

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 37-07295A



NAME AND ADDRESS: SV RANCH LLC
C/O GREGORY VIK
PO BOX 1607
BELLEVUE, WA 98009

SOURCE: GROUND WATER

QUANTITY: 2.73 CFS
720.00 AFY

PRIORITY DATE: 11/07/1973

POINT OF DIVERSION: T01S R14E S30 SESESE Within Camas County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation	04-01 TO 11-01	2.73 CFS 720.00 AFY

PLACE OF USE: Irrigation Within Camas County

T01S R14E S30	SWNE 40.0	SENE 38.0
	NESE 39.0	NWSE 40.0
	SWSE 37.0	SESE 34.0

228.0 Acres Total

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 37-07295B

NAME AND ADDRESS: SV RANCH LLC
C/O GREGORY VIK
PO BOX 1607
BELLEVUE, WA 98009

SOURCE: GROUND WATER

QUANTITY: 1.05 CFS
240.00 AFY

PRIORITY DATE: 11/07/1973

POINT OF DIVERSION: T01S R14E S30 SESESE Within Camas County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation	04-01 TO 11-01	1.05 CFS 240.00 AFY

PLACE OF USE: Irrigation Within Camas County

T01S R14E S31	NENE 39.0	NWNE 37.0
	SWNE 5.0	SENE 11.0

92.0 Acres Total

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER OF PARTIAL DECREES was mailed on June 24, 2008, with sufficient first-class postage to the following:

SV RANCH LLC
C/O GREGORY VIK
PO BOX 1607
BELLEVUE, WA 98009
Phone: 425-460-2504

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

 FILE COPY FOR 01083 Deputy Clerk