

Robert L. Harris (ISB #7018)

rharris@holdenlegal.com

Luke H. Marchant (ISB # 7944)

lmarchant@holdenlegal.com

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

1000 Riverwalk Dr., Ste. 200

P.O. Box 50130

Idaho Falls, Idaho 83405

Telephone: (208) 523-0620

Facsimile: (208) 523-9518

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

**APPLICANT'S
ARGUMENT BRIEF**

Applicant Jeffrey and Chana Duffin (collectively "Applicant" or "Duffin"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby file *Applicant's Argument Brief*. This brief is also supported by the *Declaration of Robert L. Harris in Support of Applicant's Argument Brief* 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. 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. 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 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).

Request for Briefs at 2. The due date for the briefs is July 17, 2020.

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:

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.

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 ¶132.

Each of these questions is addressed below.

I. APPLICABLE LEGAL STANDARDS FOR WATER RIGHT INTERPRETATION.

Question 1 (and possibly question 3) illicit responses to a question that invokes issues of water right interpretation. WR 35-7667 was obtained through the statutory permitting process. While a decreed water right has been judicially verified, a licensed water right has been validated by IDWR and is a perfected water right. Idaho Code § 42-220 provides that the legal rights in water rights granted by license and by court decree are the same:

Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. . . . provided, that when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, . . .

Idaho Code § 42-220 (emphasis added). Accordingly, “[e]xcept for clerical errors, or licenses that include a term limit or a condition authorizing subsequent review, the Department does not have authority to reconsider the elements of a license after the appeal period has passed.” *In the Matter of Application for Transfer No. 82640 in The Name of Clinton K. Aston*, Amended Preliminary Order Approving Transfer, at 14.

Because licensed and decreed water rights have the same legal effect, the principles of interpretation for SRBA partial decrees are the same for interpreting water right licenses. “The Snake River Basin Adjudication (‘SRBA’) was commenced by order dated November 19, 1987.” *Hagerman*, 130 Idaho at 729, 947 P.2d at 402. The SRBA was a “general stream adjudication . . . where thousands of claims and potential parties are involved” to adjudicate all of the water rights

in the Snake River Basin throughout Idaho. *In Re SRBA Case No. 39576 Subase No. 37-00864*, 164 Idaho 241, 244, 429 P.3d 129, 132 (2018). The partial decrees issued in the SRBA in relation to individual water rights are final orders of the Court, and licenses issued by IDWR are final orders, neither of which are subject to subsequent collateral attack. In the case of *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 155, 408 P.3d 899, 910 (2018), the Idaho Supreme Court 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.

The Idaho Supreme Court has described the appropriate process for interpreting water right partial decrees, a process that also applies to water rights perfected through the statutory permitting process:

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. Ereksan*, 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).

When interpreting a contract or water right, courts and administrative hearing officers must begin with the document's language and determine whether it is ambiguous. *Knipe Land Co. v. Robertson*, 151 Idaho 449, 454, 259 P.3d 595, 600 (2011). "Whether an ambiguity exists in a legal instrument is a question of law." *Id.* at 455, 259 P.3d at 601. To determine whether ambiguity exists, tribunals must solely "begin[] with the document's language." *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). From that legal

determination:

In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical.

Knipe Land Co., 151 Idaho at 454-55, 259 P.3d at 600-01 (quoting *Potlatch Education Ass'n*, 148 Idaho at 633, 226 P.3d at 1280 and omitting internal citations and quotations).

Blackfoot developed the law of interpreting water rights by specifically noting that because a water right decree “shall contain or incorporate a statement of each element of [the] water right,” it cannot do both; it “must either contain a statement of [each element] or incorporate one, but not both.” *Blackfoot*, 162 Idaho at _____, 396 P.3d at 1188-89. (citations omitted). The *Blackfoot* decision strongly indicates that there cannot be implied water right conditions or a case of implied incorporation of a document into a water right decree. *See id.* Thus, a water right decree is, in effect, an integrated contract, *i.e.*, a merged document that is the “complete and exclusive statement of the terms of the contract.” *Anderson & Nafziger v. G. T. Newcomb, Inc.*, 100 Idaho 175, 180, 595 P.2d 709, 714 (1979) (citation omitted). An integrated document is subject to the parol evidence rule. *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). This means that “extrinsic evidence of prior or contemporaneous representations or negotiations are inadmissible to contradict, vary, alter, add to, or detract from the instrument’s terms.” *Kepler-Fleenor v. Fremont Cnty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012) (citation and internal quotation marks omitted).

Regarding ambiguities, the Idaho Supreme Court has explained:

“Ambiguities can be either patent or latent.” *Swanson v. Beco Constr. Co., Inc.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007). “Idaho courts look solely to the face of a written agreement to determine whether it is [patently] ambiguous.” *Ward v.*

Puregro Co., 128 Idaho 366, 369, 913 P.2d 582, 585 (1996). “A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist.” *In re Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995).

Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013). If there is an ambiguity—either patent or latent—the tribunal can look beyond the four corners of the document (here, the water right license) and determine the meaning of the language, which is a factual question. *Pocatello Hosp., LLC v. Quail Ride Med. Inv’r, LLC*, 156 Idaho 709, 720, 330 P.3d 1067, 1078 (2014) (“If a contract is ambiguous, its interpretation is a question of fact” (citation and internal quotation marks omitted)).

With all of the above said, both Judge Wildman of the SRBA and the Idaho Supreme Court have been extremely reluctant to find any ambiguity, uncertainty, or alternative meaning (either patent or latent) within partial decrees issued by the SRBA. *See, e.g., Rangen, Inc. v. Idaho Dep’t of Water Res.*, 159 Idaho 798, 367 P.3d 193, 203 (2016) (“the name Martin–Curren Tunnel is not ambiguous and does not create a latent ambiguity in Rangen’s partial decrees”); *United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 408 P.3d 52 (2017); *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) *aff’d by Black Canyon Irrigation*, 163 Idaho 54, 408 P.3d 52; *Order Denying Petitioner’s Second Motion for Reconsideration and Order Denying Motion to Amend Petition and Complaint* (Camas County, Fifth Jud. Dist., *Cash v. Cash et al.*, Jan. 12, 2018). Judge Wildman has explained that “[i]t would constitute a serious turmoil and confusion for this Court to issue partial decrees [on the late claims,] which contradict the precise language, intent and effect of that final judgment [i.e., the prior partial decrees].” *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). For that reason, the court concluded “that the late claims were extinguished by operation of the plain language of the [prior] final judgment. To find otherwise would offend the plain language of the final judgment and result in contradictory court decrees.” *Id.* These same principles apply to interpretation of water right licenses.

Conditions contained in a water right are recognized as further description or limitation on the elements of the water right. For permits, Idaho Code § 42-203A(5) allows the Director to “grant a permit upon conditions.” The perfected permit is then licensed pursuant to Idaho Code § 42-219 where the license document issued must bear “the number of the permit under which the works from which such water is taken were constructed.” Such license must therefore incorporate any permit conditions which are part and parcel to the description of how the water right can be used, and in some instances, additional conditions can also be added to the license as necessary. *See Idaho Power Co. v. Idaho Dep’t of Water Res. (In Re Licensed Water Right No. 03-7018)*, 151 Idaho 266, 255 P.3d 1152 (2011) (Department had authority to include a term condition in Idaho Power’s license, even though such a condition was not included in the original permit). As a result of including these conditions in a license, “[s]uch license **shall be binding upon the state** as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right[.]” Idaho Code § 42-220 (emphasis added).

The binding effect of conditions in a water right license remains unchanged in the formal adjudication of a water right license. With claims submitted in an adjudication (such as the SRBA), the claim form requires inclusion of “conditions of the exercise of any water right included in any decree, license, approved transfer application or other document,” Idaho Code § 42-1409(j), the report of the Director requires inclusion of the same conditions, Idaho Code § 42-1411(2)(j), and

the final step of the adjudication process—issuance of the partial decree—is required to “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.” Idaho Code § 42-1412(6). In other words, if conditions limiting the exercise of a water right exist, they must be expressly included in the adjudication claim to be expressly contained in the water right decree. The same principles applies to water right licenses.

In addition, however, some conditions contained within water rights are for descriptive or other informational purposes only and are not directives or further limitations on the basic water right elements directed to the water right owner unless such conditions contain the word “shall”. The Idaho Supreme Court specifically addressed this situation in *Telford Lands LLC v. Cain*, 154 Idaho 981, 988–89, 303 P.3d 1237, 1244–45 (2013) (with emphasis added):

In connection with this assignment of error, the Cains also argue that the district court ignored conditions placed on the water rights of Telford Lands and PU Ranch that required them to transport the water from their two wells by means of the Moore Canal. In opposition to the Ranchers’ motion for partial summary judgment, the Cains attached to their memorandum water right reports printed from the website of the Idaho Department of Water Resources. With respect to Telford Lands, the reports included as one of the conditions of approval the statement, “Water delivered through the Moore Diversion and Timberdome Canal.” The PU Ranch water right report included a statement, “No more than 2.90 cfs or 435 acre feet per annum shall be injected into the Moore Canal.” The Cains argued that this showed there was an existing means for Telford Lands to transport water from its well. In response, the Ranchers presented the affidavit Ernest Carlsen, who had been a 33–year employee of the Department. He stated that the Department uses the word “shall” when requiring the water right holder to do or not to do something and that it “will sometimes include remarks in a transfer approval that are added for explanatory purposes only, generally to provide information to the state-employed water master to aid in on the ground delivery of water diverted under the water right.” He then averred that the statement regarding the use of the Moore and Timberdome Canals did not use the word “shall” and so did not require that the water be delivered through those canals, but rather “it informs the watermaster that as of the date of the transfer approval, water actually is delivered through the Moore and Timberdome Canals.” The Ranchers also filed the affidavit of James Cefalo, the Water Resources Program Manager for the Department’s eastern regional office, who stated that Ernest Carlson’s affidavit is consistent with the Department’s current policy. In its decision granting the Rancher’s motion for partial summary judgment as to their condemnation claim, the district court wrote

that “identification of a delivery system in a permit, license, transfer application or other similar document is for descriptive purposes only and has no binding effect for purposes of the pending motions.”

The Cains filed a motion for reconsideration, in which they argued, among other things, “It is not the province of this court to render a nullity the conditions that have been legitimately imposed by an administrative agency of the State of Idaho.” They relied for their argument upon the affidavit of Dr. Charles E. Brockway, who stated that in addition to the elements of water rights listed in Idaho Code section 42-1411(2), “the rights themselves also contain additional conditions of approval and sometimes remarks relative to each of these water rights” and that “[t]he additional conditions of approval further explain and define the water rights and provide direction to the Watermaster for administration of the right.” Notably lacking from Dr. Brockway’s carefully crafted affidavit was any assertion that the specific statements at issue were mandatory requirements for exercising the water rights. **He did not mention or refer to those statements in his affidavit. The district court did not err in holding that these statements were not mandatory requirements for exercising the water rights.**

With the foregoing in mind, the Applicant’s position on the the more detailed questions contained in the *Facts* are addressed in turn below.

II. ARGUMENT.

A. Does the proposed transfer [83160] 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?

The direct answer to the first and second components of the above question is “no.”

When faced with review of a transfer application, Idaho Code § 42-222 provides the Department (if there is no protest) or the Hearing Officer (if there is a protest) with three options:

(1) approve the transfer; (2) deny the transfer; or (3) approve the transfer with conditions. The specific language from this statute outlining these options is emphasized here:

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 plain language of this statute allows the Department to approve a transfer upon conditions, which may include removal or modification of a condition of an existing water right provided that such removal or modification does not injure other water rights or conflict with other water rights, result in an enlargement, or cause violation of the other criteria in Idaho Code § 42-222. The Department has prepared and issued documentation describing its interpretation of Idaho Code § 42-222 consistent with this preceding sentence in its *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*"). The opening sentence of the *Transfer Memo* provides that "[t]he purpose of this memorandum is to provide policy guidance for processing applications for transfers of water rights pursuant to Section 42-222, *Idaho Code*, and other applicable law." *Transfer Memo* at 1.

Where the *Transfer Memo* is an interpretation of Idaho Code § 42-222, the above statutory interpretation is entitled to "considerable weight" because IDWR meets all of the prongs of the four-prong test applied to determine the appropriate level of deference to be given to an agency construction of a statute. *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 571, 21 P.3d 890, 893 (2001).

First, IDWR is the agency that has been entrusted with the responsibility of administering the statute at issue. *Hamilton*, 135 Idaho at 571, 21 P.3d at 893. Second, IDWR's statutory construction is reasonable because the statute allows a transfer to be approved provided there is no

enlargement or injury. Third, the statutory language does not expressly treat the precise question at issue—in other words, Idaho Code § 42-222 does not specifically describe every instance of enlargement implicated in the movement or amendment of a water right.

The fourth prong looks at the rationales underlying deference, including that of repose. *Id.* This focuses on whether others have relied upon the Department's interpretation. Water users have relied upon the Department's interpretation contained in the *Transfer Memo*. In *State v. Hagerman Right Owners, Inc.*, the Idaho Supreme Court concluded that “[c]ase law and the record in this case show that the general public did indeed understand and depend upon the prior IDWR interpretation, policy and practice that partial forfeiture is a recognized concept in Idaho. . . . The Court declines to ‘unsettle the repose of all those who have detrimentally relied on . . . agency interpretations,’ and will accord IDWR’s interpretation deference in this case.” *Hagerman*, 130 Idaho at 734, 947 P.2d at 407.

As stated above, the *Transfer Memo* provides that “[r]egardless of whether or not an application is protested, Section 42-222, Idaho Code, requires the department to evaluate [the Idaho Code § 42-222 criteria].” *Transfer Memo* at 1. For these reasons, the Hearing Officer should likewise not unsettle the expectations of those that have relied upon IDWR’s interpretation of Idaho Code § 42-222 as described in the *Transfer Memo*.

When performing this deference analysis, “If the four-prong test is met, then courts must give **considerable weight to the agency’s interpretation of the statute.**” *Herrmann v. State*, 162 Idaho 682, 685, 403 P.3d 318, 321 (Ct. App. 2017) (citing *Preston v. Idaho State Tax Comm’n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998)). The guidance outlined in the *Transfer Memo* is therefore entitled to “considerable weight,” and it provides that “[r]egardless of whether or not an

application is protested, Section 42-222, Idaho Code, requires the department to evaluate [the Idaho Code § 42-222 criteria].” *Transfer Memo* at 1.

The question addressed in this section uses the word “supplemental ground water right”. At the outset, in response to this question, there is no statutory or administrative rule definition of “supplemental ground water right,” and our understanding of the supplemental water right concept is therefore entirely obtained from IDWR’s practices and policies when faced with situations it believes involve supplemental water use. Attached as Exhibits 1, 2, and 3 to the *Harris Declaration* are deposition transcripts from IDWR employees Jeff Peppersack, Carter Fritschle, and Michal Holliday taken in August of 2017 in a dispute over WR 35-2824 involving (among other things) whether or not the inclusion of the “E02” explanatory remark maintained on IDWR’s database (but not included on the face of the partial decree for 35-2824) made 35-2824 supplemental to Aberdeen-Springfield Canal Company water. While this matter was ultimately settled, the depositions explain important principles relative to IDWR’s interpretation of water rights and whether they are supplemental or not, and how transfers of such rights are accomplished. The entirety of these depositions are included in the *Harris Declaration* to avoid any claim of selectively quoting from them, but in our view, the critical takeaway principles from the depositions are:

1. There is no definition of a supplemental water right or stacked water right in a statute or IDAPA rule. Peppersack Depo. at 14, 17.
2. There is a definition of “supplemental water right” in the Transfer Memo at p. 29:

- (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.

Id. at 14.

3. According to Jeff Peppersack, it is possible that stacked water rights are not necessarily identified in the SRBA partial decrees. *Id.* at 18.
4. Explanatory remarks are not found on the partial decree but are used as information by the Department in making administrative decisions. *Id.* at 19.
5. The Transfer Memo was developed over a series of years and was written by various Department staff based on historical application of the laws and the way the Department has interpreted the laws and applied them. *Id.* at 20-21.
6. Jeff Peppersack reviewed the partial decree for 35-2824 and stated that "[w]hether they're primary or supplemental, I guess I haven't made a determination." *Id.* at 27.
7. Jeff Peppersack described generally how a transfer in a stacked water right situation is reviewed to prevent enlargement:

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

Id. at 32.

8. IDWR allows rights it considers to be supplemental to be converted to a primary water right. *Id.* at 35-37 (Jeff Peppersack explaining a transfer example).
9. To determine whether a right is supplemental, IDWR first tries to decide whether the primary/supplemental relationship exists, and there could be circumstances where the ground water and surface water are not used together, and that the intent was not to use them as a primary/supplemental relationship. *Id.* at 39-40.
10. Relative to 35-2824, Jeff Peppersack explained that from the water right report, "there's an indication that there's surface water available on the property, or at least was. But there's nothing prohibiting the groundwater from being fully utilized based on the conditions." *Id.* at 43.
11. Other than the enlargement provision of the statute, Jeff Peppersack is not aware of any statute or rule that deals with the conversion of supplemental rights to primary rights. *Id.* at 44.
12. Without an express condition providing that surface water must be used first before ground water, there is no way of enforcing use of surface water first. Additionally, it is also possible that a surface water right could be viewed as supplemental to a ground water right:

12 Q. Well, for example, I think earlier you said
 13 it's a policy of the Department that you have to use
 14 your surface water right first before you turn to
 15 groundwater.
 16 A. And that would be where we've restricted
 17 that use on conditions on a permit or water right.
 18 Q. So if that condition doesn't exist on a
 19 permit or water right, then you're saying it doesn't
 20 apply in the Department's review?
 21 A. I don't think we'd have a way of enforcing
 22 the use of surface water first otherwise.
 23 Q. So then I guess the question then becomes,
 24 do you then view that surface water as then being the
 25 supplemental right?

Page 55

1 A. So in other words, if the groundwater was
 2 used more often than the surface water, would the
 3 surface water be viewed as supplemental?
 4 Q. Yeah, even though the priority of the
 5 surface water was substantially earlier.
 6 A. I guess you can call it whatever you want.
 7 But I don't know -- I don't know the value of calling
 8 it supplemental or not, unless they were trying to
 9 transfer the surface water away and we were trying to
 10 analyze it that way, then maybe we'd try to
 11 characterize it. But I think ultimately we'd want to
 12 get to the same place, and that's look at the data,
 13 look at the relationship, and see if there's
 14 enlargement in a transfer.

Id. at 54-55.

13. After being presented with a memo prepared by Mr. Peppersack in a prior matter involving Buckeye Farms, Jeff Peppersack answered questions about the memo, which included the following explanation:

8 Q. Okay. And then down in what would be the
 9 third full paragraph that starts with "In practice,"
 10 can you read that sentence into the record.
 11 A. The first sentence?
 12 Q. Yes.
 13 A. "In practice, the Department considers a
 14 supplemental right to have a different source than the
 15 associated primary right and is restricted to use when
 16 the primary right is unavailable or insufficient."
 17 Q. Okay. So is that still the Department's
 18 practice today?
 19 A. I think that would be a good way to look at
 20 supplemental rights.

Id. at 58.

14. There are express conditions included on water rights (generally through the permit and licensing process) that expressly make the water rights supplemental, and those conditions are enforced by the Department:

23 A. "Since the Department requires that use of
24 a supplemental right is limited to times when the
25 primary right is unavailable or insufficient,

Page 60

1 enlargement of the primary right is usually not a
2 concern."

3 Q. And again, the same questions arise out of
4 that sentence.

5 Is that still the Department's
6 understanding or policy that they implement with
7 respect to reviewing primary and supplemental water
8 rights?

9 A. I think it is, but I think I need to
10 clarify that this would be the type where we have put
11 on restrictive conditions that say that it's a -- it
12 can only be used when -- when the primary surface water
13 is not available or not sufficient.

14 Q. And can you point to a Department policy
15 that states that?

16 A. I think I'd have to just point to the
17 practice that where we've applied those conditions,
18 those conditions state that the -- the supplemental
19 groundwater use is limited in use to when the -- the
20 surface water is not available or not sufficient.

21 MR. SIMPSON: That's all the questions I have.
22 Thank you, Mr. Peppersack.

Id. at 59-60.

5 Q. So I want to make sure I understand that.
6 As I understand your testimony, when we talk about
7 supplemental water rights, you made a distinction
8 between conditioned supplemental water rights and then
9 nonconditioned but considered to be supplemental water
10 rights.

11 Is that a fair characterization of those
12 two categories?

13 A. Yes, I think so.

14 Q. Okay. And in both cases would those both
15 be considered stacked water rights?

16 A. If we considered them supplemental, then
17 yes, they would both be stacked water rights.

Id. at 69.

18 Q. Okay. Does IDWR have a number of
19 conditions that are used to designate a water right as
20 a supplemental water right?

21 A. Well, they probably don't specifically say
22 they're supplemental. But yes, there are conditions
23 placed on permits and licenses that would restrict the
24 use of groundwater to times when surface water isn't
25 available or insufficient. And that would essentially

Page 73

1 identify them as supplemental rights.

2 Q. Do you know how many different versions of
3 those conditions there are?

4 A. Over time it's probably been changed and
5 updated. But yeah, I don't know. A handful at least
6 probably over time.

Id. at 72-73.

15. In the SRBA, except for situations where there was an express supplemental condition, IDWR did not include supplemental conditions, but simply noted that there was another water supply associated with the property under the explanatory remarks:

7 Q. Are you familiar with what a supplemental
8 water right is?

9 A. Yes. We didn't necessarily use that term
10 much, but I know -- I am familiar with it.

11 Q. In your review of adjudication claims, how
12 would you determine whether a water right was
13 supplemental?

14 A. That's why we tried not to use that term
15 very much.

16 Q. What was the term that you used?

17 A. We just used generally a -- if a person
18 owned two water rights, say a surface water right and a
19 groundwater right and they're both in their name, we
20 would just use the combined limits. We wouldn't
21 identify which one was primary or supplemental.

22 Q. So that's if there was a privately held
23 water right --

24 A. Yeah.

25 Q. -- a surface water right with a privately

Page 59

1 held groundwater right?

2 A. Yeah.

3 Q. With canal company shares where title to
4 the water right is held in the name of the canal
5 company, did you avoid that then?

6 A. That's why we just used this condition to
7 say they're out there. We don't know the extent of
8 which water right is used -- might be a primary right
9 and which one might be a supplemental right. We're
10 just recognizing that both rights go to the same
11 property or water sources, if you will.

12 Q. If there was a prior license or a decree
13 that included a supplemental condition, did you
14 generally translate that over into the Director's
15 report?

16 A. I'm trying to remember one in Basin 34. I
17 think we determined that it should be included. But
18 they were quite rare. I don't think I came across more
19 than a handful in the years that I was down
20 recommending adjudication claims.

Deposition of Carter Frischle at 58-59.

16. When reviewing ground water rights within the ASCC service area, IDWR found water rights with express supplemental conditions, water rights with neither an explanatory remark or explanatory condition, and water rights with at least one explanatory condition:

13 Q. So can you just explain what that table
14 represents or what you know about it. And then there's
15 one on the next page too.
16 A. So this table and the maps that follow,
17 you'll see a map representation of that table. The
18 information that I have for Question 5, Map 1, comes
19 directly from Wilma's table.
20 So of the water rights that were determined
21 to be stacked, 3200 acres worth had -- had supplemental
22 conditions on them. 79,000 -- 7,925 acres did not have
23 either a supplemental or an explanatory condition. And
24 the remainder had at least one explanatory condition.
25 Q. And do you have a list of these water

Deposition of Michael Holliday at 31.

17. In association with the above analysis performed by Michael Holliday, at that time, there were numerous iterations of supplemental and explanatory remark provisions: "So there were 44 conditions that I was looking for. I believe it was 32 explanatory and 12 supplemental conditions." *Id.* at 34. Additionally,

3 Q. Well, when a transfer application is filed
4 with the Department --
5 A. Yeah.
6 Q. -- and it's a request to transfer a
7 groundwater right that is stacked with surface water
8 rights, who makes the determination about what water
9 right is primary and what water right is supplemental?
10 A. The water right itself should have -- if it
11 is a supplemental right, should have the conditions on
12 it that would make it clear that it's a supplemental
13 right.
14 Q. Okay. When you say it has the conditions
15 on it, where would those conditions appear?
16 A. They would appear on the water right prior
17 to the -- you know, as it exists prior to the transfer.
18 Q. Okay. Are you talking about on the decree?
19 A. It could be a decree or it could be a
20 license.

Id. at 68.

Based on the foregoing, there are water rights in Idaho with (1) express supplemental conditions; and (2) water rights that are stacked, and as a result of being stacked, IDWR may analyze historical water use and determine whether such historic use makes the exercise of one

right supplemental to the other in order to evaluate enlargement when such water rights are the subject of a transfer application.

First, there are no express conditions on WR 35-7667 (either in the original license or the subsequent modification to WR 35-7667 because of Transfer 80188) that make it supplemental. *Facts* at ¶¶ 20, 23. Despite the presence of Aberdeen-Springfield Canal Company (“ASCC”) shares associated with the same place of use of WR 35-7667 during the development period and at the date of licensing of WR 35-7667, *Facts* at ¶¶ 3-15, the license issued for 35-7667 does not contain the word “supplemental” or “primary” on the face of this document. *Facts* at ¶ 20. The only condition of approval for WR 35-7667 simply embodies provisions of Idaho Code §§ 42-202 and 42-220, by providing: “This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa at the field headgate for irrigation of lands above.” As explained by Michael Holliday, there are a dozen (as of 2017) iterations of supplemental conditions historically or currently used by the Department, such as:

The right holder shall make full beneficial use of all surface water available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right for land with an appurtenant surface water right(s) to those times when the surface water supply is not available or reasonably sufficient to irrigate the place of use authorized under this right.

This type of condition is not present on WR 35-7667. If the exercise of WR 35-7667 was truly supposed to be limited to times when ASCC water was unavailable, then a condition could have been easily added when WR 35-7667 was licensed. If the condition was 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. The Idaho Supreme Court has clearly 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. This point bears further emphasis. Implicitly imposing a restriction on a water right that could easily have been made express in the licensing of WR 35-7667 would inject significant uncertainty into what rights water users received at the end of the statutory permitting process. Even when a partial decree contained reference to a settlement agreement providing that Blackfoot could use surface water for ground water recharge, the Idaho Supreme Court held that this argument was “nothing more than a collateral attack” on the decree as this nature of use could have easily been included in the partial decrees. 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 an implied condition—a condition that IDWR has

expressly included elsewhere as appropriate, and which could easily have been included on WR 35-7667.

In a separate proceeding also involving protests from the Coalition, legal briefs were submitted to address, among other things, this question relative to two other water rights:

3. Do the conditions of water rights 01-7017 and 35-7720 require the water right holder to use surface water right 01-7017 as a primary source of water and ground water right 35-7720 as a supplemental source of water?

Interlocutory Order Addressing Questions of Law, In the Matter of Applications for Transfer 83471, 83915 and 83918 in the Name of Rocky Mountain Water Exchange LLC, at 2. This question is similar to the question being addressed in this brief. The Hearing Officer concluded in the Rocky Mountain Water Exchange LLC matter as follows:

Relationship between Water Right 01-7017 and 35-7720

The partial decree for water right 35-7720 does not include any condition or language requiring the water right holder to exhaust the full supply of surface water available under water right 01-7017 before diverting ground water under water right 35-7720. Water right 01-7017 does include a condition requiring an additional (supplemental) supply of water be available for irrigation of the authorized acres when water right 01-7017 is curtailed. Water right 01-7017 is relatively junior on the Snake River and is only available for a short time period during the irrigation season. The condition on water right 01-7017 does not state that the right must be fully utilized or exhausted before using other water rights. In fact, water rights 01-7017 and 35-7720 do not include any conditions describing the order of use for the water rights. In the absence of a condition making water right 35-7720 secondary to water right 01-7017, the right holder is authorized to divert water under either water right in any order to accomplish the beneficial use described by the rights (the irrigation of 118 acres).

Id. at 7. The final sentence of the Hearing Officer's analysis bears repeating: **"In the absence of a condition making water right 35-7720 secondary to water right 01-7017, the right holder is authorized to divert water under either water right in any order to accomplish the beneficial use described by the rights (the irrigation of 118 acres)."** WR 35-7667 contains no conditions making it supplemental, which means that Duffin can use either ground water or surface water to

irrigate the Duffin property, and Duffin every right to move the WR 35-7667 off the property as long as there proof of historical use to avoid enlargement issues (which there is).

Additionally, WR 35-7667 is not supplemental simply merely because it is “stacked” with ASCC shares. As described in the *Transfer Memo*, as a result of being stacked, IDWR may analyze historical water use and determine whether such historic use makes the exercise of one right supplemental in practice to the other as a basis to evaluate enlargement when such water rights are the subject of a transfer application.

When reviewing the actual water use and development of the right (and the development of the right is something IDWR does look at as IDWR personnel described in the depositions referenced above), WR 35-7667 has not been actually been used as a supplemental source to the ASCC shares. Precisely the opposite, on the place of use for WR 35-7667, there has never been a time when ground water and surface water have been used for irrigation at the same time. Facts at ¶25. The reason WR 35-7667 was sought was because in the 1970s Duffin had difficulty receiving surface water at the end of the Hege Drain off the N Lateral. See *id.* at ¶27 (showing location of Hege Drain). Once the ground water well was drilled, it was used as the only source of irrigation water on the property until the end of 2016. In 2017, the Applicant began exclusively using ASCC water on the property (as ASCC has make significant system and operational improvements over the years resulting in a reliable source of supply). See *id.* at ¶ 26 (WMIS data confirming lack of electricity use at the well). In fact, the same pump that was used to pump ground water has been removed from the well and repurposed to divert the ASCC surface water from the Hege Drain.

As described above, there are water rights with (1) express supplemental conditions; and (2) water rights that are stacked, and a result of being stacked, IDWR may analyze historical water

use and determine whether such historic use makes the exercise of one right supplemental to the other when analyzing a transfer. Under the second described supplemental situation, and in response to the question herein, WR 35-7667 is not a supplemental water right.

Finally, it is worth noting that **even if** WR 35-7667 is determined to be supplemental for any reason, the *Transfer Memo* allows a right such as this to be transferred even if there is no enlargement. *Transfer Memo* at 29. This is explained in Jeff Peppersack's deposition testimony. See *Harris Declaration* at Exhibit 1. To verify that there will not be an enlargement, the *Transfer Memo* requires submission of five years of historical water use data for IDWR to analyze. This ensures that the ground water used at the former place of use is similar to what will be used at the new place of use. There is no specific language in Idaho Code § 42-222 concerning supplemental water rights, but enlargement is specifically described as an item that must be considered when a transfer application is filed. It is under the enlargement criteria that IDWR's position on transfer of supplemental rights (as described in the *Transfer Memo*) is appropriately based. Accordingly, even if WR 35-7667 is considered a supplemental water right, it can be changed to a primary water right under Idaho law based upon IDWR's interpretation of Idaho Code § 42-222, to which it is entitled considerable weight.

B. Is the proposed transfer contrary to the conservation of water resources within the State of Idaho?

The direct answer to this question is "no" because Duffin and/or Lava Rock Ranch, LLC will utilize sprinklers and/or pivots to irrigate the proposed place of use. This is the primary consideration when reviewing this criterion, as described in the following decision of the Department:

Conservation of Water Resources

Aston proposes to irrigate with center pivots and sprinklers. This is an efficient means of irrigation and is consistent with the conservation of water resources within the state of Idaho.

Amended Preliminary Order Approving Transfer, In the Matter of Application for Transfer No. 82640 in the Name of Clinton K. Aston, at 29. This conservation of water resources criterion does not include matters that are encompassed under the “local public interest,” as described in another decision of the Department:

Conservation of Water Resources

During oral argument for the Agencies’ *Motion*, there was some discussion about the scope of review under the conservation of water resources element set forth in Idaho Code § 42-203A(5)(f). The conservation of water resources review is meant to be separate and distinct from the local public interest review under Idaho Code § 42-203A(5)(e). Therefore, the term “conservation of water resources” does not mean reserving water from appropriation or setting water aside for instream uses such as fish habitat. These topics and issues are encompassed by the local public interest review and should be weighed against all other local public interest factors.

Diverting water from creeks and streams for irrigation use is an accepted common practice in Idaho. Bird proposes to irrigate using pipelines, sprinklers and pivots, which constitutes a conservative use of water when compared to other irrigation methods.

Order on Exceptions; Final Order, In the Matter of Application for Permit No. 74-16187 In the Name of Kurt W. Bird or Janet E. Bird, at 27. It appears that the Coalition included its question as a component of the local public interest review, which will be addressed in the following section. As to how the conservation of water resources criterion has been interpreted by IDWR, with the use of sprinklers and pivots, Duffin and/or Lava Rock Ranch, LLC satisfy this criterion.

C. 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?

In the Applicant's view, the answer to this question is "yes," this transfer is in the local public interest. Generally speaking, the local public interest involves weighing of various interests as the Hearing Officer has previously described in another matter:

Effect of Idaho Code §§ 31-3805 and 67-6537

In its brief, SWC acknowledges that the Department is not required to enforce or administer the provisions of Idaho Code §§ 31-3805 and 67-6537 when it conducts its review of a transfer application under Idaho Code § 42-222. *SWC Brief* at 11. Instead, SWC argues that these statutory provisions represent and summarize the local public interest in using surface water sources, where reasonably available, as the primary supply for irrigation use.

Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3). "The relevant elements [of the local public interest] and their relative weights will vary with local needs, circumstances, and interests." *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985). "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to [the Department's] sound discretion." *Id.*

The evaluation of whether a transfer application is in the local public interest involves identifying the local public interests and then weighing those interests. The Coalition has framed its arguments related to Idaho Code §§ 31-3805 and 67-6537 within the context of the local public interest element of review. Before the hearing officer can make an overall determination of whether the proposed transfer applications are in the local public interest, the parties must be given an opportunity to present evidence on the local public interest factor identified by the Coalition (related to the surface water irrigation preference) and also given an opportunity to present evidence on any other local public interest factors. It would be inappropriate to reach a determination on the local public interest element of Idaho Code § 42-222 without further development of the evidentiary record.

Interlocutory Order Addressing Questions of Law, In the Matter of Applications for Transfer 83471, 83915 and 83918 in the Name of Rocky Mountain Water Exchange LLC, at 7. In our view, however, it does appear that 83160 is straightforward enough that the local public interest evaluation can be addressed through the briefs submitted by the parties.

Even though the Coalition has agreed that injury is not an issue in this proceeding, *Facts* ¶33, and even though "[t]he local public interest analysis is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a) and the conservation of water resources analysis under

§ 42-203A(5)(f),” *Order on Exceptions; Final Order*, In the Matter of Application for Permit No. 74-16187 In the Name of Kurt W. Bird or Janet E. Bird, at 27, the Coalition’s question concerns the potential effect of what is being proposed under 83160 on the proposed water source—the ESPA.

To the extent there is a relationship to what is proposed under 83160 and the goal of restoring ESPA aquifer levels, which is in the local public interest, mitigation for diversion of water under WR 35-7667 is already being provided to the Coalition in the form of Duffin’s payment of assessments to the Aberdeen-American Falls Ground Water District (“AAFGWD”) that are utilized by AAFGWD to meet the mitigation obligations of the historic settlement agreement between IGWA and the Coalition that called for ground water districts to undertake certain ESPA enhancement activities in exchange for settlement of a conjunctive administration delivery call (see <https://idwr.idaho.gov/legal-actions/settlements/SWC-IGWA/> for copies of this agreement, addenda, and related documents). The settlement agreement was stipulated to as a “mitigation plan” under Rule 43 of the Idaho’s Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11), which were promulgated pursuant to authority described in Idaho Code § 42-603. After some minor changes, the Director of IDWR issued a *Final Order Approving Amendment to Stipulated Mitigation plan* on May 9, 2017 (see <https://idwr.idaho.gov/files/legal/CM-MP-2016-001/CM-MP-2016-001-20170509-Final-Order-Approving-Amendment-to-Stipulated-Mitigation-Plan.pdf>). The main action described in this settlement agreement calls for ground water district patrons (and others that join by contract) to reduce pumping across the entire ESPA by 240,000 acre-feet per year to meet certain benchmark aquifer recovery level goals. Each ground water district’s portion of the 240,000 acre-feet per year reduction has been assigned and each ground water district is then responsible for ensuring that

ground water district patrons implement pumping reductions or pay for ground water recharge to meet their respective mitigation obligations. Just like all water right owners who are patrons of AAFGWD, Duffin's diversion of water under WR 35-7667 is limited to the diversion of a certain amount of acre-feet each year, an amount that is actually less than the historic diversion amount to meet the reduction obligation allocated to AAFGWD, which in turn then allocated individual reductions to its patrons. Accordingly, pumping under WR 35-7667 at the new place of use—because it will be limited to the historic pumping (plus the imposed pumping reduction) that occurred at the current place of use—83160, if approved, will not injure the Coalition's water rights or be detrimental to the aquifer levels of the ESPA. This is because the right holder of WR 35-7667 has and will continue to contribute to aquifer recovery, which is in the local public interest. To date, these mitigation efforts have yielded positive results. *See, e.g.,*

<https://idwr.idaho.gov/files/iwrb/2019/20191210-ESPA-CAMP-Progess-Report-Final.pdf>

In addition, Idaho Code § 55-101 includes water rights within the definition of “real property.” It is in the local public interest to allow an individual's property right to be exercised, and related to this principle, implied limitations on the exercise of property rights should not be read into such property rights.

Furthermore, irrigation of farm ground and the benefits to the Aberdeen area from successful farming is in the local public interest. Agriculture is Aberdeen's main industry and critical to its local economy because it has been impacted by business closures. *See, e.g.,* https://www.idahostatejournal.com/news/local/simplot-stuns-aberdeen-potato-processing-plant-set-to-close/article_11c4cc88-0b19-11e1-a069-001cc4c002e0.html (describing closure of J.R. Simplot potato processing plant in Aberdeen).

From an overall balancing of interests, in our view, all facets of what is proposed under 83160 are in the local public interest, and in a weighing of those interests, 83160 should be approved.

D. Application for Permit 35-9000, WR 37-2801 (and its progeny rights), and WR 37-7295.

In the *Request for Briefs*, the Hearing Officer included selected documents from the water right backfiles for Application for Permit 35-9000, WR 37-2801, and WR 37-7295, as “they may be relevant to the issues raised in the pending case.” *Request for Briefs* at 1.

Application 35-9000 was submitted by Vern Duffin, and it sought a permit to develop a water right for .90 cfs for the irrigation of 45 acres. These described 45 acres are within the same legal subdivisions of the place of use of WR 35-7667. The application document also indicates that ASCC shares were associated with the property, which is additional confirmation that is contained in the *Facts* at paragraphs 3-4. Application 35-9000 was submitted on April 30, 1992 during the time that the permit for WR 35-7667 had lapsed (between November 2, 1980 and June 11, 1992). *Facts* at ¶¶10-13. It therefore appears that it was submitted because Vern Duffin believed he would not be able to perfect WR 35-7667, but once proof of beneficial use for WR 35-7667 was submitted, WR 35-7667 was reinstated and eventually licensed. This is supported by the fact that paragraph 12 of the application document provides “[t]his application is for an existing system[,]” a system that was evidently installed under the permit for WR 35-7667. It appears that Application 35-9000 was no longer pursued once WR 35-7667 was reinstated.

The fact that ASCC water was listed as another water source on the Duffin property under Application 35-9000 does not change the analysis regarding supplemental water rights, which is set forth above. The presence of this entitlement to ASCC water did not make WR 35-7667

supplemental, it was not licensed with a condition making it supplemental, and therefore, it is not a supplemental water right.

The documents associated with WR 37-2801 consist of a transfer application for this right assigned the transfer number of 5116, two quitclaim deeds, a preliminary order dated June 1, 1998, and what appears to be an identical preliminary order dated October 28, 1998. The preliminary order describes that the water right subject to the transfer—WR 37-2801—was proposed to be split into two “children” rights (a “C” and “D” portion) to be used at new points of diversion and places of use. The preliminary order describes that another water right, WR 37-7295, “authorizes the diversion of groundwater and is appurtenant to the same place of use as water right no. 37-2801B.” *Preliminary Order* at 2 (¶5).

The *Preliminary Order* describes that at least four separate times, the Department sought additional information to address “deficiencies” on the application, including information necessary to address enlargement and injury associated with the transfer of WR 37-2801. Eventually, Transfer 5116 was denied because such information was not provided, and it was not shown that Camas Creek would provide enough water during the mid-summer months for WR 37-2801 to be exercised, no history of past use of WR 37-2801, non-injury to other water rights, or non-enlargement as described in the *Preliminary Order*. Importantly, there is no discussion in the *Preliminary Order* of WR-37-7295 (a ground water right) as a “supplemental” water right or the need to provide an analysis of the historic use of the ground water right that would remain at the original place of use. In our view, this administrative decision embodies the principle that a water right associated with the same place of use of another water right remains eligible to be transferred to a new place of use, but factually, before this can occur, evidence of historic use to address

enlargement and injury must be provided. This principle is now described in the Transfer Memo at p. 29:

- (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.

Transfer Memo at 14.

Duffin has provided evidence of historic use for WR 35-7667 as it was used as the only source of water on Duffin's property for several decades, but now there has been a complete conversion to ASCC water (due to system improvements and sufficient reliability of deliver of ASCC water) in 2017. *Facts* at ¶¶24-26. Further, WR 35-7667 was placed in the Idaho Water Supply Bank in 2017. *Id.* at ¶28. This historical use makes WR 35-7667 eligible to be transferred to the proposed new place of use under 83160. And because WR 35-7667 will be utilized as the source of water at the new place of use, there will be no additional impact to other water users as

the amount of ground water diverted will be similar. Counsel for Duffin has heard this concept referred to by others as the “burden of water,” and relative to WR 35-7667, the burden of water will be similar if 83160 is approved.

Finally, the Hearing Officer included a copy of documents associated with WR 37-7295, the ground water right that “authorizes the diversion of groundwater and is appurtenant to the same place of use as water right no. 37-2801B” addressed in Transfer 5116. *Preliminary Order* at 2 (¶5). Despite the presence of surface water on the same place of use for WR 37-7295, the license for WR 37-7295 does not contain a supplemental water right condition. Because it was not a supplemental water right, then the right holder was authorized to divert water **under either water right** in any order to accomplish the beneficial use described by the rights. See *Interlocutory Order Addressing Questions of Law*, In the Matter of Applications for Transfer 83471, 83915 and 83918 in the Name of Rocky Mountain Water Exchange LLC, at 7. This made either WR 37-7295 or 37-2801 eligible to be unstacked and moved off their same place of use, but only if there was enlargement or injury. Because no evidence on these issues was provided, Transfer 5116 was denied, but not because WR 37-7295 was supplemental.

In Duffin’s case, there will be no enlargement because 35-7667 will be utilized at the new place of use like it was at the old place of use. And the ASCC water, while not being used on the Duffin property for several decades, has not been forfeited under Idaho law and remains eligible to be used once again because of a statutory defense to forfeiture. See Idaho Code § 42-223(7).

In sum, these additional documents provided by the Hearing Officer provide precedent for the analysis and issues that must be addressed that allow a stacked water right to be moved and used at a new place of use. These documents are consistent with the policies of the *Transfer Memo*, and because evidence of the historic use of 37-7667 has been provided and diversion at the new

place of use will similar or below these historic diversion amounts. There will be no enlargement or injury to the Coalition's water rights or other water rights.

III. CONCLUSION.

For all the above reasons, 83160 should be approved.

Submitted this 17th day of July, 2020.



Robert L. Harris, Esq.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 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 ARGUMENT BRIEF

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

ATTORNEYS AND/OR INDIVIDUALS SERVED:

JEFFREY AND CHANA DUFFIN
PO Box 525
Aberdeen, ID 83210
jeffduffin33@gmail.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Email

Jonas Reagan
BARKER ROSHOLT & SIMPSON LLP
163 Second Avenue West
P. O. Box 63
Twin Falls, ID 83303-0063
jreagan@idahowaters.com

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Email

Kent Fletcher
FLETCHER LAW OFFICE
P. O. Box 248
Burley, ID 83318
wkf@pmt.org

☐ Mail
☐ Hand Delivery
☐ Facsimile
☒ Email



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