

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

JEFFREY AND CHANA DUFFIN, husband
and wife,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent,

and

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

Intervenors.

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

) Case No. CV06-20-1467

) **MEMORANDUM DECISION**
) **AND ORDER**



I.
BACKGROUND

This matter concerns an application to transfer water right 35-7667 filed by Jeffrey and Chana Duffin. R., 286. Water right 35-7667 is a licensed ground water right owned by the Duffins. *Id.* at 189. It authorizes the diversion of 1.08 cfs of ground water for the irrigation of 53.9 acres in Bingham County pursuant to a June 11, 1992, priority date. *Id.* Water right 35-7667 will be referred to herein as “the ground water right.” The transfer application proposes to change the point of diversion and place of use for the ground water right to a separate parcel of property. *Id.* at 286. The Surface Water Coalition protested the application on the basis it will result in an enlargement of water use and injure existing water rights.¹ *Id.* at 347.

Department employee James Cefalo acted as hearing officer in the contested case. On May 22, 2020, the parties submitted a stipulated statement of facts. *Id.* at 370. The hearing officer subsequently issued a *Preliminary Order* denying the transfer application. *Id.* at 590. The Duffins petitioned for reconsideration. *Id.* at 603. On August 12, 2020, the hearing officer issued an *Amended Preliminary Order*, denying the transfer application on the basis it fails to satisfy the requirements of Idaho Code § 42-222(1). On September 22, 2020, the Duffins filed a *Petition* seeking judicial review of the *Amended Preliminary Order*. The *Petition* asserts the *Amended Preliminary Order* is contrary to law and requests the Court set it aside and remand for further proceedings. The Court subsequently entered an *Order* permitting members of the Surface Water Coalition to appear as intervenors. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Petition* was held before the Court on February 11, 2021.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on

¹ The term “Surface Water Coalition” refers collectively to the A&B Irrigation District, Burley Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company.

questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

An application to transfer is evaluated against the criteria set forth in Idaho Code § 42-222(1). The Director shall approve an application for transfer, in whole, in part, or upon conditions, provided:

[N]o other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code

I.C. § 42-222(1). The hearing officer found the proposed transfer would (1) result in an enlargement of the ground water right, (2) injure other water rights, (3) be inconsistent with the conservation of water resources within the state, and (4) be contrary to the local public interest. R., 659-669. He therefore denied the application. *Id.*

A. The hearing officer's determination the transfer would result in an enlargement of the ground water right is affirmed.

One criterion the hearing officer must consider is whether the transfer will result in "an enlargement in use of the original right." I.C. § 42-222(1). 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.” *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996). Enlargement includes “such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.” *Id.*

i. Overlapping water rights and the duty of water.

The existing place of use under the ground water right is 53.9 acres in Bingham County. R., 189. Those same acres are also served by 60 shares of Aberdeen-Springfield Canal Company (“ASCC”) stock owned by the Duffins.² *Id.* at 370-371. Therefore, the existing place of use is served by overlapping water rights. Each provides enough water to fully irrigate the 53.9 acres in its own right. *Id.* at 662. That does not mean, however, the Duffins may use the full water supplies at the same time.

There is no right in Idaho to use water wastefully. *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900). The law “allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it.” *Munn v. Twin Falls Canal Co.* 43 Idaho 198, 252 P. 865, 867 (1926). To that end, an irrigator may use no more water “than is necessary according to the standards and practices of good husbandry for the particular crop sought to be grown, soil and all other essential factors and conditions being taken into consideration.” *In Re Robinson*, 61 Idaho 462, 103. P.2d 693 (1940). This limit is called the “duty of water.”³ Under Idaho law, a water right is limited by the duty of water whether or not expressly stated on the face of the instrument memorializing the right.

In this case, the license issued for the ground water right expressly recognizes the duty of water limit. It provides: “[t]his right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above.” R., 34. The Court will refer to this remark as the “conditional remark.” Thus, while the Duffins may irrigate the existing place of use with the ground water right, the ASCC shares, or both, their use may not exceed the duty of water limit. It follows the Duffins may not use the full amount of water authorized under each overlapping water right at the same time.

² ASCC holds water rights 01-23B and 01-297, which permit it to divert surface water from the Snake River for the irrigation of 61,772.6 acres. R., 657. The shares distributed to end users such as the Duffins derive from those water rights. The Duffins’ 60 shares were issued for the same place of use on April 24, 1970. R., 370-371.

³ Generally speaking, Idaho law allows no more than 1 cfs of water for every 50 acres irrigated. I.C. § 42-220.

In fact, the record establishes the overlapping rights have never been used together in the same year. R., 378. Nor have they been used to irrigate more than 53.9 acres. *Id.* Up until 2017, the ground water right was used exclusively to irrigate the existing place of use. *Id.* at 377. From 2017 to present, the existing place of use has been irrigated exclusively with surface water from the ASCC shares. *Id.* This historic use of the overlapping water rights is consistent with duty of water limitations.

ii. The proposed transfer would result in an increase in irrigated acres.

The transfer seeks to separate the overlapping water rights. Under the transfer, the ground water right would be moved to a separate parcel of land, leaving the ASCC shares to irrigate the existing place of use. *Id.* at 288. The Duffins intend to continue to irrigate the existing place of use with ASCC shares if the transfer is approved. *Id.* There are no other water rights at the proposed place of use. *Id.* at 662. Therefore, the ground water right would serve as the sole source of irrigation water thereon, and the ASCC shares would serve as the sole source of irrigation water for the existing place of use. The result would be the irrigation of 107.8 total acres as opposed to 53.9 acres. The hearing officer found this increase in irrigated acres would be an enlargement and denied the transfer. *Id.* at 659-667. For the reasons set forth herein, the Court agrees.

a. The hearing officer correctly applied *Barron v. Idaho Dept. of Water Resources*.

In *Fremont-Madison Irr. Dist.*, the Court acknowledged that “an increase in the number of acres irrigated” constitutes an enlargement. 129 Idaho at 458, 926 P.2d at 1305. The Court expounded further on this principle in *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 18 P.3d 219 (2001). In *Barron*, the Idaho Supreme Court addressed enlargement in the context of overlapping water rights. The facts are similar to this case. *Barron* involved a transfer. The applicant sought to change the point of diversion and place of use for water right 37-2801. *Id.* at 415, 18 P.3d at 220. The existing place of use consisted of 311 acres. *Id.* at 416, 18 P.3d at 221. Those acres were also served by an overlapping water right. *Id.* As in this case, the transfer sought to separate the overlapping rights, with one to be moved to irrigate a separate parcel. *Id.* The Department denied the transfer on the basis the applicant failed to show it would not enlarge

the use under the original right, among others bases. *Id.* at 418-419, 18 P.3d at 223-224. The district court agreed and the Idaho Supreme Court affirmed.

In addressing enlargement, the Idaho Supreme Court focused in part on the relationship between the overlapping water rights. *Id.* at 419-420, 18 P.3d at 224-225. Noting both were “appurtenant to the same land,” the Court recognized that separating the rights could result in an increase in irrigated acreage. *Id.* The Court found such an increase would constitute an enlargement in contravention of Idaho Code § 42-222(1):

The problem arising with [the] proposed transfer is that the previously combined use of the two water rights is limited to the consumptive use on the 311 acre tract of land. *If water right 37-02801 is moved to another tract, (or tracts) with the result that the two rights would irrigate more than 311 acres, then there is an enlargement of the water right.*

Id. at 419-420, 18 P.3d at 224-225 (emphasis added). The Court’s holding in this respect is applicable to the present case.

Applying *Barron* to the facts of this case, the hearing officer found the proposed transfer would likewise result in an increase in irrigated acreage. R., 662. He found further that such an increase would constitute an enlargement in contravention of Idaho Code § 42-222(1):

In light of the *Barron* decision, the outcome of this contested case is clear. In Application 83160, Duffin proposes to change the place of use for water right 35-7667. The proposed place of use has no existing water rights. The existing place of use for water right 35-7667 is also covered by shares from ASCC. Duffin does not propose to move the ASCC shares with water right 35-7667 to the proposed place of use. Instead, Duffin proposes to continue to irrigate the existing place of use with water under their ASCC shares.

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

R., 662. The Court finds the hearing officer correctly applied the principles set forth in *Barron*. It agrees the transfer will result in the irrigation of 107.8 total acres as opposed to 53.9 acres, and that this increase in irrigated acreage, and the resulting increase in diversion, constitutes an enlargement under Idaho law. It follows the *Amended Preliminary Order* must be affirmed.

The Duffins attempt to dismiss the Idaho Supreme Court's analysis of overlapping water rights in *Barron* as dicta. The question of enlargement as a result of separating overlapping water rights was before both the district court and the Idaho Supreme Court. *Barron*, 135 Idaho at 419-420, 18 P.3d at 224-225. The Court finds the Idaho Supreme Court's analysis of the same was necessary to decide the issue presented to it, and therefore is not dicta. See e.g., *State v. Hawkins*, 155 Idaho 69, 74, 305 P.3d 513, 518 (2013) (if a statement "is not necessary to decide the issue presented to the appellate court, it is considered to be dictum and not controlling"). However, even if the analysis is dicta, the Court finds it persuasive and adopts it to the facts of this case in the same fashion as it was adopted by the hearing officer.

b. The hearing officer correctly considered the Duffins' ASCC shares.

Notwithstanding *Barron*, the Duffins contend Idaho Code § 42-222(1) limits the enlargement determination to an examination of the water right listed on the transfer application itself – in this case the ground water right. They assert the Department is limited to evaluating "the elements of a singular water right" and cannot consider "other water entitlements (such as water from canal company shares) that may be associated the same property." *Petitioners' Opening Br.*, p.22. It is their position the hearing officer was precluded from considering the overlapping ASCC shares in the transfer proceeding because there is no combined use limitation on the ground water right referring to the ASCC Shares.⁴

The license for the ground water right contains the conditional remark specifically addressing the combined use of water on the existing place of use. R., 34. This includes the use

⁴ The Duffins appear to argue the *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 136 (2017) effectively overruled *Barron*. It did not. The *City of Blackfoot* did not involve a transfer. Rather, the water right holder argued its right permitted it to use water for a use not identified in the purpose of use element. The Court disagreed, stating the argument "is nothing more than an impermissible collateral attack on the partial decree." *Id.* at 307. The hearing officer's consideration of the ASCC shares here is not a collateral attack on the license. Rather, the hearing officer is simply carrying out his statutory duty under Idaho Code § 42-222(1) to examine all the evidence and information in evaluating whether the proposed transfer will result in injury or enlargement. Therefore, the Duffins' argument is misplaced.

of water under the ASCC shares on the existing place of use.⁵ Therefore, the hearing officer did not err in considering the shares given that the combined use of water is referenced by the license itself. However, even if the license did not contain the conditional remark, the Court still finds the hearing officer appropriately considered the ASCC shares.

Idaho Code § 42-222(1) creates an affirmative duty on the part of the Director to “examine all the evidence and available information” when evaluating a proposed transfer. The Idaho Supreme Court has recognized this duty, stating: “the director, in deciding whether to approve the transfer, is statutorily required to examine all the available evidence and information.”⁶ *Barron*, 135 Idaho 414, 421, 18 P.3d 219, 226 (2001). In this case, that evidence and information includes the fact that the existing place of use is served by an overlapping water right. Therefore, the Court finds the Duffins’ argument to be contrary to the plain language of the ground water right itself, the plain language of Idaho Code § 42-222(1), and controlling case law. It follows the hearing officer did not err in considering the ASCC shares in his evaluation of the proposed transfer.

iii. The proposed transfer would result in an increase in consumptive use.

The Duffins next argue there is no enlargement under the proposed transfer because there would be no increase in use under the ground water right itself. They rely on the language of Idaho Code § 42-222(1), which prohibits “an enlargement in use *of the original right*” (emphasis added). Given this language, they assert there will be no increase in use under the ground water right because it authorizes the irrigation of 53.9 acres at the existing place of use, and the transfer seeks to irrigate 53.9 acres at the proposed place of use. The Duffins’ analysis is over simplified. It fails to account for the duty of water limit under Idaho law, as well as the ground water right’s conditional remark. *R.*, 34.

⁵ The filed examiner’s notes for the ground water right noted the presence of the 60 ASCC shares on the same place of use. Historically, the Department has approved ground water rights that overlap with canal company shares to allow for flexibility or fill a need with respect to irrigation practices. For example, approximately 27,000 of the 61,772.6 acres authorized by ASCC’s water rights are overlapped by ground water irrigation rights. *R.*, 666. However, the use of an overlapping right is not without limitation, either by express condition or by operation of law.

⁶ Indeed, in *Barron* the Idaho Supreme Court affirmed the Department’s consideration of overlapping water rights where there was, as here, no combined use limit on the water right the applicant sought to transfer. *Id.* at 419-420, 18 P.3d at 224-225.

Simply stated, the transfer would permit the Duffins to do what they cannot do now – use the full water supply under each overlapping water right at the same time for purposes of irrigation. The ability to use the full amount authorized under the ground water right for irrigation *even if* they are also irrigating the original place of use with their ASCC shares is an enlargement of the ground water right. Without the transfer, the Duffins would be precluded from using the ground water right in this fashion due to (1) the duty of water limit, and (2) the right’s conditional remark. With the transfer, these limitations are removed, with the result that each right may be used simultaneously to irrigate 107.8 total acres as opposed to 53.9. Irrigating additional acres in this fashion would necessarily result in an increase in consumptive use and reduce return flows to the system.⁷ Therefore, the Court finds the hearing officer correctly concluded the proposed transfer would result in an enlargement in use of the ground water right. It follows the *Amended Preliminary Order* must be affirmed.⁸

B. The hearing officer’s determination the proposed transfer would result in injury to other water rights is affirmed.

Another criterion the hearing officer must consider is whether the transfer will injure existing water rights. I.C. § 42-222(1). An enlargement in the context of a transfer is unlawful because it increases the burden on the water system. In this respect, an enlargement is akin to a new appropriation of water. However, unlike a new appropriation, which receives the most junior priority date on the system, an enlargement occurs under the priority of the original water right, thereby diminishing the priorities of junior right holders. This diminishment in priority results in injury. *See e.g., City of Pocatello v. Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012) (“Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder”). For this reason, the Idaho Supreme

⁷ The term 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.” I.C. § 42-202B(1). Irrigating 107.8 total acres as opposed to 53.9 acres necessarily increases consumptive use due to more water being transpired through the larger amount of crop. Idaho Code § 42-222(1) specifically authorizes the Director to “consider consumptive use . . . as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.”

⁸ The Duffins cite Department policy in the form a Department memorandum in support of their position. The Court notes that Department policies are not binding on the district court and that the analysis set forth herein is guided by controlling statutes and case law.

Court has directed “there is *per se* injury to junior water rights holders anytime an enlargement receives priority.” *Id.* The hearing officer correctly concluded that such is the case here. R., 667-668.

The matter of injury resulting from enlargement is amplified with respect to the Eastern Snake Plain Aquifer (“ESPA”). In 1993, the Director issued a *Moratorium Order* halting the processing of applications to appropriate new ground water rights over a large portion of the ESPA. R., 5. The moratorium is an acknowledgment that the water source in this area of the ESPA is fully appropriated. *Id.* Given declining aquifer levels and spring discharges, the *Moratorium Order* recognizes that an increased burden on the system resulting from new appropriations will likely interfere with other existing uses of water. *Id.* Therefore, to “protect existing water rights,” the *Moratorium Order* prohibits new withdrawals of water by halting the processing of applications to appropriate new water rights. *Id.* at 8. The *Moratorium Order* remains in effect today.

The *Moratorium Order* does not prohibit the processing or approval of transfer applications on the ESPA. However, it does bolster the hearing officer’s determination that injury to existing water rights would occur in this case if the transfer were approved. R., 667-668. The proposed point of diversion under the transfer is within the designated moratorium area. *Id.* at 667. Like a new appropriation of water, the transfer would increase the burden on the aquifer for the reasons discussed in the enlargement analysis (i.e., an increase in irrigated acreage, diversion, and in consumptive use). This increased burden would occur under the priority date of the ground water right, thereby diminishing the priorities of junior right holders. The result in *per se* injury. Therefore, the Court finds that approval of the transfer would violate the spirit of the *Moratorium Order* and result in the very injury to existing water rights it seeks to prevent. For these reasons, the hearing officer’s determination the transfer would result in injury to other water rights must be affirmed.

C. Substantial rights.

The Duffins argue their substantial rights were prejudiced by the *Amended Preliminary Order*. Since the Duffins failed to establish the transfer would not result in an enlargement in use of the original right or injury to other water rights, the hearing officer was within his authority to deny their application under Idaho Code § 42-222(1). Therefore, the Duffins have

not shown their substantial rights were prejudiced. It follows the *Amended Preliminary Order* must be affirmed.

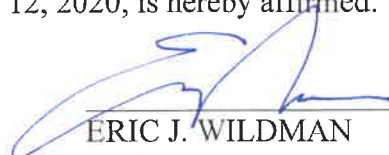
D. Remaining criteria.

Because the Court finds the *Amended Preliminary Order* must be affirmed on the issues of enlargement and injury, it need not reach the hearing officer's determinations related to conservation of water resources within the state and the local public interest.

**IV.
ORDER**

Therefore, based on the foregoing, IT IS ORDERED that the *Amended Preliminary Order Denying Transfer* dated August 12, 2020, is hereby affirmed.

Dated February 22, 2021


ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on February 22, 2021, with sufficient first-class postage to the following:

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