

BONNEVILLE COUNTY, IDAHO

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

BLACK HAWK HOMEOWNERS
ASSOCIATION, INC., an Idaho nonprofit
membership corporation; IRON RIM
RANCH HOME OWNERS ASSOCIATION,
INC., an Idaho nonprofit membership
corporation,

Petitioners,

v.

THE IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

IN THE MATTER OF APPLICATIONS
FOR PERMIT NO. 25-14428

In the name of Black Hawk HOA and Iron
Rim Ranch HOA.

Case No. CV 17-1141

Fee Category L.3.a – \$221.00

**NOTICE OF APPEAL AND
PETITION FOR JUDICIAL REVIEW
OF FINAL AGENCY ACTION**

Petitioners, Black Hawk Homeowner’s Association, Inc. (“Black Hawk”) and Iron Rim
Ranch Home Owners’s Association, Inc. (“Iron Rim” and, together with Black Hawk, the

**NOTICE OF APPEAL AND
PETITION FOR JUDICIAL REVIEW
OF FINAL AGENCY ACTION**

“Associations”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., file this *Notice of Appeal and Petition for Judicial Review of Final Agency Action* challenging a final decision by the Idaho Department of Water Resources, pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279 seeking judicial review of the Preliminary Order Denying Motion for Summary Judgment and Denying Application, issued by James Cefalo, the hearing officer designated by the Idaho Department of Water Resources (the “Department”) on January 13, 2017.

2. Black Hawk is associated with the Black Hawk Subdivision located in the foothills southeast of Idaho Falls, Idaho, in Bonneville County, Idaho. There are no surface irrigation water rights or other surface water entitlements associated with the Black Hawk Subdivision.

3. Iron Rim is associated with the Iron Rim Ranch Subdivision located in the foothills southeast of Idaho Falls, Idaho, in Bonneville County, Idaho. There are no surface irrigation water rights or other surface water entitlements associated with the Iron Rim Ranch Subdivision.

4. The Black Hawk Subdivision and the Iron Rim Ranch Subdivision are located adjacent to one another and together contain 141 individual subdivision lots for construction of single-family residential homes.

5. The original developer of the Black Hawk Subdivision, Morgan Construction, submitted an application for water right permit on March 29, 1999, to appropriate 1.05 cfs for

domestic purposes (inclusive of up to ½ acre of irrigated landscaping per subdivision lot) for 65 subdivision lots in divisions two and three of the Black Hawk Subdivision. The application was assigned the identification number of 25-7669, and after advertisement, was not protested.

6. A water right permit for 25-7669 was issued on April 8, 1999. The permit included the following conditions:

6. The domestic use authorized under this right shall not exceed 13,000 gallons per day per home.
7. The irrigation occurring under this domestic use shall not exceed ½ acre within each platted subdivision lot upon which a home has been constructed. This right does not provide for irrigation of common areas or for irrigation of lots upon which homes have not been constructed.

7. A request for extension of time to submit proof of beneficial use was approved by IDWR, which extended the proof due date of the permit to April 1, 2009.

8. Ownership of the permit for 25-7669 was assigned to George Z. McDaniel of Blackhawk Ventures LLC on July 11, 2005.

9. George Z. McDaniel was also the developer of the Iron Rim Ranch Subdivision.

10. During the development period of 25-7669, the water system developed under this permit was expanded to include the Iron Rim Ranch Subdivision. The water system is monitored and regulated as a public drinking water system by the Idaho Department of Environmental Quality.

11. Proof of beneficial use was submitted on April 1, 2009.

12. On March 17, 2015, ownership of 25-7669 was assigned to the Associations.

13. A license for 25-7669 was issued on July 6, 2015. The license contains the

following conditions:

1. Place of use is within Blackhawk and Iron Rim Ranch Subdivisions.
2. Domestic use is for 65 homes.
3. The domestic use authorized under this right shall not exceed 13,000 gallons per day per home.
4. The irrigation occurring under this domestic use shall not exceed ½ acre within each platted subdivision lot upon which a home has been constructed. This right does not provide for irrigation of common areas or for irrigation of lots upon which homes have not been constructed.

14. The diversion volume and irrigated acreage limitations on domestic use per lot (or unit) contained in the license for 25-7669 are the same limitations contained in Idaho Code § 42-111(a) for a home.

15. While 25-7669 was under licensing review, the Associations recognized that the number of constructed homes within their respective subdivisions was approaching the limit of 65 homes authorized under the conditions of 25-7669. As a result, the Associations submitted an application for permit which was assigned the identification number of 25-14395. This application sought .40 cfs for domestic purposes for 76 homes, but specifically did not include the right to irrigate up to ½ acre of landscaping. After advertising, 25-14395 was not protested, and a permit was issued on December 29, 2013.

16. The permit for 25-14395 contains the following conditions:

3. The domestic use authorized under this right shall not exceed 13,000 gallons per day per home.
4. Domestic use is for 76 homes and does not include lawn, garden, landscape, or other types of irrigation.
5. Prior to filing proof of beneficial use for this water right, the right

holder shall obtain a water right sufficient to cover all irrigation expected to occur on the 76 residential lots described under this right. Failure to obtain a sufficient irrigation right by the date specified shall be cause to void this water right.

17. Very few ground water irrigation water rights have historically been developed in the area east of the Snake River and south of Idaho Falls because most of the irrigation occurring in this area on the valley floor is accomplished through surface water irrigation.¹ Accordingly, with few ground water rights for sale or otherwise obtainable, the Associations have not been able to purchase or otherwise obtain ownership of separate irrigation water rights in order to meet condition no. 5 of the permit for 25-14395.

18. As a result of the Associations' inability to obtain ground water rights for outside irrigation purposes, the Associations submitted the current application for water right permit on October 13, 2015, which was assigned the administrative identification number of 25-14428.

19. This application—25-14428—seeks the right to appropriate 0.76 cfs for domestic purposes for both non-consumptive use *and* the ability to irrigate up to ½ acre of landscaping per subdivision lot for 76 subdivision lots. The diversion volume and irrigated acreage limitations on the domestic use per lot contained in the application are the same as those contained in Idaho Code § 42-111(a).

20. 25-14428 was advertised on November 5th and November 12th of 2015.

21. After advertisement, 25-14428 was protested by A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company

¹ A review of IDWR records reveals that most of the surface water irrigation in the referenced area occurs under water rights owned by the Progressive Irrigation District and the Idaho Irrigation District.

(hereinafter, collectively the “Coalition”). As bases of protest to 25-14428, the Coalition asserted the following:

4. The Application has failed to demonstrate that diversions under this right will not injure existing natural flow and storage water rights.
5. The Application has failed to provide any proposed mitigation to offset impacts of the new diversion anticipated under the application.

22. The Coalition has not asserted that any ground water rights—either owned by them or others whose interests are represented by the Coalition—will be injured by 25-14428.

23. A prehearing conference was held on January 26, 2016, and the parties were not able to resolve the protests of the Coalition. This necessitated proceeding with 25-14428 as a contested matter.

24. The Associations submitted modelling, using the transfer tool (ETRAN 3.2, based on the Enhanced Snake Plain Aquifer Model (ESPAM)), depicting various impacts to various reaches to the Snake River above Milner Dam.

25. Nevertheless, the Associations believe that two legal principles together demonstrate that the use proposed by 25-14428 cannot cause a legally cognizable injury to any senior water rights. Specifically:

- a. The history and purpose of Idaho Code § 42-111(1), which sets forth what is commonly referred to as the “domestic exemption” because Idaho Code § 42-227 provides that wells drilled for “domestic purposes” are not subject to the mandatory water right permitting requirements described under Idaho Code § 42-229.

- b. The Department's Moratorium Orders, which contained detailed findings of fact and conclusions of law, which (in various forms) include "applications for ground water permits seeking water for multiple ownership subdivisions" within the domestic exemption "provided each unit satisfied the definition for the [domestic exemption]." *Amended Moratorium Order*, Order ¶ 5 (dated April 30, 1993).

26. The Associations' efforts to assert these legal arguments (which included an inaccurately labelled *Petition for Declaratory Ruling*, which was withdrawn and replaced with a motion for summary judgment) drew the attention of Idaho Ground Water Appropriators, Inc. ("IGWA"). IGWA sought to intervene in this proceeding, even though the prehearing conference had already occurred. Because IGWA did not have "a substantial reason for delay or good cause for the untimely filing," IGWA's *Petition to Intervene* was denied. *Order Denying Petition to Intervene*, p. 4 (filed October 18, 2016). Not satisfied, IGWA sought reconsideration—which was denied. IGWA then asked the hearing officer to redesignate the *Order Denying Petition to Intervene* as a recommended or preliminary order, rather than the interlocutory order it clearly was—which request the hearing officer also correctly denied.

27. On October 7, 2016, the Associations filed their *Motion for Summary Judgment*, which argued on the basis of the *de minimus* nature of use proposed by 25-14428, the domestic exemption, the moratorium orders, public policy, and Idaho law, that there was no cognizable injury to the Coalition on the bases asserted by the Coalition and, thus, 25-14428 should be issued.

28. On October 26, 2016, the Coalition filed the *Coalition's Response to Motion for Summary Judgment* and the *Declaration of Paul L. Arrington*.

29. On January 13, 2017, the hearing officer issued the *Preliminary Order Denying Motion for Summary Judgment and Denying Application* (the "*Final Order*").

30. The *Final Order* not only denied the Associations' *Motion for Summary Judgment* but also denied issuance of a permit for 25-14428, a matter which was not placed before the hearing officer for disposition. Ordinarily, an applicant would be afforded an opportunity to provide a mitigation plan or otherwise settle the contested case in light of a decision on summary judgment. The Associations were not afforded such an opportunity.

31. After 14 days, or on January 27, 2017, the *Final Order* became the final order of the Department pursuant to IDAPA 37.01.01.730.02.b.

32. Pursuant to Idaho Code § 67-5273(2) and IDAPA 37.01.01.730.02.d, the Associations may petition for judicial review within twenty-eight (28) days of when the preliminary order became final, which in this matter, is on or before February 24, 2017.

33. The *Final Order* is the subject of this *Notice of Appeal and Petition for Judicial Review of Final Agency Action*.

JURISDICTION AND VENUE

34. This petition is authorized by Idaho Code §§ 42-1701A(4), 67-5270, and 67-5279.

35. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5272.

36. Venue lies in this Court pursuant to Idaho Code § 67-5272 because the Associations' principal place of business is located (and the proposed use of 25-14428 would occur) in Bonneville County, Idaho.

37. Pursuant to the Idaho Supreme Court's Administrative Order issued on December 9, 2009, "all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." See <http://srba.idaho.gov/adminorders.pdf>. The Snake River Basin Adjudication District Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. The Associations have attached a copy of the Snake River Basin Adjudication District Court's *Notice of Reassignment* form for the convenience of the clerk.

38. The Department's *Preliminary Order Denying Motion for Summary Judgment and Denying Application*, dated January 13, 2017, is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

39. This Notice of Appeal and Petition for Judicial Review of Final Agency Action is made within 28 days from the time the *Preliminary Order Denying Motion for Summary Judgment and Denying Application* became the final order of the Department, as required by Idaho Code § 67-5273(2).

PARTIES

40. Petitioner, Black Hawk Homeowners Association, Inc., is an Idaho nonprofit membership corporation, with its principal place of business located in Bonneville County, Idaho, and is a co-applicant for Permit No. 25-14428.

41. Petitioner, Iron Rim Ranch Home Owner's Association, Inc., is an Idaho nonprofit membership corporation, with its principal place of business located in Bonneville County, Idaho, and is a co-applicant for Permit No. 25-14428.

42. Respondent, Idaho Department of Water Resources, is an executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701, *et seq.*, with its state office located at 322 E. Front Street, Boise, Ada County, Idaho.

STATEMENT OF INITIAL ISSUES

43. Petitioners intend to assert the following initial issues on judicial review:
- a. Whether the Department's *Final Order* and the orders thereby affirmed were made in violation of constitutional or statutory provisions.
 - b. Whether the Department's *Final Order* and the orders thereby affirmed were made upon unlawful procedure.
 - c. Whether the Department's *Final Order* and the orders thereby affirmed were made without the support of substantial evidence on the record as a whole.
 - d. Whether the Department's *Final Order* and the orders thereby affirmed were arbitrary, capricious, or an abuse of discretion.
 - e. Whether the Department's actions prejudiced a substantial right of the Associations.
 - f. Whether the Department's actions were made in violation of and contrary to the provisions of certain moratorium orders issued by the Department.
 - g. Whether the Department erred by not finding that the diversion of water under 25-14428 is *de minimis* under Idaho law.

- h. Whether the Department erred in finding that the location of the points of diversion listed in 25-14428 are not encompassed within the above-referenced moratorium orders.
- i. Whether the Department erred in finding that the moratorium orders were not a final determination of injury or non-injury.
- j. Whether the Department's determination that "applicants pursuing domestic rights for single home use might be required to mitigate for potential impacts to senior rights" is contrary to the provisions of Idaho Code § 42-111.

AGENCY RECORD

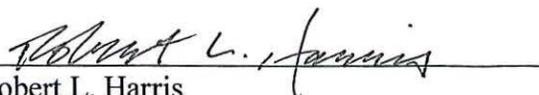
44. Judicial Review is sought of the Department's *Preliminary Order Denying Motion for Summary Judgment and Denying Application*, dated January 13, 2017.

45. The Department did not hold a hearing in this proceeding.

46. Petitioners anticipate they can reach a stipulation regarding the agency record with the Respondent and any intervenors, and will pay its necessary share of the fee for preparation of the record at such time.

47. Service of this *Notice of Appeal and Petition for Judicial Review of Final Agency Action* has been made on the Respondents as they exist at the time of the filing of this Petition.

Dated this 23rd day of February 2017.


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

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February 2017, I served a copy of the following described pleading or document on the parties listed below by the indicated method.

Document Served: NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION

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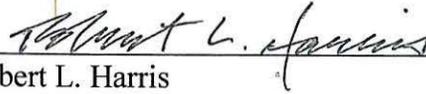
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