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, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent.	Case No. CV-2017-1141

RESPONDENT'S BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Black Hawk Homeowners Association, Inc., and Iron Rim Ranch Home Owners Association, Inc. (collectively, "Applicants"), appeal the *Preliminary Order Denying Motion for Summary Judgement and Denying Application* ("Order") wherein an Idaho Department of Water Resources ("Department") hearing officer denied the Applicants' *Motion for Summary Judgment* ("Motion") and Application for Permit No. 25-14428 ("Application"). The Applicants acknowledge their proposal to divert ground water from a single well for use at seventy-six homes within their subdivisions would reduce the quantity of water under existing water rights that divert from the Snake River. R. at 408-09.[1] However, the Applicants asked the hearing officer, and ask the Court on judicial review, to ignore this impact and declare, "as a matter of law," that the injury caused by their proposed water use is not legally cognizable nor subject to any injury analysis. *Id*. at 412; *Petitioners' Brief* at 8. The hearing officer denied the Applicants' request because the injury caused by their proposed water use is legally cognizable and must be reviewed in accordance with Idaho Code § 42-203A(5). *Id.* at 415-17. The Court should affirm the hearing officer's denial of the Motion.

B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND

On October 13, 2015, the Applicants filed the Application seeking a permit to divert 0.76 cfs of ground water from a single well for use at seventy-six homes within their subdivisions. R.

[1] Citations to the record herein refer to the bates stamp numbers of the agency record lodged with the Court.

at 1-5; 407. On November 27, 2015, the Surface Water Coalition ("SWC")[2] filed a timely protest against the Application. *Id*. at 13.

On October 7, 2016, the Applicants filed their Motion. The Applicants acknowledged their proposed water use will have an impact "on reach gains to the Snake River that benefit senior water rights users." *Id.* at 121. However, the Applicants asked the hearing officer to ignore this impact and determine, "as a matter of law," their proposed water use cannot cause "a legally cognizable injury" to other water rights "as long as each subdivision lot (or unit) is limited to the same water use parameters contained in the definition for an exception to the requirement to file an application for permit set forth in Idaho Code § 42-111 (13,000 [gallons per day] and no more than irrigation of up to [one-half] acre of land)." *Id*. at 106 (emphasis in original).

In support of their argument, the Applicants referred to Idaho Code § 42-111 (1)'s definition of "domestic purposes;" the term *de minimus*; Article XV, Section 3 of the Idaho Constitution; Rule 20.11 of the Department's Conjunctive Management Rules (IDAPA 37.03.11) ("CM Rules"); and Department moratorium orders related to the Eastern Snake River Plain Area. *Id.* at 117-22. The Applicants concluded "a decision on this issue in favor of the [Applicants] would resolve all parts of the [SWC's] protest and should result in issuance of a water right permit." *Id.* at 123.

On October 26, 2016, the SWC filed a *Response to Motion for Summary Judgment*. The SWC asked the hearing officer to deny the Motion, asserting "Idaho's Constitution, statutes and case law, as well as the Director's moratorium orders" do not support the Applicants' conclusion

[2] The SWC is comprised of 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.

that the Department must approve the Application "without consideration of impacts on existing water right[s]." *Id*. at 4.

On January 13, 2017, the hearing officer issued the Order. The hearing officer explained that Idaho Code § 42-111 (1) defines "domestic purposes" that are exempt from the permit requirement set forth in Idaho Code § 42-229. *Id*. at 411. The hearing officer quoted Idaho Code § 42-111(2)'s statement that "domestic purposes . . . shall not include water for multiple ownership subdivisions . . . unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section" (i.e. a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day). *Id.* The hearing officer determined, and the Applicants conceded, the Applicants were required to file the Application for their proposed water use. *Id*. at 256, 411-12.

The hearing officer next explained that "[e]very application for permit filed with the Department is subject to the review criteria set forth in Idaho Code § 42-203A(5)," including that "the Applicant must demonstrate that the water use proposed in their application will not 'reduce the quantity of water under existing water rights.'" *Id.* at 412. The hearing officer rejected the Applicants' assertions in support of their argument that their proposed water use cannot cause legally cognizable injury and denied the Motion. *Id.* at 410-17. The hearing officer also denied the Application because the Applicants' "proposed water use will reduce the quantity of water under existing rights on the Snake River" and the Applicants proposed no "plan to mitigate for the impact to existing rights." *Id.* at 416.

On February 23, 2017, the Applicants filed their *Notice of Appeal and Petition for Judicial Review of Final Agency Action* challenging the Order. *Id*. at 424.

II. ISSUES ON APPEAL

The Department's formulation of the issues on appeal is as follows:

1) Whether the hearing officer's denial of the Motion must be affirmed because the injury caused by the Applicants' proposal to divert ground water from a single well for seventy-six homes in their multiple ownership subdivisions is legally cognizable and must be analyzed consistent with the plain language of Idaho Code § 42-203A(5).
2) Whether the Department is entitled to an award of attorney fees because the Applicants' argument that injury caused by their proposed water use is not legally cognizable is without a reasonable basis in fact or law.
3) Whether the hearing officer's denial of the Application should be reversed so the Applicants may present evidence at hearing regarding mitigation to offset injury to existing water rights.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under the Act, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds 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. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

A. Injury Caused by the Applicants' Proposed Water Use Is Cognizable and Must Be Evaluated.

The *Petitioners' Brief* opens with a discussion of statutory, constitutional, and other authorities that address domestic water uses. The Applicants assert these authorities support their argument that the injury caused by their proposed water use for seventy-six homes in their multiple ownership subdivisions is "not legally cognizable" and is immune from any analysis. *Petitioners' Brief* at 13, 16-17, 22. The Department agrees there are special provisions in Idaho law and Department rules and orders that apply only to domestic water uses. However, the Applicants misconstrue and misrepresent these authorities in their attempt to support their argument that the injury caused by their proposed water use is beyond the reach of legal inquiry. The Applicants' argument is without a reasonable basis in fact or law and must be rejected.

1. The Applicants' proposed water use will injure senior water rights, does not constitute domestic use within the meaning of Idaho Code § 42-111(1)(a), and must be analyzed consistent with Idaho Code § 42-203A(5).

The Applicants concede their proposed water use will reduce flows in the Snake River above Milner Dam. R. at 408. The total consumptive use proposed by the Application will "reduce the quantity of water in the Snake River above Milner Dam by approximately 85.9 acre-feet per year, which equates to a continuous reduction of flow in the Snake River of approximately 0.12 cfs." *Id.* at 115, 408-409. Notwithstanding this admitted impact, the Applicants argue the hearing officer erred by analyzing claims of injury in the Order.

In support of their argument, the Applicants assert their proposed water use "entails domestic use per lot within the meaning of Idaho Code § 42-111 (1)(a)," and is, therefore, non-

injurious "as a matter of law." *Petitioners' Brief* at 8, 9, 13.[3] The Applicants' assertion ignores the plain language of Idaho Code § 42-111. Idaho Code § 42-111(2) expressly excludes "water for multiple ownership subdivisions" from the definition of "domestic purposes" unless "the use meets the diversion rate and volume limitations set forth in Idaho Code § 42-111*(1)(b).*" (emphasis added). The Applicants' proposed water use for their multiple ownership subdivisions[4] exceeds the limitations set forth in Idaho Code § 42-111(1)(b) and, as such, cannot constitute "domestic purposes" within the meaning of Idaho Code § 42-111(1). R. at 1. The Applicants' proposal to limit each subdivision lot to the water use parameters set forth in Idaho Code § 42-111(a) (13,000 gallons per day, including the irrigation of up to one-half acre) does not change this result. The plain language of Idaho Code § 42-111(1)(a) specifies the uses described therein are "domestic purpose" only "if the *total use* is not in excess of thirteen thousand (13,000) gallons per day." (emphasis added). The Applicants proposal to use up to 13,000 gallons per day for *each* of the seventy-six homes in their subdivisions is well beyond Idaho Code § 42-111(1)(a)'s *total use* limitation of 13,000 gallons per day.

The Applicants attempt to create ambiguity in Idaho Code § 42-111 by pointing to subsection (1)(a)'s use of the word "homes" and subsection (2)'s use of the words "water for multiple ownership subdivisions." *Petitioners' Brief* at 9. The Applicants assert the statutes' use of these words creates ambiguity as to whether their proposed water use is for "homes" and not

[3] The Applicants also assert that "Idaho Code § 42-111 (1) sets forth the scope of what is commonly referred to as the 'domestic exemption'. . . ." *Petitioners' Brief* at 8. This assertion mischaracterizes Idaho Code § 42-111(1), which simply defines what water uses constitute "domestic purposes." Idaho Code § 42-111(1) does not set forth any exemptions.

[4] Idaho's ground water statutes do not define the term "subdivision." However, Idaho Code § 50-1301(16) defines "subdivision" as "a tract of land divided into five (5) or more lots, parcels, or sites for the purpose of sale or building development, whether immediate or future . . . ." The water use proposed by the Application is for seventy-six homes within multiple ownership subdivisions within the meaning of Idaho Code § 42-111 (2) (specifically, "two subdivisions located in the foothills southeast of Idaho Falls, Idaho in Bonneville County"). *Petitioners' Brief* at 1; R. at 1-3.

"multiple ownership subdivisions" and, therefore, their use falls within the meaning of "homes" set forth in Idaho Code § 42-111(1)(a). *Id.* at 9-10. The Applicants argue this ambiguity permits an examination beyond the plain language of Idaho Code § 42-111 into legislative changes to the term "domestic purposes." *Id.* at 10-13. The Applicants emphasize the 1990 change in the statute's definition of "domestic purposes" from "water for a single family household" to "use of water for homes." *Id.* at 13. The Applicants argue this change demonstrates *"the Idaho Legislature contemplated and intended that multiple homes could be served by a community well within the numerical limits of the domestic exemption volume (13,000 gpd) and irrigated acreage limitations (1/2 acre) and not be subject to an injury analysis for such use*." *Id.* (emphasis in original).

The legislative history regarding the changing definition of "domestic purposes" does not support the Applicants' argument. The Applicants are correct that the definition of "domestic purposes" changed over time, first referring to use of water for the "household" in 1951, then to "a single family household" in 1970, and then to "water for homes" in 1990 up until today. *Petitioners' Brief* at 11-12. Noticeably absent from the *Petitioners' Brief* is any discussion of the 1995 amendment to Idaho Code § 42-111, which represents the statute as it exists today. *See* 1995 Idaho Sess. Law Chapter 233 (S.B. No. 1255).

The 1995 amendment to Idaho Code § 42-111 added subsection (3), specifying that "[m]ultiple water rights for domestic uses or domestic purposes" defined in the statute "shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section." Senator Laird Noh, who sponsored the 1995 amendment, explained at the Senate Affairs

Committee Meeting that the purpose of the amendment was "to clarify the intent of Section 42-111 as amended in 1990." Senator Noh explained:

> The definition of domestic purpose or domestic use is intended to allow a water right **for a home** with up to on-half acre of irrigation and/or a limited number of livestock, to enjoy some benefits of special consideration or reduced processing requirements under the law; **or to allow a second home** to be added to an existing water system and enjoy the same benefits. **It was not intended to allow unrestricted development of a new water use by adding or combining 13,000 gallon per day increments.**

Senate State Affairs Comm., 53rd Leg., *Domestic Water Purposes, Clarify Exemptions* (Sen. Minutes Rep. March 6, 1996)(emphasis added). The Statement of Purpose regarding the 1995 amendment confirms Senator Noh's explanation, stating:

> This Legislation seeks to clarify the intent of Section 42-111, Idaho Code, as amended in 1990. The definition of domestic purpose or domestic use is intended to provide a narrow exemption, Section 42-227, to the mandatory application and permit process, Section 42-229, and to provide exemptions or benefits in other enumerations sections of the Idaho Code. **The exemption is not intended to provide a means by which several water uses, each individually meeting the definition of Section 42-111, can be utilized together to supply water for a use that requires a water right to be developed under the provisions of Section 42-229**, or that could only have been developed under the constitution prior to March 25, 1963.
>
> The definition, as amended in 1990, was intended to **allow a water right for a home** with up to one-half acre irrigation and/or a limited number of livestock, to enjoy some benefits of special consideration or reduced processing requirements under the law. The definition was also intended to **allow a second home** to be added to an existing water system and enjoy the same benefits. **The definition was not intended to allow unrestricted development of a new water use by adding or combining 13,000 gallon per day increments.**

(emphasis added). This legislative history cuts directly against the Applicants' argument and demonstrates the Idaho Legislature intended the definition of "domestic purposes" in 42-111(1)(a) refers to one or two homes, not seventy-six homes combining 13,000 gallon per day increments as the Applicants assert.

Even if the Applicants' proposed water use did constitute "domestic purposes" within the meaning of Idaho Code § 42-111 (contrary to the plain language and legislative history of the statue), nothing in Idaho Code supports the Applicants' assertion that such domestic purposes cannot, as a matter of law, cause cognizable injury. Idaho Code § 42-227 exempts wells drilled for Idaho Code § 42-111's "domestic purposes" from Idaho Code § 42-229's permit requirement. The Applicants erroneously equate this exemption to a legislative proclamation that such "domestic purposes" cannot cause "cognizable injury" and are immune from "an injury analysis." *Petitioners' Brief* at 8-13. Idaho Code § 42-227 makes no mention of injury nor does it exempt domestic purposes from an injury analysis. The Applicants' argument that Idaho Code § 42-227's exemption for "domestic purposes" from the permit requirement is also an exemption for such purposes from any injury analysis is contrary to the plain language of Idaho Code § 42-227 and lacks any basis in law.

While someone using water for Idaho Code § 42-111's "domestic purposes" is not required to file an application for permit, once a water user does file an application for permit for such purposes, the application is subject to the procedures and review criteria set forth in Idaho Code § 42-203A. *See* Idaho Code § 42-229. Idaho Code § 42-203A(1) sets forth procedures the Department must follow "[u]pon receipt of *an* application to appropriate the waters of this state . . . ." (emphasis added). Idaho Code § 42-203A(5) specifies the Department must review "*all* applications," to determine whether the proposed use "will reduce the quantity of water under existing water rights." (emphasis added). Idaho Code § 42-203A sets forth these procedures and review requirements for *all* applications for permit and does not distinguish between applications for different types of water use. The Department must comply with Idaho Code § 42-203A's mandatory requirements and cannot arbitrarily ignore them. *See Sweeney v. Otter*, 119 Idaho

135, 138, 804 P.2d 308, 311 (1990) ("Where a statute or constitutional provision is clear we must follow the law as written."). Idaho Code § 42-227's exemption for "domestic purposes" from the permit requirement does not constitute a legal determination that such purposes are incapable of cognizable injury or immune from any injury analysis. As the hearing officer determined, Idaho Code § 42-227 and Idaho Code § 42-111 "simply identify which proposed uses must be pursued through an application for permit and which uses are exempt from that process." R. at 412. The hearing officer correctly evaluated the Application as required by the plain language of Idaho Code § 42-203A to determine whether the Applicants' proposed use will reduce the quantity of water under existing water rights.

2. References to the term *"de minimis"* do not demonstrate water use for domestic purposes cannot cause legally cognizable injury.

The Applicants also erroneously equate the Snake River Basin Adjudication ("SRBA") Court's use of the term "*de minimis*" in its *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimus Domestic and Stock Water Claims* (June 28, 2012) ("SRBA Order") to a determination that water use for domestic purposes cannot cause legally cognizable injury. *Petitioners' Brief* at 8, 21-22.

In the SRBA Order, the Court utilized the term *de minimis* to designate a subset of water rights which were deferrable in the adjudication. The Court defined *de minimis* water rights consistent with the definition of "domestic purposes" set forth in Idaho Code §§ 42-111(1)(a) and (b). *SRBA Order* at 2-3. Consistent with § 42-111(2), the Court also specified the term *de minimus* does not include "water for multiple ownership subdivisions . . . unless the use meets the diversion rate and volume limitations set forth in subsection (b) above [0.04 cfs and 2,500 gallons per day]." *Id.* As the hearing officer determined, the Court's utilization of the term *de minimis* to describe water rights deferrable in the adjudication "only addresses the question of

whether a claim must be filed in the SRBA for certain water uses." R. at 412. The Court's use of the term *de minimis* does not mean that, as a matter of law, injury due to water use for domestic purposes is not cognizable.

The Applicants cite the legal maxim *de minimis non curat lex* to support their argument, stating "'[t]he law does not concern itself with trifles.'" *Petitioners' Brief* at 21. Again, the Applicants' proposal to divert ground water from a single well for use at seventy-six homes in their subdivisions will reduce flows in the Snake River above Milner Dam and impact senior water rights. R. at 408-09. The law *does* concern itself with such impact to senior water rights and does not consider injury to water rights a mere trifle. In Idaho, water rights are real property. *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983); Idaho Code § 55–101. "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor." *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). "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." *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982).

Consistent with Idaho law's recognition of the value of water rights and concern for injury to those rights, Idaho Code § 42-203A(5) mandates the Department review *every* application for permit to determine whether the proposed water use "will reduce the quantity of water under existing water rights" and allows the Department to "reject" an application if such determination is made. There is no exception to Idaho Code § 42-203A(5)'s mandate for review based on different types of proposed water use. While Idaho Courts have recognized "the mere fact that injury *might* result" is not a valid reason to reject an application, *see Application of*

Boyer, 73 Idaho 152, 161, 248 P.2d 540, 545 (1952), the Applicants here concede, and the record establishes, their proposed water use *will* reduce the quantity of water under existing water rights. R. at 115, 408-409. The Applicants' references to the term *de minimis* and the legal maxim *de minimis non curat lex* do not demonstrate their proposed water use cannot cause cognizable injury.

3. The Department's moratorium orders do not determine whether water use for domestic purposes or multiple ownership subdivisions can cause legally cognizable injury.

The Department issued moratorium orders related to diversion and use of surface and ground water in the Snake River Basin in 1992 and 1993. The *Amended Moratorium Order* dated April 30, 1993 ("Moratorium Order"), restricted the "processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the Eastern Snake River Plain Area . . . ." R. at 288. As the hearing officer determined, "[t]he proposed points of diversion listed in [the Application] are not located within the Eastern Snake River Plain Area as defined by the Moratorium [Order]." R. at 414. As such, the Moratorium Order is not relevant to the processing or approval of the Application. However, the Applicants refer to the following language in the Moratorium Order to support the argument that their proposed water use cannot cause legally cognizable injury:

The moratorium does not apply to any application for domestic purposes as such term is defined in section 42-111, Idaho Code. For the purposes of this exception, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered provided each unit satisfies the definition for the exception of requirement to file an application for permit as described in [Section 42-111].

R. at 289; *Petitioners' Brief* at 15. The Applicants argue this language constitutes a determination by the Department that any "injury caused by diversion of water for qualifying domestic uses (including impact or injury from a community well in a subdivision) [is] not legally cognizable to prevent the development" of such uses. *Petitioners' Brief* at 16.

The Applicants' reliance upon the Moratorium Order to support their argument is misplaced. The Moratorium Order simply excludes new applications for "domestic purposes" defined in Idaho Code § 42-111 and multiple ownership subdivisions from the ban on processing and approval and provides such applications "will be considered." R. at 289. The Moratorium Order does not address whether water use for domestic purposes or multiple ownership subdivisions can cause legally cognizable injury. As the hearing officer stated, "[t]he exceptions or exclusions set forth in the Moratorium [Order] merely govern what types of applications that can continue to be processed and evaluated by the Department. They are not a final determination of injury or non-injury." R. at 414. Further, "[t]he Moratorium [Order] cannot be used to trump or circumvent the statutory review criteria required for all applications for permit" set forth in Idaho Code § 42-203A(5). *Id.* The Applicants' argument that the Department "determined" in the Moratorium Order that any "injury caused by diversion of water" for use as proposed by the Applicants is not legally cognizable misconstrues and misrepresents the contents of the order.

4. The Idaho Constitution recognizes water use for domestic purposes can cause legally cognizable injury that may be remedied by a takings claim.

Article XV, Section 3, of the Idaho Constitution specifies that, "when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall . . . have the preference over those claiming for any other purpose . . . ." The Applicants assert this "preference of domestic water rights over other

types of water rights" demonstrates "that domestic use designated in Idaho Code § 42-111 is not subject to an injury determination." *Petitioners' Brief* at 18.

The Applicants' argument ignores that Article XV, Section 3 also specifies that implementation of the preference for domestic purposes over other water uses is "subject to such provisions of law regulating the taking of private property for public and private use." This specification constitutes a recognition that, contrary to the Applicants' argument, water use for domestic purposes can cause legally cognizable injury.

The Applicants also overlook that the Idaho Supreme Court has addressed, and rejected, the Applicants' argument that Article XV, Section 3's preference for domestic water use demonstrates such use is not subject to an injury determination. In *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741, 742 (1911), the Montpelier Milling Company sought an injunction against the city of Montpelier to restrain the municipality from diverting waters of Montpelier creek. The Montpelier Milling Company claimed an 1891 right to divert 10 cfs of water from Montpelier creek to run and operate its mill and alleged that, in April 1908, the city of Montpelier "unlawfully and wrongfully" diverted water from Montpelier creek at a point above the milling company's point of diversion, such that the milling company was "deprived of said water necessary for power purposes for its said mill . . . and by reason thereof has been damaged . . . ." *Id.* The city of Montpelier argued the milling company failed to state a cause of action because its diversion of water was for manufacturing and milling purposes, whereas the city's diversion was for municipal and domestic purposes, "and thus shows that the appropriation made by the [city] was superior in right to that of the [milling company]." *Id.* The city relied upon Article XV, Section 3's preference for domestic purposes over other water uses to support its argument.

The Court rejected the city's argument, explaining that Article XV, Section 3 "clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of private property for public and private use . . . ." *Id.* at ____, 113 P. at 743. The Court stated:

> It clearly was the intention of the framers of the Constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the Constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes. This would manifestly be unjust, and clearly in contravention of the provisions of this section, which declare that the right to divert and appropriate the unappropriated waters of any natural stream for beneficial use shall never be denied, and that priority of appropriation shall give the better right.
>
> . . . .
>
> It is clear, therefore, that under the provisions of the above-quoted section of the Constitution, a municipality cannot take water for domestic purposes which has been previously appropriated for other beneficial uses without fully compensating the owner, and in this case it appearing that the [milling company] appropriated waters of Montpelier creek and applied the same to a beneficial use in 1891, the [city] had no right to interfere with such appropriation, to the injury of the [milling company], without full compensation.
> *Id.* at _____, 113 P. at 743-44.

Like the city in *Montpelier*, the Applicants rely upon Article XV, Section 3's preference for domestic purposes over other water uses to support their argument that their proposed water use is immune from any injury analysis. *Petitioners' Brief* at 18. The Applicants' argument ignores the Idaho Supreme Court's determination in *Montpelier* that Article XV, Section 3 does not shield domestic water users from claims of injury by senior water users. *Id.* at _____, 113 P. at 743-44. The Applicants' argument that Article XV, Section 3 exempts the Application from any injury determination is meritless and contrary to caselaw.

5. The Idaho Supreme Court implicitly recognized domestic water use can cause legally cognizable injury in addressing the constitutionality of CM Rule 20.11.

CM Rule 20.11 states that "[a] delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definitions set forth in [Idaho Code § 42-111]." IDAPA 37.03.11.020.11. The Applicants assert CM Rule 20.11's protection for water rights for domestic purposes in the context of delivery calls supports their argument that domestic water uses cannot cause legally cognizable injury to existing water rights. *Petitioners' Brief* at 18.

The Applicants read more into CM Rule 20.11 than is supported by the plain language of the rule. As the hearing officer determined, CM Rule 20.11 only "identifies what types of water rights are subject to a delivery call under the [CM Rules]." R. at 413. CM Rule 20.11 does not address whether domestic water rights protected from curtailment in a delivery call proceeding have caused injury to senior water right holders instigating the call.

In addition, the Applicants cite the Idaho Supreme Court's decision in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 881, 154 P.3d 433, 452 (2007) ("AFRD#2") to support their argument that their proposed water use cannot cause legally cognizable injury. *Petitioners' Brief* at 19-20. But in that case, the Court implicitly recognized the exact opposite—that domestic water rights *can* cause legally cognizable injury. In its analysis regarding the constitutionality of CM Rule 20.11's exclusion of domestic ground water rights from administration in a delivery call proceeding, the Court determined that Rule 20.11 and Article XV, Section 3 "can be read together and applied in accordance with the Constitution," noting the CM Rules "do not exclude the possibility of a takings claim" by senior water users whose water rights have been taken by domestic water users. *American Falls Reservoir Dist. No. 2*, 143 Idaho at 881, 154 P.3d at 452. In so holding, the Idaho Supreme

Court implicitly recognized that, contrary to the Applicants' argument, domestic water use *can* cause legally cognizable injury to senior water users who can seek to remedy such injury through a takings claim. Without legally cogzable injury, there could be no takings claim. AFRD#2 does not support the Applicants' argument that domestic water use cannot cause legally cognizable injury.

6. The hearing officer could not ignore the plain language of Idaho Code § 42-203A in evaluating the Application.

The Applicants assert that, because each of the seventy-six homes within their multiple ownership subdivisions will be limited to 13,000 gallons per day and the irrigation of no more than half an acre, they could have "drilled an individual well for each lot" without filing an application for permit and without "injury analysis" instead of filing the Application to divert ground water for the homes from a single well. *Petitioners' Brief* at 23. The Applicants assert the impacts of water use from individual wells for the seventy-six homes and the community well proposed by the Application are the same. *Id.* at 23. Accordingly, the Applicants conclude the hearing officer erroneously exalted "form over substance" in analyzing the Application to determine whether the proposed use "will reduce the quantity of water under existing water rights." *Id.* at 23-24.

The Applicants suggest the hearing officer could have ignored the plain language of Idaho Code § 42-203A(5) in analyzing the Application. Again, Idaho Code § 42-203A(5) mandates the Department review "*all* applications," to determine whether the proposed use "will reduce the quantity of water under existing water rights." (emphasis added). Idaho Code § 42-203A sets forth the same review criteria for *all* applications for permit and does not distinguish between applications for different water uses. The Department must comply with Idaho Code § 42-203A's mandatory requirements and cannot arbitrarily ignore them. *See Sweeney*, 119 Idaho

at 138, 804 P.2d at 311 ("Where a statute or constitutional provision is clear we must follow the law as written."). Further, as discussed above, nothing in Idaho Code, the Idaho Constitution, Idaho caselaw, nor the Department's rules or orders supports the Applicants' assertion that the use of water for domestic purposes or multiple ownership subdivisions cannot cause legally cognizable injury. The Applicants chose to file the Application seeking a permit to divert 0.76 cfs of ground water from a single well for use at seventy-six homes within the Applicants' subdivisions. R. at 1-5. The hearing officer had to comply with Idaho Code § 42-203A(5)'s mandate to analyze whether the water use proposed by the Application will reduce the quantity of water under existing water rights.

The Applicants also assert the hearing officer "reserve[d] the capricious right to require" those who file applications for permit for domestic use "to provide mitigation and not require mitigation from other, identical proposed uses when such users only need to seek and obtain a drilling permit for a well that fits under the domestic exemption." *Petitioners' Brief* at 24. The Applicants overlook that it is not the hearing officer, but rather Idaho law which requires *all* applications for permit undergo review consistent with Idaho Code § 42-203A(5). Again, Idaho Code § 42-203A(5) mandates the Department evaluate *any* application for permit regardless of its proposed use in accordance with the specified review criteria. Idaho Code § 42-203A(5) also allows the Department to "grant a permit upon conditions." One such condition can be that the applicant "mitigate losses of water to the holder of an existing water right." IDAPA 37.03.05.045.01.a.iv. The plain language of Idaho law specifies that water users who subject themselves to the permit process also subject themselves to Idaho Code § 42-203A(5). The hearing officer's statement that applicants who meet the definition of "domestic purposes" in Idaho Code § 42-111 "might be required to mitigate for potential impacts to senior rights,"

whereas those who do not file applications for permit for domestic purposes may not, is not "capricious" as the Applicants assert, but rather consistent with the plain language of Idaho Code § 42-203A(5) and the Department's Water Appropriation Rules.

7. Acceptance of the Applicants' argument would have far reaching and negative consequences for Idaho's water resources.

Acceptance of the Applicants argument that their proposed diversion of ground water from a single well for use at seventy-six homes in their subdivisions cannot cause legally cognizable injury would have far reaching and negative consequences for Idaho's water resources. It is well-documented that ground water resources across Idaho have been declining, including the Eastern Snake Plain Aquifer ("ESPA"), and that predicted population increases will place additional demands on such resources. *See Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 197 (2016); *see also* S.C. Res. 136 & 137, 63rd Leg., 2nd Reg. Sess. (Idaho 2016). A decision that would immunize ground water diversions like those proposed by the Applicants from any injury analysis would only serve to increase consumptive uses of Idaho's ground water resources and further exasperate declines. Such a decision would work to undermine efforts of ground water districts whose water users are reducing their consumptive use to resolve water delivery calls and "stabilize and ultimately reverse the trend of declining ESPA water levels" in accordance with their June 30, 2015, settlement agreement with the SWC. *See* R. at 239; *see also* S.C. Res. 138, 63rd Leg., 2nd Reg. Sess. (Idaho 2016). Such a decision would also work to undermine the state of Idaho's efforts to meet annual managed recharge goals and to address statewide aquifer stabilization and sustainability as requested, and funded, by the Idaho Legislature. *See* S. 1176, 64th Leg., 1st Reg. Sess. (Idaho 2017); S. 1402, 63rd Leg., 2nd Reg. Sess. (Idaho 2016); S.C. Res. 136 & 137, 63rd Leg., 2nd Reg. Sess. (Idaho 2016); S. 1190, 63rd Leg., 1st Reg. Sess. (Idaho 2015); H. 547, 62nd Leg., 2nd Reg. Sess. (Idaho 2014).

Nothing in the plain language of Article XV, Section 3, of the Idaho Constitution or Idaho Supreme Court precedent supports the Applicants' argument that water use for domestic purposes cannot cause legally cognizable injury to senior priority water rights. *See American Falls Reservoir Dist. No. 2*, 143 Idaho at 881, 154 P.3d at 452; *Montpelier Milling Co.*, 19 Idaho at____, 113 P. at 742. Nothing in Idaho Code nor the Department's rules or orders supports the Applicants' argument that its proposed water use is incapable of cognizable injury or immune from the injury analysis required by Idaho Code § 42-203A(5). The Applicants' argument must be rejected because acceptance of it would have far reaching and negative consequences for Idaho's ground water resources and because it lacks any reasonable basis in fact or law.

B. <u>The Department Is Entitled to an Award of Attorney Fees Because the Applicants' Argument Lacks a Reasonable Basis in Fact or Law.</u>

Idaho Code § 12-117 states:

> (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.
>
> (2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

The Department is entitled to an award of reasonable attorney fees pursuant to Idaho Code §§ 12-117(1) and (2) because the Applicants' argument that its proposed use of ground water cannot cause legally cognizable injury is without a reasonable basis in fact or law. The Applicants assert their substantial rights have been prejudiced because the hearing officer rejected their argument in the Order. *Petitioners' Brief* at 28. The Applicants have suffered no

prejudice to a substantial right. As discussed herein, the Applicants' argument that their proposed water use is incapable of cognizable injury ignores the plain language of Idaho Code and Idaho Supreme Court precedent. The Applicants also misconstrue references to the term *de minimis* and the Department's rules and orders in an attempt to justify their position. Nothing cited by the Applicants supports their argument that domestic water uses are incapable of causing injury as a matter of law and, therefore, exempt from any injury analysis. Because the Applicants' argument lacks a reasonable basis in fact or law, the Department is entitled to an award of attorney fees pursuant to Idaho Code §§ 12-117(1) and (2).

C. The Department Does Not Oppose Remand So the Applicants May Propose Conditions of Approval to Mitigate Injury to Existing Water Rights.

The Applicants assert the hearing officer erred by denying the Application instead of "just determining" their Motion. *Petitioners' Brief* at 26-27.[5] The Applicants assert—for the first time—they would like the Department to consider "a mitigation plan" relative to the Application. *Id.* at 28.

In its protest, the SWC asserted the Applicants "failed to provide any proposed mitigation to offset impacts of the new diversion anticipated" pursuant to the Application and "failed to show that the Application meets criteria required by Idaho Code §§ 42-203A and 42-111(2) and (3)." R. at 13. In their Motion, the Applicants ignored these assertions and argued "a decision on this issue in favor of the [Applicants] would resolve all parts of the [SWC's] protest and should result in issuance of a water right permit." *Id.* at 123. Now, based upon the hearing officer's denial of the Application, the Applicants assert "questions of fact" remain to be

[5] The Applicants also assert that, based upon the language of Idaho Rule of Civil Procedure 56, the hearing officer erred by entering "summary judgment on behalf of the non-moving party." *Petitioners' Brief* at 25. First, the Idaho Rules of Civil Procedure do not apply to contested case proceedings before the Department. IDAPA 37.01.01.052. Second, the hearing officer did not enter summary judgment in favor of the SWC. The hearing officer denied the Applicants' Motion.

determined upon remand and further proceedings before the Department. *Petitioners' Brief* at 27-28.

For reasons stated herein, the hearing officer's denial of the Motion should be affirmed. However, the Department does not oppose remand so the Applicants may present evidence at hearing regarding mitigation to offset injury to existing water rights.

V. CONCLUSION

The Applicants' proposed diversion of ground water from a single well for seventy-six homes in its subdivisions will reduce the quantity of water under existing water rights that divert from the Snake River. Nothing in Idaho Code, the Idaho Constitution, Idaho caselaw, nor the Department's rules or orders supports the Applicants' assertion that its proposed water use cannot cause legally cognizable injury. The hearing officer correctly rejected the Applicants' argument and determined Idaho Code § 42-203A requires the Department analyze the Application to determine whether it will injure existing water rights. The Court should affirm the hearing officer's denial of the Motion and award the Department reasonable attorney fees. However, the Department does not oppose reversal of the hearing officer's denial of the Application so the Applicants may present evidence at hearing regarding mitigation to offset injury to existing water rights.

RESPECTFULLY SUBMITTED this 21ST day of June 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21ST day of June 2017, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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