IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

Docket No. CV42-2015-2452

IN THE MATTER OF APPLICATION FOR PERMIT NO. 35-14402
In the name of Jeffery M. Cook
(IDWR Docket No. CM-DC-2011-004)

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

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents,

SURFACE WATER COALITION'S OPENING BRIEF

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COME NOW, American Falls Reservoir District #2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (hereinafter "Surface Water Coalition" or "Coalition"), by and through their attorneys of record and hereby submit this Opening Brief pursuant to the Court's July 1, 2015 *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources.*

STATEMENT OF THE CASE

I. Nature of the Case

Through this petition for judicial review, the Coalition questions whether the Department can approve an application for permit seeking to increase the diversion rate (quantity element) under established water rights. The issue is complicated by the fact that the Applicant, and his predecessors in interest, unlawfully diverted in excess of their allowed diversion rate of 5.13 c.f.s. for over a decade. R. 49 (the Applicant diverted 8.2 c.f.s. since acquiring the property even though the water rights only authorize a combined diversion rate of 5.13 c.f.s.). The Idaho Department of Water Resources ("IDWR" or "Department") approved the permit, authorizing a diversion rate in excess of the established water rights with a volume limitation of 1,221 afa – based on a calculation of the annual volume of water that may have been diverted under established water rights using the Applicant's historical irrigation practices. R. 61. These are the same historical practices that involved the illegal diversion of water in excess of the authorized diversion rate. According to the Department, "if the proposed permit and the Cook's existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the proposed permit will be fully mitigated." R. 53, ¶ 19.

The Department's decision is in error. First, a water right is defined by its elements – which includes the diversion rate limit. The expansion of any element of a water right results in an enlargement of that right. By allowing a water user to increase his diversion rate and to mitigate for that increased diversion by reducing the authorized volume under existing water right – volume that has not been used for at least a decade – the Department has condoned an unlawful enlargement. In essence, the water user will be able to divert more water in a shorter period of time than could ever have been diverted under the original water rights.

Even if such a practice is acceptable, there is no evidence in the record to suggest that the mitigation proposed in this case is sufficient to offset the increased depletionary impacts of the new diversions. The Applicant never provided any analysis of the mitigation that was approved through the Final Order. The Final Order does not even provide any analysis. Instead, it merely concludes that the mitigation is sufficient. Absent evidence to support this conclusion, the Final Order must be reversed.

Approval of this application sets a dangerous precedent for water use on the Snake River Plain and throughout Idaho. Few irrigators divert the entire volume of water authorized by their water rights. Shoulder season lack of demand, crop type, stoppages for various reasons such as harvest, weather conditions, maintenance and other factors all contribute to water users using less than the authorized volume in any given year. To allow a water user to identify this unused volume of water as mitigation for new consumptive water rights is false mitigation and only increases the impacts of new diversions on existing water users. The reasoning in the Department's present order would allow any farmer who uses a lower volume of water than authorized under existing water rights to request an increase in diversion rate – thus removing more water

from the aquifer in a shorter period of time and increasing the rate that water is used. Such analysis is not supported by the law and should be reversed.

II. Course of Proceedings

On August 29, 2014, Jeffrey M. Cook ("Cook") filed a new application with IDWR seeking to divert 5 cfs of groundwater for irrigation. R. 1. The Coalition protested the application. R. 10. A hearing was held on April 24, 2015. R. 31. On May 15, 2015, the Hearing Officer entered the *Preliminary Order Issuing Permit*. R. 48.

Pursuant to Idaho Code § 67-5245(2) and (3), as well as Department Rule of Procedure 730.02.b,[1] the Coalition filed an Exceptions brief with the Director. R. 64. The exceptions were denied as untimely.[2] R. 86.

By operation of law, the Preliminary Order became a Final Order on May 29, 2015 – 14 days after issuance of the Preliminary Order. *See* Dept. Rule 730.02.b (Exceptions briefs must be filed within 14-days of issuance of the preliminary order, "otherwise, ***this preliminary order will become a final order of the agency***") (emphasis added) (IDAPA 37.01.01.730.02.b); I.C. § 67-5245(3) (Director may review preliminary order on his own initiative but only on 14-days written notice).

On June 26, 2015, the Coalition filed its *Petition for Judicial Review*, pursuant to Rule 730.02.f (IDAPA 37.01.01.720.02.f), which provides that "if this preliminary order becomes final, any party aggrieved by the final order … may appeal the final order and all previously issues orders in this case to the district court." R. 80.

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[1] IDAPA 37.01.01.730.02.b.1.

[2] The Preliminary Order was issued on May 15, 2015. R. 48. The Department emailed the Preliminary Order on May 18, 2015. The Coalition did not receive the Preliminary Order in the mail until May 22, 2015. The Coalition filed its Exceptions Brief 14 days after the Preliminary Order was received via email (May 18, 2015). The Department dismissed the Exceptions as untimely, holding that the 14-day time limit began on May 15, 2015.

III. Statement of Facts

Cook owns a total of six water rights that, when combined, authorized a total diversion rate of 5.13 cfs and total volume of 2,187 afa. Ex. 101 (at pdf page 5). However, since at least 2006, Cook, and his predecessors in interest, have illegally diverted water at a rate of 8.2 cfs. R. 49, ¶¶ 7-8. Importantly, Cook has no water right authorizing the diversion of the additional 3.07 cfs. R. 77 (applicant admits to diverting at "higher rate" and indicates that application 35-14402 was filed for "the very purpose" of addressing this higher, unauthorized diversion rate).

In 2014, Cook filed the above application seeking a new water right that would authorize the additional 3.07 cfs that had been illegally diverted on the Cook property for nearly a decade.[3] To mitigate for the increased diversion rate, Cook offered to reduce the total authorized volume under his existing water rights from 2,187 afa to 1,522 afa. Ex. 101. This mitigation was based on calculations by Cook's expert and represented the volume diverted in 2012 – the highest diversion volume on the Cook property over the last 15 irrigation seasons. *Id.*; *see also* R. 49 at ¶ 10 (1,522.1 afa "represents the highest annual diversion volume occurring in the last 15 years"); R. 52 at ¶ 8 (same). Importantly, in 2012, Cook was exceeding the allowed diversion rate under his existing water rights. R. 49 at ¶¶ 7-8. No testimony was provided that either Cook or his predecessors in interest ever diverted more than 1,522 afa for irrigation of the Cook property in any irrigation season.

During the hearing, Cook testified that a normal irrigation season included several periods of time where irrigation would cease – including harvest periods and shut off for weather and

[3] The application originally sought a diversion rate of 5 cfs. R. 1. When combined with the existing water rights, Ex. 101, this would equal a total diversion rate of 10.13 cfs. However, the Cook system could only divert up to 8.2 cfs. R. 49 at ¶ 7.

maintenance issues. R. 52 at ¶ 10 & R. 53 at ¶ 16; Tr. at 36-40. In addition, Cook testified that he is typically finished irrigating after late-September. R. 53 at ¶ 17 ("According to Cook, he rarely irrigates after the second harvest and does not generally irrigate in October"); Tr. at 36-40.

Cook further speculated that, had he limited his diversion to the authorized limits of the existing water rights (i.e. at a rate of 5.13 cfs), he would have used water for a longer period of time during the irrigation season – i.e. he would have changed the normal irrigation practices. R. 50 at ¶¶ 13-15 (discussing irrigation practices) & R. 52 at ¶ 9. At most, however, Cook testified he would use water 149 of the available 214 days of the irrigation season.[4] R. 52 at ¶ 9; *see also* Ex. 101 (irrigation season is 214 days long). Some of Cook's testimony was rejected. R. 52 at ¶¶ 11-13 ("The arguments advanced by RMEA in support of a 149-day pumping period are not persuasive"). Other testimony was accepted. R. 52-53 at ¶¶ 15-17. In the end, relying upon a speculative calculation, the Hearing Officer concluded that Cook would have irrigated for 120 days had he been limited to the 5.13 cfs diversion rate. R. 53 at ¶ 18 & n.1. Based on this, the Hearing Officer approved the Permit, authorizing a total diversion ate of 8.2 cfs with a volume limitation of 1,221 afa. R. 61. According to the Hearing Officer, if "the proposed permit and the Cook's existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the proposed permit will be fully mitigated." R. 53 at ¶ 19.

[4] The evidence was uncontroverted that the Applicant grew timothy grass on the property, a crop that requires irrigation during almost all of the irrigation season. Ex. 101. However, no evidence was presented that the Applicant would grow the same crop if he were to comply with the law and only use the diversion rate stated on the water right. In fact, the Applicant testified that he did not fully understand the diversion rate of the water rights when he purchased the property, and if he had realized that the water rights had a restricted diversion rate, he probably would not have purchased the property. Tr. at 138, ll.3-10.

ISSUES PRESENTED

The Coalition asserts the following issues on appeal:

1. Whether limiting the diversion volume under a new permit filed only for an increased diversion rate to use a volume authorized under existing water right(s) constitutes sufficient mitigation for the new permit?

2. Whether limiting the diversion volume under a new permit for an increased diversion rate to a volume authorized under existing water right(s) constitutes an enlargement of water use?

3. Whether the *Order* is supported by substantial evidence?

4. Whether the *Order* complies with Idaho Law?

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). Generally, a Court is charged with deferring to an agency's decision. *Mercy Medical Center v. Ada County,* 146 Idaho 220, 226 (2008). The Court, however, is "free to correct errors of law." *Id.* Constitutional questions and questions of statutory interpretation are questions of law over which the Court exercises free review. *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 35, 40 (2011).

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure,

" (d) "is not supported by substantial evidence in the record as a whole" or (e) is "arbitrary, capricious or an abuse of discretion." I.C. § 67-5279(3); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796 (2011).

An agency's decision must be supported by "substantial evidence." *Chisholm*, 142 Idaho at 164 ("Substantial evidence ... need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusions as the fact finder"). This Court is not required to defer to an agency's decision that is not supported by the record. *Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

An agency action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id.*

Although the Court grants the Director discretion in his decision making, *supra*, the Director cannot use this discretion as a shield to hide behind a decision that is not supported by the law or facts. Such decisions are "clearly erroneous" and must be reversed. *See Galli v. Idaho County*, 146 Idaho 155, 159 (2008) ("A decision is clearly erroneous when it is not supported by substantial and competent evidence").

ARGUMENT

I. The Final Order Authorizes an Enlarged Diversion Rate Beyond the Reasonable Expectations of the Existing Water Rights and is, Therefore, Contrary to Law.

The decision to authorize a new increased diversion rate based on limiting the diversion volume to that already authorized under existing water rights is contrary to the law. A water right is constrained by its elements. *See* I.C. § 42-1420. It is illegal to divert water in any manner that is not consistent with the elements of the water right. I.C. § 42-351(1) ("It is unlawful

for any person to … divert or use water not in conformance with a valid water right"); *see also* I.C. § 42-201(2) (illegal to divert water without a water right). Any attempt to divert water in excess of any element on an existing water right will require a new water right. I.C. § 42-201 (all new diversions require an application for permit); *see also* I.C. § 42-1426 (for the limited purpose of the Snake River Basin Adjudication, enlargements occurring before the commencement of the adjudication were given a safe harbor from the application process).

The Department has considered, and rejected, a nearly identical request to increase a diversion rate by the City of Shelley. *See* Ex. 202. There, Shelley sought a new groundwater right with a diversion rate of 3.34 cfs for municipal purposes. *Id.* As part of the mitigation for the new consumptive uses, Shelley offered to limit "the total annual volume diverted to the total volume authorized by Shelley's perfected water rights." *Id.* According to Shelley, no injury would result because there would be no additional volume of water authorized for diversion. *Id.* at 12-13; Ex. 200 at 2 ("Shelley argues, based on a presumption that it is entitled to the annual volume described above and the volume is not exceeded by an increased flow rate, that the protestants cannot be injured").

On summary judgment, the Hearing Officer rejected this proposed mitigation plan.

> The extent of a water right is bounded by the beneficial use of the water under the water right. A municipality has the ability to grow into its water right within reasonable limits. These limits include the express components that define the municipal water rights. One of these components is the flow rate. A reasonable exercise of a municipal water right is the construction of additional storage or additional delivery line capacity to address relatively short term demands on the system. These reasonable expansions of a municipal system are recognized within the expansion flexibility of a municipal system.
>
> Shelley argues, however, that a new water right can authorize significant additional flow rate, and that any additional volume diverted would, as a matter of law not injure another water user even though the increased volume could not have been physically diverted under the flow rate authorized by the

existing water rights. Adoption of this argument by the Department could result in a license to significantly increase the flow rate, and correspondingly increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights, even if the rights do not expressly fix a volume limitation.

Based on the above, the issue presented by Shelley is an issue of fact. The issue is one of whether the increase in flow rate will cause an increase in the annual volume of water diverted that could not be reasonably expected under Shelley's existing municipal water rights. For instance, if the extra flow rate were sought simply to supply fire protection flows to satisfy a fire protection standard, and the only additional volume would be diverted to fight an existing fire, the facts would probably dictate a conclusion that there is no injury. On the other hand, if additional flow rate would double the total annual volume diverted under the existing municipal water rights, it is more probable that injury could occur.

Ex. 200 at 2.

In this case, the Hearing Officer's Preliminary Order, Ex. 201, confirmed that Cook's increased diversion rate would "increase the annual volume diverted" – even if the new diversions were constrained by the volume limitations of the existing water rights:

> Approval of this water right application will increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights. The increase in the total volume of water diverted under this right will result in a reduction in the quantity of water available under existing rights. Large annual volumes for municipal water rights, whether implied when no volume is specified or expressly stated in the water right, ***are constrained and limited by the flow rate authorized by the water rights***.

Ex. 201 at 8, ¶ 12 (emphasis added). In the Final Order in the City of Shelley case, the Director rejected this portion of Shelley's mitigation plan using identical language as the Preliminary Order. Ex. 202 at 13, ¶ 14.[5]

The decision in the Shelley matter confirmed that increasing one's diversion rate results in an increase of the "annual volume diverted." *Id.* (Such increases would "increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights").

[5] The Permit was approved based on alternate mitigation provided by the City.

This is because diversion volumes "are constrained and limited by the flow rate authorized by the water rights." *Id.* The determining factor is "what was reasonably expected under the existing" water rights.

This case provides a prime example of the conclusion that increased diversion rate results in increased diversion volume. Cook's existing water rights authorize a diversion rate of 5.13 cfs and an annual volume of 2,187 afa. Ex. 101 at 5 (chart depicting existing water rights). For at least the last 15 years, neither Cook nor his predecessors have ever diverted more than 1,522 afa for irrigation of the property. Ex. IDWR 1. As stated above, Cook offered to limit diversion to 1,522 afa as mitigation for the new diversions specifically because that volume represented the highest volume of water Cook had diverted in any irrigation season. Ex. 101. Importantly, however, Cook was only able to divert that volume because he had been exceeding the authorized diversion rate under his water rights. In other words, based on his customary irrigation practices, Cook had no reasonable expectation that he would be able to divert 1,522 afa for irrigation using his authorized diversion rate. The unlawful diversion is what allowed Cook to use 1,522 afa in the first place. Such actions cannot now be the basis for "mitigation" for a new water right in the ESPA.

At hearing, evidence was presented that specifically identified the reasonable expectations of annual volume diversions under the existing water rights. In particular, Exhibit 101 compared the diversion volumes for irrigation scenarios based on a 5.13 cfs diversion rate, as authorized, and at an 8.2 diversion rate, as had been diverted for at least 15 years.

Irr. Days	5.13 cfs	8.2 cfs	Increase
103	1,048.062 afa	1675.264 afa	**627.202 afa**
164	1,668.758 afa	2667.411 afa	**998.653 afa**
76.2	775.4 afa	1,239.4 afa	**464 afa**
149	1,516.1 afa	2,423.4 afa	**907.3 afa**

Ex. 101 (pdf pages 5-6).

As an example, the above chart demonstrates that, using the authorized diversion rate (i.e. 5.13 cfs), Cook would only have "reasonably expected" to divert 1,048.062 afa in 103 days of irrigation. *Id.* However, since Cook had been exceeding the authorized diversion rate, and diverting at a rate of 8.2 cfs, he was actually able to divert and use 1,678.264 afa over the same period of time – an increase of 627.202 afa due to the unlawful diversions. Any increase in volume diverted during that period of time would exceed the authorizations of the water right and, therefore, be unlawful.

The same conclusion applies to the 120-day irrigation season adopted by the Department. R. 53 at n.1. Indeed, using the diversion rates of the existing water rights, it would take Cook 120 days to divert 1,221 afa.[6] However, notwithstanding the limitations of the water rights, the Final Order allows Cook to divert *more water* in a *shorter period of time* than he could have under the existing rights. At a diversion rate of 8.2 cfs, Cook will be able to divert the same 1,221 afa in only 75 days[7] – 45 days faster than under the existing water rights. This is exactly the Department's concern that lead to the rejection of the proposed mitigation in the Shelley decision. *See* Ex. 200 at 2 ("Adoption of this argument by the Department could result in a license to significantly increase the flow rate, and correspondingly increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights").

[6] The number of days was determined by dividing the volume (1,221 afa) by the acre feet per cfs (1.9835 af) by the diversion rate (5.12 cfs). 1,221 afa -/ 1.9835 af / 5.13 cfs = 120 days.
[7] 1,221 / 1.9835 af / 8.2 cfs = 75 days.

Under the existing water rights, Cook could never have "reasonably expected" to divert 1,221 afa in only 75 irrigation days.[8] *See also* Ex. 101 at 5-6. By allowing Cook to divert more water in fewer days, the Final Order has allowed Cook to exceed the reasonable expectations of the established water rights – thus constituting an unlawful enlargement. As such, the decision should be reversed.

II. The Final Order Fails to Require Sufficient Mitigation for the New Diversion Rate and Increased Volume Used.

The Final Order attempts to justify the increased diversion rate and volume by stating:

> If the proposed permit and the Cook's existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the proposed permit will be fully mitigated. The volume of water diverted under the proposed permit will be offset by a corresponding reduction in the volume pumped under the existing water rights. In combination, the water rights will not exceed the historical annual volume diverted under the existing water rights.

R. 53 at ¶ 19. Further, "the proposed permit and the existing water rights will be limited to a combined annual diversion volume of 1,221 acre-feet. This represents the maximum volume of water reasonably expected to be diverted under the existing water rights based on historical use." R. 54 at ¶ 23. This mitigation is inappropriate for at least the following reasons.

A. The Conclusions on Mitigation are Contrary to Department Precedent.

The decision's conclusions on mitigation misread the prior Shelley Orders. In those proceedings, the Director did not limit the "reasonably expected" determination to the volume that had historically been diverted under the existing water rights. Rather, the Director concluded that the volume of water authorized is "constrained and limited by the flow rate authorized by the water rights." Ex. 202 at 13. ¶ 14. In this case, the flow rate of the existing water rights is 5.13 cfs. This rate constrains and limits the volume that can be diverted and expected by the Applicant. By increasing the flow rate to 8.2 cfs, the Hearing Officer has allowed Cook to exceed

[8] Rather, Cook would only be able to divert 763.15 afa in that time (i.e. 75 days * 1.9835 af * 5.13 = 763.15).

these constraints and limitations by diverting volumes of water at a faster rate – thereby diverting the 1,221 afa 45 days faster than would be permitted under the established water rights. *Supra.*

B. There is No Evidence In the Record to Support the Final Order's Conclusion that Sufficient Mitigation Has Been Provided.

There is no analysis in the record to support the conclusion that the "corresponding reduction in the volume pumped under the existing water rights" would appropriately mitigate the new diversions. *Supra.* In attempting to distinguish the City of Shelley matter from the current proceedings, the Final Order concludes that a reduction of volume pumped would be sufficient because it was "based on historical use." R. 53-54 at ¶¶ 22-23. As such, the Final Order concluded that reductions based on historical use (as opposed to decreed pumping volumes) would sufficiently mitigate for increased diversions under the new water right.[9] This decision is wrong for at least the following reasons.

First, Cook's "historical use" was an illegal use. Since at least 2006, Cook has been diverted in excess of his water rights quantity limitation (8.2 cfs instead of 5.13 cfs). To allow mitigation "based on historical use," particularly when that historical use is illegal, should not be permitted. *C.f., Ada County Highway Dist. v. Total Success Invs.*, LLC, 145 Idaho 360, 370 (2008) ("The clean hands doctrine stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue") (citations omitted).

[9] Cook agrees with this analysis. Indeed, in opposing the Coalition's exceptions before the Director, Cook argued that this matter is distinguished from the City of Shelley matter precisely because "the City did not propose to limit its water rights to the volume it historically diverted. Rather, the City proposed to limit its volume to the decreed volume of its water rights. The Applicant's proposal limits its diversion volume to what was actually diverted, or at least what was reasonably expected because of the 8.2 cfs diversion rate the Applicant utilized." R. 77.

Furthermore, there is no evidence that the reduction based on historical use is even sufficient to offset the new depletions. The distinction between historical and decreed pumping volumes is important. As stated above, there is no testimony that Cook has never diverted more than 1,522 afa during any irrigation season. *See, e.g.*, Ex. 101. In other words, there is no "reduction" from 2,187 afa to 1,221 afa because there is no evidence that 2,187 afa has ever actually been diverted under the existing water rights. Cook cannot expect to divert 2,187 afa when such use has never occurred. *Supra* (discussing Cook's regular irrigation practices and how situations including harvest, weather issues and maintenance needs result in water being shut off for certain periods of time during the season). At most, therefore, the only "corresponding reduction in the volume pumped under existing water rights" would be the difference between the 1,522 afa historically used by Cook and the 1,221 afa ordered by the Department – a difference of 301 afa.[10]

There is no evidence in the record to support the conclusion that a reduction from 1,522 afa to 1,221 afa will properly and appropriately mitigate for the new diversions under the new permit. Indeed, the only discussion of mitigation in the record is the mitigation plan provided by Cook – which analyzed a reduction in the volume from 2,187 afa to 1,522 afa. Ex. 101. That plan does not contemplate – let alone analyze – any reductions from 1,522 afa to 1,221 afa or whether that constitutes sufficient mitigation. *Id.*

The sufficiency of the mitigation is a serious question that must be decided based on evidence in the record. Idaho law requires consideration of whether or not the water right will "reduce the quantity of water under existing water rights." I.C. § 42-203A(5)(a). The Department's *Amended Moratorium Order* further prohibits the development of new consumptive water rights without proper mitigation. R. 55-56. Notwithstanding this mandate, the Final Order does not

[10] It is important to remember that the increased volume diverted by Cook was based on illegal diversions.

analyze whether the authorized mitigation will actually provide sufficient mitigation. As stated above, at a diversion rate of 8.2 cfs, Cook will be able to divert 1,221 afa in 75 days.[11] However, at a diversion rate of 5.13 cfs, as authorized by the existing water rights, Cook would only be able to divert 763.15 afa in that time – a difference of 457.85 afa. The record is wholly devoid of any analysis support the conclusion that a reduction of 301 afa (from 1,522 afa to 1,221 afa) constitutes sufficient mitigation to offset an increased diversion of 459.34 afa. Rather, the Final Decision simply concludes that such mitigation is appropriate. Absent sufficient evidence, however, the Final Decision must be reversed.

C. The Applicant Has Refused to Take Steps to Utilize his Existing Water Rights.

Finally, in the Shelley matter, the Director confirmed that the "reasonable exercise" of the existing water rights may require the implementation or change of certain controls or practices to maximize his water use. "A reasonable exercise of a municipal water right is the construction of additional storage or additional delivery line capacity to address relatively short term demands on the system." Ex. 200 at 2. In this case, crops and irrigation patterns can be rotated and ponds can be constructed. Rather than take such actions, however, "Cooks seek to obtain a water right to cover their existing irrigation system, thereby avoiding the expense associated with changing the system." R. 49 at ¶ 8; Tr. at 23-25. The law does not permit this expanded use merely because Cook wants to avoid some expense.

CONCLUSION

The permit authorizing an increased diversion rate is contrary to law and Department precedent. The permitted use will result in an increased diversion of water in a shorter period of time. Contrary to the Final Order, Cook should not be permitted to divert at a higher rate and use

[11] 1,221 / 1.9835 af / 8.2 cfs = 75 days.

more water than was "reasonably expected" under the existing water rights. As such, the Court should reverse the Final Order.

DATED this 16th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2015, I caused to be served a true and correct copy of the foregoing upon the following by the method indicated:

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