IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

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

A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, TWIN FALLS CANAL COMPANY and NORTH SIDE CANAL COMPANY, Petitioners, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent	**Case No. CV-42-2015-2452**
IN THE MATTER OF APPLICATION FOR PERMIT NO. 35-14402 In the name of Jeffrey M. Cook	

APPLICANT'S RESPONSE BRIEF

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

Robert L. Harris, ISB #7018
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
Idaho Falls, Idaho 83402
P.O. Box 50130
Idaho Falls, Idaho 83405-0130
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Jeffrey M. Cook and Karl T. Cook (collectively the Applicant)

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, ID 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for American Falls Reservoir District #2 and Minidoka Irrigation District

Garrick L. Baxter, ISB #6301
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720
Telephone: (208) 287-4800
Facsimile: (208) 287-6700

Attorneys for the Idaho Department of Water Resources

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Karl T. Cook and Jeffrey M. Cook (hereinafter collectively "Cook" or "Applicant"), the water right applicants in the underlying administrative matter challenged in above-entitled appeal, hereby submit *Applicant's Response Brief.* This brief is in response to the *Surface Water Coalition's Opening Brief* filed on September 16, 2015 (the "*Opening Brief*"). This brief is filed pursuant to this court's July 2, 2015 *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* and in anticipation that the court will grant *Applicant's Notice of Appearance, or Alternatively, Unopposed Motion to Intervene Pursuant to I.A.R. 7.1* previously filed in this matter.

I. STATEMENT OF THE CASE.

A. Nature of the Case.

The content and arrangement of this brief is governed by I.A.R. 35(b), which provides that this statement of the case should be provided only to the extent the Applicant disagrees with the statement of the case set forth in the *Opening Brief.*

The Applicant agrees that the above-entitled appeal challenges the Idaho Department of Water Resources' ("IDWR" or "Department") issuance of water right permit no. 35-14402 (hereinafter, simply "35-14402"). The original application for 35-14402 was protested by the Surface Water Coalition (the "SWC" or "Coalition"). After taking evidence during a one-day hearing, 35-14402 was issued pursuant to a *Preliminary Order Issuing Permit* dated May 15, 2015 (hereinafter, "*Preliminary Order*") authored by Hearing Officer James Cefalo (the "Hearing Officer").

The Applicant also agrees that the Coalition did attempt to file exceptions with the director of the Idaho Department of Water Resources (hereinafter, simply the "Director") pursuant to IDAPA 37.01.01.730.02.b, but the exceptions were ultimately determined to be

untimely filed. R. 64-73. As a result, the *Preliminary Order* became a final order of the Department on May 29, 2015, and will be referred to as the "*Final Order*" in this brief. The Coalition appealed the *Final Order* on June 28, 2015. R. 80-85.

Concerning the remaining portions of the statement of the case, the entirety of pages 2-3 of the Coalition's *Nature of the Case* section are argumentative and misplaced because this section of its *Opening Brief* should only describe "briefly the nature of the case." Rather than respond to the Coalition's arguments at this point, the Applicant will respond in the Argument section *infra*.

Additionally, concerning the nature of the case before this court, as raised by the Applicant herein, this appeal must first address a subject matter jurisdiction issue, specifically, whether the Coalition failed to exhaust its administrative remedies under Idaho law by failing to have the Director review the *Preliminary Order* through the exceptions process outlined in the Idaho Administrative Procedures Act (the "APA") and IDAPA 37.01.01.730.02.b before resorting to the Court with this appeal.

B. Course of Proceedings.

Applicant agrees with the course of proceedings contained in the *Opening Brief*.

C. Statement of Facts.

I.A.R. 35 requires a "concise statement of the facts." The *Opening Brief*'s statement of facts is mostly argumentative and some statements are incorrect or incomplete. Accordingly, it is more efficient for the Applicant to set out its own concise set of facts.

1. On August 29, 2014, on behalf of both Karl T. Cook and Jeffrey M. Cook, Jeffrey M. Cook submitted an application for water right permit for 35-14402, an application that was later slightly amended. R. 1-5.

2. The application for permit sought authorization to develop a water right for up to 5 c.f.s to be used in conjunction with the Applicant's existing water rights initially with no increase in the decreed diversion volume authorized under the existing water rights. R. 3.

3. Applicant's existing water rights referenced in the application for 35-14402 are evidenced by the water right reports found at Exhibits 103-108. For convenience of the court, these water rights are summarized in the following chart found at Exhibit 101:

WATER RIGHTS — Karl & Jeffery Cook

Jeffery Cook	Diversion Rate (cfs)	Volume AFA	Acre Limit	PPU Acres
35-7280	3.13 cfs	626.7 afa	156.7 acres	418.0 acres
35-7281	3.73 cfs	836.0 afa	209.0 acres	418.0 acres
35-13241	0.86 cfs	209.2 afa	52.3 acres	418.0 acres
Sum =	7.72 cfs	1671.9 afa	418.0 acres	418.0 acres
LIMITED TO:	3.83 cfs	1633.3 afa	418.0 acres	418.0 acres

WATER RIGHTS

Karl Cook	Diversion Rate (cfs)	Volume AFA	Acre Limit	PPU Acres
35-14334	1.07 cfs	213.2 afa	53.3 acres	142.0 acres
35-14335	1.27 cfs	284.0 afa	71.0 acres	142.0 acres
35-14336	0.29 cfs	70.8 afa	17.7 acres	142.0 acres
Sum =	2.63 cfs	568.0 afa	142.0 acres	142.0 acres
LIMITED TO:	1.30 cfs	554.4 afa	142.0 acres	142.0 acres

Combined Water Rights

Jeffery Cook	3.83 cfs	1633.3 afa	418.0 acres
Karl Cook	1.30 cfs	554.4 afa	142.0 acres
Combined =	5.13 cfs	2187.7 afa	560.0 acres

4. The existing water rights have a combined diversion rate of 5.13 cfs. Tr. p. 11, LL. 18-22.

5. The application for 35-14402 was protested by the Coalition. R. 10-12.

6. A hearing was held on April 24, 2015. Tr. p. 5, LL. 11-12.

7. The Applicant currently farms timothy hay, sometimes known as timothy grass, on its farm, and has for a number of years. Tr. p. 9, LL. 23-25.

8. Timothy hay is a broad-leaf plant that has a six-inch root, as opposed to alfalfa, which typically has a root of one to one and one-half feet in length. Tr. p. 10, LL 5-10.

9. Timothy grass requires water more frequently and less intensively because of its shallow root zone. Tr. p. 13, LL. 5-15.

10. The Applicant's farm has a single well that feeds four main pivots and a mini-pivot. The well and pump were not changed after the Applicant purchased the farm from its prior owner, the Butikofers. Tr. p. 10, LL. 16-22. The Applicant installed a new mini-pivot on the farm, and a new main line, but did not make other changes to the irrigation facilities since the farm was purchased. Tr. p. 11, LL. 1-12.

11. The Applicant was not aware of the 5.13 c.f.s combined diversion limitation until the Spring of 2014, which was many years after the property was purchased. Tr. p. 11, LL. 23-25, p. 12 LL. 1-11.

12. The Applicant's wells are measured and reported by Water District 120. Tr. p. 11, LL. 12-17. The Applicant was assessed based on the additive rate of the Applicant's combined existing water rights of approximately 10 c.f.s. Tr. p. 12, LL. 20-25.

13. Based on WMIS data dating back to 1997, the well diverted between 6.61 c.f.s. (1997 measurement) and 8.2 c.f.s (2007 measurement). Ex. 102.

14. The measured diversion rates exceed the authorized combined diversion rate of 5.13 c.f.s. under the Applicant's combined existing water rights.

15. Because of the Applicant's desire to raise timothy hay and to conform its water rights to the amount actually diverted from the well and pump, the Applicant filed the application to develop 35-14402 in order to address the situation. Tr. p. 22, LL. 5-23 (testimony of rotating between two pivots instead of three and impact on timothy hay crop).

16. Based on the 2007 measurement, at the hearing,the Applicant only sought development of an additional 3.07 cfs (5.13 (existing water rights) + 3.07 = 8.20 c.f.s.), even though the application for permit originally sought development of 5 c.f.s. Tr., p. 25, LL. 12-15.

17. Based on WMIS data dating back to 1997, based on measurements from Water District 120 using the Power Consumption Coefficient (PCC) methodology, the Applicant diverted the following volumes of water under its existing combined water rights:

Year	**Amount**
2014	1185.30
2013	1439.00
2012	1522.10
2011	1293.00
2010	1043.00
2009	1259.00
2008	1471.83
2007	1415.11
2006	976.87
2005	937.61
2004	759.20
2003	883.70
2002	678.90
2001	388.12
2000	538.71
1999	776.99

1998	2738.27
1997	3689.25

18. The Applicant submitted an expert report concerning 35-14402 and had its expert testify at the hearing. Exhibit 101. This expert testimony will be discussed in more detail below.

19. The Coalition submitted an expert report concerning 35-14402 and had its expert testify at the hearing. Exhibit 203. The Coalition's expert testimony will be discussed in more detail below.

20. The Hearing Officer issued a permit for 35-14402, which contains limiting conditions on this permit and the existing combined water rights of a diversion rate of 8.20 c.f.s and a diversion volume of 1,221 AF per year. R. 61-62.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL.

1. Did the Coalition's failure to file exceptions with the agency head (the Director) deprive this court of subject matter jurisdiction because the Coalition has not satisfied the exhaustion of remedies requirement under Idaho Code § 67-5271 and other applicable Idaho law?

III. ARGUMENT.

A. Standard of Review.

Concerning subject matter jurisdiction, the Idaho Supreme Court has held that "[a] defect in subject matter jurisdiction, however, cannot be waived and may be raised at any time." *State v. Garcia*, 355 P.3d 635, 639 (2015) (emphasis added). It may even be raised for the first time on appeal and it presents a question of law which this Court may decide. *See State v. Peterson*, 153 Idaho 157, 160, 280 P.3d 184, 187 (Ct. App. 2012) ("We initially address the state's

assertion that the district court lacked subject matter jurisdiction to consider Peterson's motion because, while raised for the first time on appeal, a challenge to a court's subject matter jurisdiction may be brought at any time. A claim that the district court lacked subject matter jurisdiction presents a question of law over which we exercise free review." (internal citations omitted)).

Presuming that the Court has subject matter jurisdiction to hear this appeal, the Court can then consider the merits of the appeal. Judicial review of the merits of this appeal involves a review of a final decision of the Director which is governed by the APA. Idaho Code § 42-1701A. Under the APA, 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 cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(a); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court must affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of 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); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. The Coalition must show that the Department erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the Coalition has been prejudiced. Idaho Code § 67-5279(4). Even if the evidence in the record is conflicting, the Court cannot overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d

219, 222 (2001). The Coalition also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999) (emphasis added).

B. Because the SWC failed to timely file exceptions with the Director pursuant to certain provisions of the APA and IDAPA 37.01.01.730.02.b, the SWC failed to exhaust its administrative remedies under Idaho law. Because exhaustion is a condition precedent to judicial review, this court lacks subject matter jurisdiction to rule on the merits of this appeal.

The SWC failed to timely file exceptions to the *Preliminary Order* with the Director pursuant to certain provisions of the APA and IDAPA 37.01.01.730.02.b. R. 86-92. The Coalition did file an appeal pursuant to a section of the APA (Idaho Code § 67-5273) within twenty-eight (28) days of the *Preliminary Order* becoming the *Final Order*. However, this raises a legal question concerning whether the Coalition is required to file exceptions with the Director in order to meet the exhaustion requirement under Idaho law before filing an appeal to a district court. Stated in question form, did the Coalition's failure to file exceptions with the agency head (the Director) deprive this court of subject matter jurisdiction because the Coalition has not satisfied the exhaustion of remedies requirement under Idaho Code § 67-5271 and other applicable Idaho law?

As far as we can ascertain, there are no cases which specifically and expressly hold that a party challenging Department action must first file exceptions with the Director pursuant to the APA and/or IDAPA 37.01.01.730.02.b. before filing an appeal to this court, and consequently, this appears to be an issue of first impression. However, based on a review of the APA, the Department's procedural rules, and Idaho case law, this court should hold that a party must file exceptions with the Director in order to meet the exhaustion requirement. The Director must have had an opportunity to review his agency's decision before it goes to this court for review. Without filing exceptions and thereby exhausting its administrative remedies, the court lacks

subject matter jurisdiction to hear the Coalition's appeal and the appeal should be dismissed. As a result, the matter should be considered concluded and development of 35-14402 should only be subject to the provisions of the *Final Order*.

"Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant." *Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d 732, 735 (2006) (citations omitted). Under the APA, a "person aggrieved by final agency action . . . is entitled to judicial review" only if that person "complies with the requirements of sections 67-5271 through 67-5279, Idaho Code." Idaho Code § 67-5270(2). One of those requirements is that the petitioner must have "exhausted all administrative remedies" provided by the APA. Idaho Code § 67-5271(1) (emphasis added). This exhaustion requirement is a "condition precedent to judicial review." *Hart v. Idaho State Tax Comm'n*, 154 Idaho 621, 623, 301 P.3d 627, 629 (2012). This is because failure to exhaust administrative remedies deprives a district court of subject matter jurisdiction over the matter. *Regan v. Kootenai Cnty.*, 140 Idaho 721, 100 P.3d 615 (2004).

The exhaustion requirement, codified in Idaho Code § 67-5271(1), requires that "where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act." *White v. Bannock Cnty. Commissioners*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003) (emphasis added) (citing *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); *Pounds v. Denison*, 115 Idaho 381, 766 P.2d 1262 (Ct.App.1988)). Thus, "[a] party seeking judicial review must run the full gamut of administrative proceedings before an application for judicial relief may be considered." *Hart*, 154 Idaho at 623, 301 P.3d at 629 (citation and internal quotation marks omitted) (emphasis added).

The rationale for the exhaustion requirement was explained by the Idaho Supreme Court:

> Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.

Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 870, 872, 154 P.3d 433, 441, 443 (2007) (quoting *White v. Bannock County Comm'rs,* 139 Idaho 396, 401–02, 80 P.3d 332, 337–38 (2003)). The Ninth Circuit has also noted that "[t]he exhaustion doctrine serves to permit administrative agencies to utilize their expertise, correct any mistakes, and avoid unnecessary judicial intervention in the process." *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 846 (9th Cir. 2013) (citation and internal quotation marks omitted). The United States Supreme Court pointed out that a "primary purpose" of the exhaustion requirement is "the avoidance of premature interruption of the administrative process," especially when "[t]he agency . . . is created for the purpose of applying a statute in the first instance." *McKart*, 395 U.S. at 193-94, 89 S. Ct. at 1662. Further, "since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise." *Id.* at 194, 89 S. Ct. at 1663. Finally, the Supreme Court noted that "of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." *Id.*

Because the APA provides the opportunity to bring a preliminary order to the agency head, Idaho Code § 67-5245(2)-(7), a petitioner must exhaust those administrative remedies before a court will review the agency's decision. Idaho Code §§ 67-5270(2) and 67-5271(1). The exceptions process described in IDAPA 37.01.01.730.02.b. is a petition to have the matter

reviewed by the agency head under Idaho Code § 67-5245 and is an administrative remedy available to the Coalition that it must exhaust. This is self-evident because, when responding to an exceptions petition, the "head of the agency or his designee for the review of preliminary orders shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing." Idaho Code § 67-5245(7) (emphasis added). The underlined language emphasizes why it is necessary for the Director to have his say in a matter before it is appealed, which is that the Director can decide the matter *de novo* and analyze the evidence presented at the hearing to a hearing officer through the knowledge, experience, and expertise of the Director.[1] To paraphrase the Idaho Supreme Court in *American Falls Reservoir Dist. No. 2*, 143 Idaho at 870, 872, 154 P.3d at 441, 443, the Coalition's failure to timely file exceptions with the Director concerning 35-14402 deprived the Director with the opportunity to mitigate or cure errors in the *Final Order* without judicial intervention, did not defer to the administrative process established by the Idaho Legislature and the Department's procedural rules, and failed to show a sense of comity for the quasi-judicial functions of the Director.

The law on exhaustion is based upon important policy considerations as described above. However, it is anticipated that the Coalition will assert that it had the option of filing exceptions or an appeal to this Court in this matter because of the following language found in Idaho Code § 67-5273 regarding the timing for filing a petition for judicial review. That statute provides, in relevant part:

> A petition for judicial review of . . . a preliminary order that has become final when it was not reviewed by the agency head . . . must be filed within twenty-eight (28) days of . . . the date when the preliminary order

[1] The parties and the court are certainly well-acquainted with IDWR's current Director, Gary Spackman, and his long tenure and experience within the Department as a hearing officer on numerous contested cases. The district court should take judicial notice of such tenure and experience.

> became final, . . . or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon.

Id. While an initial review of this provision could appear to allow a petitioner to seek judicial review by the district court of a decision without exhausting the available administrative remedies, it must be read in light of the "overall scheme and intent of the legislation." *State v. Yzaguirre*, 144 Idaho 471, 480, 163 P.3d 1183, 1192 (2007) (quoting *Idaho State Tax Comm'n v. Haener Bros., Inc.*, 121 Idaho 741, 744, 828 P.2d 304, 307 (1992)). This will require the Court to engage in the statutory interpretation process.

Under Idaho law, the same principles of statutory construction apply to statutes and administrative regulations: "Administrative regulations are subject to the same principles of statutory construction as statutes." *Stafford v. Idaho Dept. of Health & Welfare*, 145 Idaho 530, 533, 181 P.3d 456, 459 (2008). In order to interpret a statute or rule, the plain language of the statute is first examined. If the plain language of the statute or rule is unambiguous and not subject to reasonable differences of opinion as to its meaning, then the language of the statute or rule controls. If, however, the statute is ambiguous, then the court will engage in principles of statutory construction to determine legislative intent and ascribe meaning to the ambiguous portion of the rule or statute. These principles were very recently explained:

> The objective of statutory interpretation is to give effect to legislative intent. Such intent should be derived from a reading of the whole act at issue. Statutory interpretation begins with "the literal words of the statute, and this language should be given its plain, obvious, and rational meaning." If the statutory language is unambiguous, "the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." This is because '[t]he asserted purpose for enacting the legislation cannot modify its plain meaning.' A statute is ambiguous where:
>
> > [T]he meaning is so doubtful or obscure that reasonable minds might be uncertain or disagree as to its meaning. However, ambiguity is not established merely because different possible

> interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous.... [A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it.

Farmers Nat. Bank v. Green River Dairy, LLC, 155 Idaho 853, 356, 318 P.3d 622, 625 (2014) (internal citations omitted).

It appears that the provisions of Idaho Code § 67-5273 conflict with other provisions of the APA which creates an ambiguity, and in such an instance, "when a statute contains ambiguous language, [the Court] look[s] to the other statutes in the title or act relating to the same subject matter and read them *in para materia* in an effort to determine what the legislature intended." Id. at 864, 318 P.3d at 633 (italics in original, citation and quotation marks omitted). The title of a statute can also "aid in ascertaining legislative intent." *Walker v. Nationwide Fin. Corp. of Idaho*, 102 Idaho 266, 268, 629 P.2d 662, 664 (1981). Further, "[w]here two statutes appear to apply to the same case, the specific should control over the general." *K. Hefner, Inc. v. Caremark, Inc.*, 128 Idaho 726, 732, 918 P.2d 595, 601 (1996) (citing *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 149, 879 P.2d 1078, 1082 (1994)).

Idaho Code § 67-5273 is titled "Time for Filing Petition for Review," and deals with the required deadlines to file a petition for judicial review of an agency action. The deadline for filing the petition is vitally important, since untimeliness deprives the reviewing court of jurisdiction to hear the case. *See* I.R.C.P. 84(n). On the other hand, Idaho Code § 67-5270 provides the actual "Right of review" (its title) and lists the prerequisites for filing a petition. Thus, Idaho Code § 67-5270 is the statute that more specifically deals with the circumstances under which a petitioner is entitled to judicial review and controls that issue and this statute specifically qualifies the right of review as being subject to Idaho Code § 67-5271, which is entitled "Exhaustion of administrative remedies," and provides that a "person is not entitled to

judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." (emphasis added). One of those remedies is the ability to file exceptions with the Director pursuant to Idaho Code § 67-5245, a right further provided for in the Department's procedural rules at IDAPA 37.01.01.730.02.b.

While Idaho Code §§ 67-5270 and 5271 are specific in nature, Idaho Code § 67-5273 is more general as to the requirements for judicial review, but does provide time limits for filing a petition with which Idaho Code § 67-5270 also requires a petitioner to comply. As a result, the doctrine of exhaustion requires that a petitioner must exhaust all available administrative remedies (including pursuing review by the agency head) and timely file a petition before a court will judicially review an agency decision.

Regarding the exhaustion requirement issue raised herein, the district court should consider a Utah case where two employees filed a discrimination complaint against their employer, State Farm, with Utah's Industrial Commission. *State Farm Mut. Auto. Ins. Co. v. Indus. Comm'n of Utah*, 904 P.2d 236, 237 (Utah Ct. App. 1995). After investigating the complaint, the Commission issued an order concluding that State Farm had discriminated against the employees. *Id.* In a procedure very similar to Idaho's, the Commission informed State Farm at the time the order was issued that State Farm could appeal the order by filing a written request with the Director of the Commission's Anti-Discrimination Division or else the order would become final in thirty days. *Id.* State Farm did not file the written request, but allowed the order to become final and then sought judicial review. *Id.* The court concluded that even though the statute granting State Farm the ability to appeal the initial order was phrased permissively (*i.e.* "A party may file. . ."), State Farm was required to appeal the initial order to exhaust its

administrative remedies before it was able to seek judicial review of the Commission's decision. *Id.* at 238.

It should also be noted that there are occasions when courts have found the exhaustion requirement inapplicable where there are no administrative remedies to pursue. For example, in *Fuchs v. State, Dep't of Idaho State Police, Bureau of Alcohol Beverage Control*, 152 Idaho 626, 628, 272 P.3d 1257, 1259 (2012), the Bureau of Alcohol Beverage Control changed the rule allowing a person to be included multiple times on a priority list for a liquor license. The Bureau sent Fuchs a letter, explaining that multiple inclusions would be removed from various priority lists and he would be included only once on each list. *Id.* The letter did not describe an administrative appeals process. *Id.* Fuchs filed a petition for judicial review of the Bureau's action. *Id.* The Idaho Supreme Court held that Fuchs was not barred from seeking judicial review before pursuing administrative remedies because "there is no administrative remedy to exhaust" since (1) the statute requiring due process for licensees does not include license applicants and (2) there are no "enumerated administrative remedies in the letter or the [administrative] rule." *Id.* at 630, 272 P.3d at 1261.

The Coalition's appeal is more similar to the *State Farm* case than the *Fuchs* case. Here, there were additional administrative remedies available to the Coalition which it chose not to pursue. The Coalition cannot rely on the timing statute, Idaho Code § 67-5273, to create an exception to Idaho Code § 67-5270, which grants and defines the ability to seek judicial review in the first place, and Idaho Code § 67-5271, which imposes the exhaustion requirement. Unlike *Fuchs*, the remedies are clearly contained in the applicable statutory language and the Coalition was clearly informed of the available administrative remedies when the Department issued its preliminary order and provided its standard sheet describing the options available to the parties.

Like *State Farm*, the aggrieved party chose not to pursue the available administrative remedies. And, just like in *State Farm*, this appeal must be dismissed because the aggrieved party has failed satisfy the exhaustion requirement of Idaho Code § 67-5271 which deprives the district court of subject matter jurisdiction. "If a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted." *Regan v. Kootenai Cnty.*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004).

The Director should have had an opportunity to review his agency's decision before it was appealed to this Court for review, but the Coalition did not timely provide him that ability. Therefore, for the reasons set forth above, this Court does not have subject matter jurisdiction and must dismiss the claims raised on appeal by the Coalition because the Coalition failed to exhaust its administrative remedies by failing to timely file exceptions with the Director.

C. In the alternative, there is substantial evidence in the record upon which the Department based its decision to issue 35-14402 with conditions limiting the diversion of 35-14402 and the Applicant's existing combined water rights to a diversion rate of 8.20 c.f.s. and a diversion volume of 1,221 AF per year.

In the alternative, and presuming that the Court determines there is no subject matter jurisdiction issue, the Court may consider the merits of the appeal. As to the merits of the *Final Order*, the Coalition argues that the *Final Order* was not correct or lawful for the following reasons:

1. The Final Order authorizes an enlargement. *Opening Brief* at 7.
2. The Hearing Officer failed to follow precedent contained in a prior contested case involving the City of Shelley. *Opening Brief* at 8-9
3. The Hearing Officer improperly analyzed evidence regarding what the Applicant would have diverted if the Applicant had been held to its 5.13 c.f.s combined diversion rate. *Opening Brief* at 11-13.
4. The Hearing Officer should not have issued the permit for 35-14402 because the Applicant does not have "clean hands." *Opening Brief* at 13.
5. That "there is no evidence that the reduction based on historical use is even sufficient to offset the new depletions." *Opening Brief* at 14.

6. The Applicant refused to take steps to utilize his existing water rights by deciding not to construct ponds or other storage facilities from which the Applicant could re-divert 5.13 c.f.s at a higher diversion rate.

These arguments are interrelated, and consequently, will all be addressed in this section of *Applicant's Response Brief*. In addressing these arguments, it is critical for the Court to remember the standard of review burden placed upon the Coalition to have the *Final Order* reversed. The *Final Order* is entitled to deference because, even if the evidence in the record is conflicting, the Court should not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Coalition also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999). Substantial does not mean that the evidence is uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds could conclude that the finding was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they could conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See e.g., Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); see also *Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

In its *Opening Brief*, the Coalition immediately asserts that "the Department has condoned an unlawful enlargement." *Opening Brief* at 2. This assertion appears to be based, at least in part, on frustration that the Department did not pursue a notice of violation action against the Applicant and/or that the Applicant should not be issued 35-14402 under the clean hands

doctrine because the Applicant was "unfair and dishonest, or fraudulent and deceitful as to the controversy in issue." *Id.* at 13. These claims are unfair to the Applicant and the Department.

First, the Applicant was not deceitful because he was not aware of the 5.13 c.f.s limitation until the Spring of 2014. Tr. p. 11, LL. 23-25, p. 12 LL. 1-11. Within months of discovering the issue, the Applicant submitted the application for permit for 35-14402 in August of 2014. Additionally, his well was regularly measured by Water District 120 and assessed on the additive rate of his combined water rights in an amount of approximately 10 c.f.s. Tr. p. 12, LL. 20-25. The Applicant filed the application for 35-14402 not because he was forced to by the Department, Water District 120, or anyone else—the application was filed to conform the water rights to the actual diversions associated with the Applicant's diversion system. To the contrary of being deceitful or not having clean hands, the Applicant was honestly trying to resolve an issue that he recently became aware of. Without the application being filed, the Applicant could have continued indefinitely until Water District 120 discovered the additive diversion rate on its records that led to the error. Instead, the Applicant was forthright about resolving the issue. He was not dishonest, fraudulent, or deceitful. There is no evidence in the record from the Coalition indicating that the Applicant was aware of the diversion rate prior to 2014.

Second, the Department is not "condoning" past behavior. Rather, the Department is doing what the Department does by working with water users to solve water right issues that arise. In its responsibilities to enforce water rights, the Director of the Department has discretion in how it deals with these issues pursuant to Idaho Code § 42-1701B(1): "The director of the department of water resources is authorized and may commence and pursue enforcement actions to remedy the designated violations set out in title 42, Idaho Code." (emphasis added). If the Coalition wants to challenge the Director's exercise of discretion on how it pursues an

enforcement issue, this Court has previously described this process in a memorandum decision regarding Basin Wide Issue No. 17, and that is to review the Director's discretion after an action is "brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion . . ." *Memorandum Decision, Basin Wide Issue 17, Subcase No. 00-91017* at 12. The Department's decision not to proceed with an enforcement action was not listed as an issue on appeal and is therefore not an action subject to review by this Court. Furthermore, our review of the record does not indicate that the Department is condoning the past unauthorized over-diversions. Instead, it rendered a decision on a new water right permit to address the situation legally and lawfully without any comment or ruling of past diversions in excess of the decreed combined diversion rate.

In ruling on the issuance of 35-14402, the Department correctly analyzed the City of Shelley matter concerning Application for Permit No. 27-12155. The Coalition described the Shelley matter as involving a "nearly identical request to increase a diversion rate by the City of Shelley." *Opening Brief* at 8. This is not accurate because the applications and the proposed mitigation associated with the applications are not nearly identical. The City of Shelley matter was different 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. Exhibit 201. Actual City diversions were analyzed to be, on average, 2,000 AF per year, while the decreed volume limitations totaled 7,246.1 AF annually. *Id.* at 3-4. Thus, the difference between historical diversions and actual diversions differed by over 5,000 AF per year. The City asserted that it was entitled to the annual volume decreed in the water rights "and that the protestants cannot be injured if the volume is not exceeded due to the increase in flow

rate." *Id.* at 8. The Department rejected this argument, and held that "[t]he extent of a water right is bounded by the beneficial use of the water under the water right." *Id.* Thus, the City would have diverted more volume under its rights because it would have additional rate unless the volume was limited to its historical beneficial use. This is precisely why Cook proposed limiting his diversion volume.

While the substance of the expert testimony of both the Applicant's expert and the Coalition's expert will be discussed in more detail below, the City of Shelley decision is not precedent that would prohibit what the Department did with 35-14402. This is because of the volume limitation imposed on 35-14402 and the Applicant's existing water rights. Indeed, this is actually consistent with the summary judgment decision in the City of Shelley matter wherein the hearing officer determined that "[t]he 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." Exhibit 200 at 2 (emphasis added). Concerning 35-14402, the limitation to the historical beneficial use of the combined existing water rights as determined by the Hearing Officer will prevent an increase of the annual volume of water diverted by the Applicant. Accordingly, the City of Shelley decision does not bar or prohibit the Department from issuing a permit such as 35-14402.

Concerning historical beneficial use, the Coalition asserts that there was not substantial evidence in the record to support the Department's decision, that the Hearing Officer improperly analyzed evidence regarding what the Applicant would have diverted if the Applicant had been held to its 5.13 c.f.s combined diversion rate, *Opening Brief* at 11-13, and that there is no evidence that the reduction based on historical use is even sufficient to offset the new depletions. *Id.* at 13.

At the outset, there is no dispute that the Applicant diverted in excess of the authorized diversion rate of its existing water rights. Recognizing this, the Applicant's expert, Roger Warner, prepared an analysis (Exhibit 101) based on Jeff Cook's testimony that at a reduced rate and based upon actual Ontrac pivot data included in the expert report, the Applicant would have changed his irrigation practices and left the pump on for more days if the well's diversion was limited to 5.13 c.f.s. Tr. p. 128, LL. 25 through p. 129, LL. 6 (Testimony of Roger Warner). There was extensive testimony given regarding the historical volumes the Applicant diverted at a rate in excess of 5.13 c.f.s. and how the Applicant's irrigation practices would have been different if he had been held to 5.13 c.f.s. Jeff Cook was even called upon to testify after his initial examination to describe this in more detail. Tr. p. 22, LL. 5-23 (initial testimony describing that at 5.13 c.f.s., he would have to rotate two pivots at a time and he would use more water "[b]ecause you'd never shut the pump off."); Tr. p. 132, LL. 1 through p. 136. LL. 25 (later more detailed testimony describing that all pivots are run at the same time, which would change to two pivot rotations). Based on this information, the Applicant's expert concluded that the Applicant would have diverted somewhere between 103 and 164 days, and ultimately concluded that the Applicant would have diverted for 149 days if held to 5.13 c.f.s.

The Coalition did not present any evidence indicating that the Applicant would not have changed his irrigation practices. The Coalition's own expert, Greg Sullivan from Brockway Engineering, testified that he did not believe Jeff Cook was being dishonest. Tr. p. 168, LL. 1-9. More importantly, the Coalition's expert testified that he had "no reason to disagree with [Roger Warner's] analysis," Tr. p. 169, LL. 21-22 (discussing the 149-day conclusion). Tr. p. 169, LL. 23 through p. 170, LL. 2. In fact, the only articulated concern from the Coalition's expert was

the perceived legal impediment for 35-14402 based on the City of Shelley matter, not any technical reason relating to injury to the Coalition's rights:

> Q. [MR. HARRIS]. Okay. So if I – just to conclude, if I understand the Surface Water Coalition's objections, it's that there should be a legal impediment to be able to increase your rate even if you limit it to the historical volume that the right was able to divert?
>
> A. [MR. SULLIVAN]. Yes, I believe that's correct.
>
> Q. Okay. And in terms of how Roger calculated the – what the Cooks would have done, you're not here to testify that you have any issues with his analysis?
>
> A. No. we do not -- I do not.

Tr. p. 178, LL. 10-20; *See also* Tr. p. 169, LL. 10-22.

Furthermore, the Coalition's expert acknowledged that the ESPA model contains inputs of volume, not diversion rate, and that the rate at which a certain volume is pumped from the ESPA would not injure the SWC:

> Q. (BY MR. ARRINGTON): The model does not input diversion rates; isn't that correct?
>
> A. You're referring to the ESPA model?
>
> Q. The ESPA model. Sorry.
>
> A. No, it does not. You cannot input the diversion rate.
>
> Q. So when we're trying to analyze what increased injury might result from an increased diversion rate, can we use the model?
>
> A. You cannot use the ESPA model for that.

Tr. p. 147, LL. 23 through p. 148 LL. 7.

> Q. [BY MR. HARRIS]: Okay. Back on IDWR Exhibit 1. Do you see that in 2012 they pumped 1522 acre-feet?
>
> A. Yes.
>
> Q. Okay. And do you think that that's a -- well, let me ask this way.
>
> If that amount was pumped out very quickly or over a drawn-out period, does that increase the impacts aquiferwide? Would it hurt your clients any more or less than whether it was diverted more quickly or less quickly?
>
> A. I would say no.

Tr. p. 163, LL. 5-15.

Q. (BY THE HEARING OFFICER): If the Cooks came here with clean hands –

A. Uh-huh.

Q. – and they were able to establish that they had pumped – never exceeded any element of their water right and that they had pumped exactly 1500 acre-feet every year and they were proposing with the new water right with an increased rate, but that all their rights combined would still be limited to 1500-acre feet, does that amount to an additional impact on the aquifer?

A. Not with the volume, it will not.

Tr. p. 188, LL. 16-24.

Despite agreement between the expert consultants on the issue of what the Applicant would have diverted if he had been held to 5.13 c.f.s., the Hearing Officer took issue with the Applicant's expert report and did not agree with the 149-day pumping period. R. 52. As a result, the Department engaged in its own analysis and, based on testimony from Jeff Cook and Roger Warner concerning additional "off" days, concluded that the Applicants would not have diverted for 149 days, but would have diverted 5.13 c.f.s. for 120 days. R. 53. Based on diversion these numbers, the Hearing Officer concluded that 35-14402 should be limited to the diversion volume of 1,221 AF. Consistent with the principle that a water right should be held to the historic beneficial use of water under the water right, Exhibit 200 at 2, the Hearing Officer limited the diversion volume of the Applicant's water rights and 35-14402 to 1,221 AF per year.[2]

The Coalition argues that the Applicant will be able to divert 1,221 AF per year in only 75 days, which is 45 days faster than under his existing water rights, and that this will allow the Applicant "to divert more water in a shorter period of time than he could have under the existing rights," thereby resulting in an enlargement. *Opening Brief* at 11-12. However, from a technical standpoint, this argument ignores the testimony of the Coalition's own expert described above that an increase in the diversion rate of the collective water rights will not impact the SWC if the

[2] It should be noted that the Applicant was not very excited about this reduced limitation from what he proposed, but nevertheless, agreed to the limitation.

historical diversion volume is listed as a limitation. There are no "new depletions" with such an arrangement, *Opening Brief* at 14, because the same number of acres will be irrigated. The testimony from Jeff Cook even indicates that a higher rate will allow him to be more efficient, and actually allow him to decrease the amount of time the well is operated. See Testimony of Jeff Cook discussed *supra.*

The Coalition further argues that the "historical use" amount used by the Hearing Officer was based on illegal use. This is simply not true. The Hearing Officer believed some of the testimony of both Jeff Cook and Roger Warner, and after considering their testimony, he did not agree with the 1,522 AF per year amount offered by the Applicant. Instead, he settled on 1,221 AF per year, which, based on substantial evidence in the record, is what the Applicant would have diverted had he been held to 5.13 c.f.s. Accordingly, the Applicant was not given credit for diversions associated with a diversion rate of 8.2 c.f.s.

Additionally, the Coalition argues that the reduction in the overall diversion volume under the Applicant's collective water rights is not mitigation. *Opening Brief* at 14. But the reduced volume is a reduction of a legal entitlement that the Applicant is currently entitled to. It would be similar to voluntarily giving up the right to divert for a longer period of use under a water right. *See* Tr. p. 200, LL. 6-11 (Q. [BY MR. HARRIS] Don't the Cooks have an entitlement to divert up to 2187 acre-feet at 5.13 c.f.s.? A. [BY MR. SULLIVAN] Yes, they do. Q. And if they give that up, aren't they giving up a water entitlement, if they go down to 1500? A. I would say, yes, it would be.").

Finally, again citing to the City of Shelley matter, the Coalition argues that the Applicant should change cropping and irrigation patterns and construct ponds in order to stay within the limitation of the existing base rights. *Opening Brief* at 15. However, the City of Shelley

language was referring to a municipal system with municipal storage tanks and increased water lines to meet peak demand times and the ability of a municipality to "grow into" its water rights: "A municipality has the ability to grow into its water rights within reasonable limits. . . A reasonable exercise of a municipal water right is the construction of additional storage or additional delivery line capacity to address relatively short term demand on the system." Exhibit 200 at 2 (emphasis added). There is no indication in any of the City of Shelley documents that it has applicability to irrigation systems such as those owned by the Applicant. Indeed, this argument advanced by the Coalition makes no practical sense. In essence, the Coalition would rather have the Applicant construct an expensive holding pond where the water so held would be subject to evaporative losses—consumptive use—and increased well operation time because of the necessity of the Applicant to use the well more at 5.13 c.f.s. and re-divert the water again into the system at a higher re-diversion rate. See Tr. p. 52, LL. 1 through p. 53, LL. 3 (Testimony of Roger Warner) and Tr. p. 175 LL. 5-8 (Testimony of Greg Sullivan acknowledging evaporative losses). This would be contrary to the conservation of water resources because it would create more consumptive use, not less.

Additionally, it should be noted that with the 1,221 AF limitation, the Applicant would not be able to "grow into" his water rights to divert up to 2,187.7 AF. He will be forever limited moving forward with a 44% reduction in the authorized volume of the Applicant's collective water rights. This reduced amount is less than the actual volume amount the Applicant diverted at between 7.0 and 8.2 c.f.s. in 2007 (1415.11 AF), 2008 (1471.83 AF), 2009 (1259.00), 2011 (1293.00 AF), 2012 (1522.10 AF), and 2013 (1439.00 AF). Now authorized to divert at 8.2 c.f.s, but limited to 1221 AF per year, this will require vigilance on behalf of the Applicant to comply with the volume limitation, and if he does not, the permit can be rescinded pursuant to its

conditions or the Applicant may be subject to an enforcement action under Idaho Code §42-1701B. Simply stated, the reduced diversion volume under existing water rights is mitigation.

In sum, given the Hearing Officer's thorough analysis in the *Final Order*, it can hardly be argued that his findings of fact were so weak that reasonable minds could not come to the same conclusion that the Hearing Officer reached:

> The Cooks proposal to limit the proposed permit and the existing water rights to the historical annual diversion volume reasonably expected to be pumpted under the existing water rights constitutes adequate mitigation for the proposed permit. The appropriate combined annual volume limits is 1,221 acre-feet, as described above. 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. Application 35-14402 is not barred by the moratorium because mitigation has been provided to offset injury to other water rights.

R. 56.

The facts underlying the *Final Order* are of sufficient quantity and probative value that reasonable minds could conclude that the *Final Order* is proper. The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(a); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). As a result, the Department's *Final Order* should be upheld because it is based on substantial evidence in the record and did not violate any provision of Idaho Code § 67-5279(3) or prejudice a substantial right of the Coalition.

IV. CONCLUSION.

The Director must have had an opportunity to review his agency's decision before it was appealed to this Court for review, but the Coalition did not timely provide him that ability. Therefore, for the reasons set forth above, this Court does not have subject matter jurisdiction and should dismiss the claims raised on appeal by the Coalition because the Coalition failed to exhaust its administrative remedies by failing to timely file exceptions with the Director.

Assuming that the Court has subject matter jurisdiction and the Court reviews the merits of the Coalition's appeal, given the Hearing Officer's thorough analysis, it can hardly be argued that his findings of fact were so weak that reasonable minds could not come to the same conclusion that the Hearing Officer reached. The facts underlying the *Final Order* are of sufficient quantity and probative value that reasonable minds could conclude that the *Final Order* is proper. As a result, the Department's *Final Order* should be upheld because it is based on substantial evidence in the record and did not violate any provision of Idaho Code § 67-5279(3) or prejudice a substantial right of the Coalition.

Dated this 13th day of October, 2015.

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

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 13th day of October, 2015.

DOCUMENT SERVED: APPLICANT'S RESPONSE BRIEF

ORIGINAL TO: Eric J. Wildman
District Judge
253 3rd Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Paul L. Arrington Barker Rosholt & Simpson LLP 195 River Vista Place, Suite 204 Twin Falls, ID 83301-3029 pla@idahowaters.com	(✓) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Mail (✓) Email
W. Kent Fletcher Fletcher Law Office P.O. Box 248 Burley, ID 83318 wkf@pmt.org	(✓) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Mail (✓) Email
Garrick Baxter Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720 Garrick.baxter@idwr.idaho.gov	(✓) First Class Mail ( ) Hand Delivery ( ) Facsimile ( ) Overnight Mail (✓) Email

Robert L. Harris

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

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