

**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,  
MILNER 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

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**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**

This is a judicial review proceeding in which the Surface Water Coalition (“SWC”)<sup>1</sup> appeals a final order issued by the Idaho Department of Water Resources (“Department”) approving Application for Permit 35-14402 (“Application”).

### **B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND**

Karl T. Cook and Jeffrey M. Cook (“Applicants”) filed the Application with the Department on August 29, 2014. Ex. 100 at 1. The Application proposes diverting 5.00 cfs of ground water from an existing well (“existing well”) for irrigation of 560 acres. *Id.* at 1-2. The existing well is the only authorized point of diversion for the Applicants’ water rights 35-7280, 35-7281, 35-13241, 35-14334, 35-14335, and 35-14336 (“existing water rights”). Exs. 103-108. When combined, the existing water rights are limited to a diversion rate of 5.13 cfs, an annual diversion volume of 2,187.7 acre-feet, and irrigation of the same 560 acres described in the Application. Ex. 101 at 5.

The Applicants purchased the farm ground identified as the place of use in the Application on March 31, 2006. *Id.* at 2. Since purchase of the farm ground, the Applicants have diverted from the existing well at a rate up to 8.20 cfs. *Id.* This rate is in excess of the 5.13 cfs rate authorized by the Applicants’ existing water rights. *Id.* The Applicants state they “submitted [the Application] to align their water rights with their historic diversion rate.” *Id.* at 1. The Application states: “This application proposes to increase the diversion rate of the point of diversion for [the existing water rights], with **NO INCREASE** in the decreed Diversion Volume so that the period of irrigation can be shortened to accommodate crops.” Ex. 100 at 2

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<sup>1</sup> The SWC is comprised of 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.

(emphasis in original). In other words, the Applicants seek an additional water right to allow for diversion of more water from the existing well during the peak water use period in the irrigation season, but agree to a combined annual volume limit so there is no increase in the total annual diversion volume authorized by their existing water rights.

The SWC protested the Application. R. at 10-12. An administrative hearing was held on December 3, 2014. At hearing, the Applicants explained they only seek a diversion rate of 3.07 cfs under the Application (the difference between 5.13 and 8.20 cfs). Ex. 101 at 4.

The Department's Hearing Officer ("Hearing Officer") issued a *Preliminary Order Issuing Permit* ("Order") on May 15, 2015. R. at 48-60. In analyzing the Application under the first factor of Idaho Code § 42-203A(5), the Hearing Officer determined the Application proposes a consumptive use of water that, "without mitigation, would reduce the amount of water available to satisfy water rights from sources hydrologically connected to the Eastern Snake Plain Aquifer." *Id.* at 50-51. The Hearing Officer concluded that, "[t]o prevent a reduction to other water rights, the combined annual volume limit must not exceed the historical maximum annual volume diverted under the [Applicants'] existing water rights." *Id.* at 51. The Hearing Officer stated that determining the historical annual volume diverted under the existing water rights "is a challenge" because the Applicants have historically diverted at a rate in excess of the 5.13 cfs authorized by their existing water rights. *Id.*

In order to limit the Applicants' water rights appropriately, the Hearing Officer calculated the historical annual volume of water the Applicants would have diverted had they operated within limits of their existing water rights. *Id.* The Hearing Officer rejected the method used in the expert report submitted by the Applicants, but identified another method to calculate the volume of water the Applicants would have diverted at a rate of 5.13 cfs. *Id.* at 52. Specifically,

the Hearing Officer utilized data from 2012 because that year represents the maximum annual diversion volume from the Applicants' existing well (1,522.1 acre-feet) and the highest annual power consumption of the Applicants' diversion system (1,466,880 kWh) in the last fifteen years. *Id.*; Ex. 1 at 1. The Hearing Officer also utilized instantaneous flow rate and power consumption measurements of the Applicants' pumping system taken in 2007, 2010, and 2013, to derive an average power system demand of 564 kW. R. at 50, 52. Based on this data, the Hearing Officer calculated the Applicants pumped for approximately 2600 hours, or 108 days, in 2012.<sup>2</sup> *Id.* at 52. The Hearing Officer added two days of pumping because the Applicants demonstrated they would not have participated in a voluntary shut-off program had they diverted at a rate of 5.13 cfs. *Id.* The Hearing Officer also added ten days of pumping because the Applicants demonstrated they would have eliminated down time associated with mid-summer harvest had they diverted at a rate of 5.13 cfs. *Id.* at 53. Accordingly, the Hearing Officer concluded "[t]he evidence in the administrative record indicates that the [Applicants] would have diverted 1,221 acre-feet of ground water in 2012 if they had they been limited to a diversion rate of 5.13 cfs."<sup>3</sup> *Id.* (footnote omitted).

In approving the Application and issuing Permit 35-14402 with a diversion rate of 3.07 cfs, the Hearing Officer concluded the condition of approval requiring that Permit 35-14402 "and the existing water rights will be limited to a combined annual diversion volume of 1,221 acre-feet" ensures the permit "will not reduce the quantity of water under other existing water rights." *Id.* at 54, 56. The Hearing Officer also concluded the Applicants satisfied their burden of proof for the remaining factors in Idaho Code § 42-203A(5) and, "[b]ecause diversion under Permit

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<sup>2</sup> 1,466,880 kWh / 564 kW = 2600 hours.

<sup>3</sup> 120 days \* 5.13 cfs = 615.6 cfs-days \* 1.9835 af/cfs-day = 1,221 acre-feet. R. at 53.

35-14402 is mitigated through a reduction in use under existing water rights, the proposed permit is not barred by the [Department's 1993 *Amended Moratorium Order*]." *Id.* at 56.

The Order became a final appealable order of the Department by operation of law on May 29, 2015.<sup>4</sup> *Id.* at 88. The SWC filed its *Petition for Judicial Review* of the Order on June 26, 2015.

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<sup>4</sup> The SWC filed untimely exceptions with the Department on June 1, 2015. *R.* at 88. The Director of the Department issued an *Order Dismissing Exceptions* on July 1, 2015. *Id.* at 86-92.



## **II. ISSUES ON APPEAL**

The issues presented by the SWC are as follows:

- 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 rights(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?

Respondent's formulation of the issues presented is as follows:

- 1) Whether the Department can approve an application for permit seeking an increased diversion rate of ground water if the permit and the applicant's existing ground water rights are limited to a combined historical annual diversion volume pumped under the existing rights.
- 2) Whether the Department erred by approving the Application.

### **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. I.C. § 42-1701A(4). Under the Idaho Administrative Procedure 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. THE DEPARTMENT MAY APPROVE AN APPLICATION FOR PERMIT SEEKING INCREASED DIVERSION RATE OF GROUND WATER IF LIMITED TO HISTORICAL ANNUAL VOLUME PUMPED UNDER EXISTING RIGHTS**

The fundamental legal question presented in this case is whether the Department may approve an application for permit proposing an increased diversion rate of ground water by limiting the permit and the applicant's existing ground water rights to the historical annual volume pumped under the existing rights. The SWC argues approval of such an application is contrary to Idaho law. *SWC's Opening Brief* at 7. However, such approval is expressly allowed by Idaho law. Idaho Code § 42-203A(5)(a) states an application for permit may be approved if the proposed use "will not reduce the quantity of water under existing water rights." Rule 45.01.a of the Department's Water Appropriation Rules sets forth criteria for determining whether a proposed use will reduce the quantity of water under existing water rights:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

IDAPA 37.03.08.045.01.a-a(i). Therefore, an application for permit that seeks an increased diversion rate of ground water, but does not increase the annual volume diverted beyond "the historical amount beneficially used by the water right holder" under existing ground water rights, does not result in reduction in the quantity of water available under other existing rights. IDAPA 37.03.08.045.01.a-a(i). The Department can approve such an application consistent with Idaho law assuming other statutory criteria are met.

In addition, “[a]n application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the [Department].” IDAPA 37.03.08.45.01.a.iv. Further, applications proposing consumptive use of water from water sources within the Eastern Snake Plain Area and tributaries thereto are prohibited by the Department’s 1993 *Amended Moratorium Order* unless “[p]rotection and furtherance of the public interest” requires approval or “development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other water rights.” R. at 55-56.

In sum, where an application for permit proposes consumptive use of water that would reduce the amount of water available to satisfy rights from sources within the Eastern Snake Plain Aquifer and tributaries thereto, the application cannot be approved unless mitigation prevents that reduction. In the instance where such an application proposes an increased diversion rate from ground water in conjunction with a combined annual diversion volume limited to the historical annual volume pumped under the applicant’s existing ground water rights, reduction to other rights is prevented. In other words, the combined annual volume limit mitigates losses of water to holders of existing water rights such that the application may be approved in accordance with Idaho Code § 42-203A(5)(a) and the Department’s 1993 *Amended Moratorium Order*.

## **B. THE DEPARTMENT PROPERLY APPROVED THE APPLICATION**

As explained above, the Application proposes a consumptive use of water that, “without mitigation, would reduce the amount of water available to satisfy water rights from sources hydrologically connected to the Eastern Snake Plain Aquifer.” R. at 50-51. Therefore, the Application cannot be approved without mitigation sufficient to prevent that reduction.

As mitigation, the Applicants recommended a combined annual volume limit between their existing water rights and Permit 35-14402. Specifically, the Application states: “This application proposes to increase the diversion rate of the point of diversion for [the existing water rights], with **NO INCREASE** in the decreed Diversion Volume so that the period of irrigation can be shortened to accommodate crops.” Ex. 100 at 2 (emphasis in original). However, the Hearing Officer properly concluded that, “[t]o prevent a reduction to other water rights, the combined annual volume limit must not exceed the historical maximum annual volume diverted under the [Applicants’] existing water rights.” R. at 51.

As explained in Section I.B., the Hearing Officer calculated the combined annual volume limit utilizing 2012 data representing the maximum annual diversion volume from the existing well and the highest annual power consumption of the Applicants’ diversion system in the last fifteen years. *Id.* at 52. The Hearing Officer also utilized instantaneous flow rate and power consumption measurements of the Applicants’ pumping system taken in 2007, 2010, and 2013, to derive an average power system demand. *Id.* at 50, 52. Based on this data, the Hearing Officer calculated the Applicants pumped for approximately 108 days in 2012. *Id.* at 52. To determine the volume of water the Applicants would have pumped had they diverted at a rate of 5.13 cfs, the Hearing Officer added twelve days to the calculation. *Id.* at 53-53. Accordingly, the Hearing Officer concluded “the [Applicants] would have diverted 1,221 acre-feet of ground water in 2012 if they had been limited to a diversion rate of 5.13 cfs.”<sup>5</sup> *Id.* at 50, 52-53. The condition of approval requiring that Permit 35-14402 and the existing water rights be limited to a combined annual diversion volume of 1,221 acre-feet prevents reduction to the quantity of water under existing water rights in accordance with Idaho Code § 42-203A(5)(a) and the Department’s

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<sup>5</sup> 120 days \* 5.13 cfs = 615.6 cfs-days \* 1.9835 af/cfs-day = 1,221 acre-feet. R. at 53.

Water Appropriation Rules.<sup>6</sup> The condition also mitigates diversion under Permit 35-14402 in compliance with the Department's 1993 *Amended Moratorium Order*.<sup>7</sup> The Department properly approved the Application.

The SWC argues the Hearing Officer erred by utilizing data based upon operation of the Applicants' system at a diversion rate of 8.2 cfs. *See SWC's Opening Brief* at 1. This data simply allowed the Hearing Officer to calculate the number of days the Applicants pumped ground water in 2012 under their existing system to irrigate their crop of Timothy Hay. To grow that same crop with a decreased diversion rate of 5.13 cfs, the Hearing Officer reasonably concluded, based upon substantial evidence in the record, that the Applicants would have pumped water under their existing system for additional days (i.e. two days because the Applicants would not have participated in a voluntary shut-off program and ten days because the Applicants would have eliminated down time associated with mid-summer harvest). The Hearing Officer did not err by determining the Applicants would have pumped for 120 days had they operated at a diversion rate of 5.13.

The SWC also argues approval of the Application is contrary to law because it "authorizes an enlarged diversion rate beyond the reasonable expectations of the existing water rights." *SWC's Opening Brief* at 7. The SWC concludes that, by allowing the Applicants to divert "more water in fewer days, the [Order] has allowed [the Applicants] to exceed the

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<sup>6</sup> The Hearing Officer's determinations under Idaho Code § 42-203A(5)(b) through (g) are not at issue on appeal.

<sup>7</sup> The SWC asserts the Hearing Officer allowed the Applicants to utilize "the unused volume of water" under their existing water rights "as mitigation." *SWC's Opening Brief* at 2. This is incorrect. To mitigate for depletion of water resulting from Permit 35-14402, the Hearing Officer limited the permit and the Applicants' existing water rights to a combined annual diversion volume of 1,221 acre-feet, the historical annual volume pumped under the existing rights. Thus, the volume of water diverted under Permit 35-14402 "will be offset by a corresponding reduction in the volume pumped under existing water rights." R. at 56.

reasonable expectations of the established water rights—thus constituting an unlawful enlargement.” *Id.* a 12.

The concept of “enlargement” is applicable to applications for transfer under Idaho Code § 42-222, not applications for permit under Idaho Code § 42-203A. What the SWC really argues is that the Application results in reduction of the quantity of water under existing water rights (i.e. injures other water rights) without sufficient mitigation in violation of Idaho Code § 42-203A(5). *See SWC’s Opening Brief* at 7, 11-15.

The fact that Permit 35-14402 allows the Applicants to divert ground water at an increased rate does not automatically result in injury to other water right holders and mandate rejection of the Application. Instead, the pertinent question presented by the Application is whether it will result in an increase in diversion beyond the historical annual volume beneficially used by the Applicants’ under their existing water rights. The situation is different where, for example, an application seeks an increased diversion rate from an intermittent surface water source because that diversion could have immediate impact on downstream surface water users. Under that scenario, if an application proposes diversion of surface water at an increased rate, limiting the permit and the existing surface rights to a combined historical annual volume of the existing rights will not likely mitigate injury to downstream users. However, where, as here, an application seeks an increased rate in ground water diversion, and ground water is available year-round, the appropriate focus of the inquiry to determine whether such diversion will reduce the quantity of water to existing rights centers on whether there will be an increase in historical annual volume diverted under the applicant’s existing ground water rights.

In addition, decisions of the Director of the Department (“Director”) *In the Matter of Application to Appropriate Water No. 27-12155 in the Name of the City of Shelley* (“Shelley

Case”), do not support the SWC’s argument that the Application should be rejected. *See SWC Opening Brief* at 8-10, 11-13. In the Shelley Case, the City of Shelley (“Shelley”) filed an application for permit seeking diversion of ground water that would deplete surface water flows of the Snake River. Ex. 202 at 1. As mitigation, Shelley offered “limiting the total annual volume diverted to the total volume authorized by Shelley’s perfected water rights.” *Id.* Thus, instead of agreeing to limit diversion to the historical annual volume, Shelly offered to limit diversion to the total annual volume authorized by Shelley’s existing water rights. Shelley argued “that a municipal water right grants entitlement to the full volume of water that would accrue by continuously diverting the existing water rights at the authorized flow rates for an entire year.” *Id.* at 12. Shelley also argued that, because it was “entitled to the annual volume described by its existing water rights,” the protestants could not “be injured if the volume is not exceeded due to an increase in flow rate.” *Id.*

In denying Shelley’s motion for summary judgment, the Director recognized that Shelley’s application seeking additional flow rate could increase the annual volume diverted beyond the historical annual volume diverted under Shelley’s existing water rights. The Director emphasized that Shelley’s application could “correspondingly increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights.” Ex. 200 at 2. The Director acknowledged “[a] municipality has the ability to grow into its water rights within reasonable limits” and that “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 not injury.” *Id.* The Director also stated that “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.” *Id.* The Director’s statements demonstrate the focus was on *injury* that could result from the *increase in historical annual volume* diverted due the proposed increase in flow rate.

In rejecting Shelley’s mitigation proposal, the Director redoubled focus on the issue of potential injury from an increase in diversion beyond the historical annual volume diverted under Shelley’s existing water rights. The Director stated: “Issuance of a municipal water right does not create an absolute expectation that the annual volume authorized is established and is only limited by the volume calculated by continuous accrual of the flow rate over the period of a year.” Ex. 202 at 12-13. The Director explained “[t]he extent of a water right is bounded by the beneficial use of the water under the water right.” *Id.* at 13. The Director concluded “[a]pproval of this water right application will increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights” and “result in a reduction in the quantity of water available under existing rights.” *Id.*

The SWC cites to the Director’s statement in the Shelley Case that “[l]arge annual volumes for municipal water rights . . . are constrained and limited by the flow rate authorized by the water rights.” *SWC Opening Brief* at 9. The SWC then suggests “[t]he decision in the Shelley matter confirmed that increasing one’s diversion rate results in an increase of the . . . ‘annual volume diverted beyond what was reasonably expected’” under existing water rights. *Id.* The SWC is incorrect. The Director’s statement is just additional recognition that, in the context of municipal water rights, an increase in annual volume diverted beyond what was reasonably expected under existing rights due to an increased flow rate equates to injury. The Director’s statement does not dictate that any proposed increase in diversion rate results in injury to other water right holders.

Here, the Hearing Officer's analysis of the Application is consistent with the Director's analysis in the Shelley Case. Specifically, the Hearing Officer rejected the idea that Permit 35-14402 could be mitigated by a combined annual diversion volume equal to that authorized by the Applicants' existing water rights. R. at 51. The Hearing Officer determined that, "[t]o prevent a reduction to other water rights, the combined annual volume limit must not exceed the historical maximum annual volume diverted under the [Applicants'] existing water rights. *Id.* The Hearing Officer concluded "[t]he evidence in the administrative record indicates that the [Applicants'] would have diverted 1,221 acre-feet of ground water in 2012 if they had been limited to a diversion rate of 5.13 cfs (the rate authorized by their existing water rights)." *Id.* at 53 (footnote omitted). By limiting Permit 35-14402 and the Applicants' existing water rights to a combined annual diversion volume of 1,221 acre-feet, the Hearing Officer ensured no increase in the historical annual volume diverted under the Applicants' existing water rights and ensured Permit 35-14402 will not injure other water rights. The Hearing Officer's analysis is consistent with the Director's analysis in the Shelley Case. The SWC is incorrect that the Shelley Case mandates rejection of the Application.<sup>8</sup>

Finally, the SWC argues "[t]he record is wholly devoid of any analysis" to support the conclusion that a 1,221 acre-feet combined annual volume limit "constitutes sufficient mitigation" for diversion under Permit 35-14402.<sup>9</sup> *SWC Opening Brief* at 14, 15. This argument

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<sup>8</sup> The SWC also argues the Director's decision in the Shelly Case confirmed the Applicants must rotate their crops and irrigation patterns and construct ponds rather than file the Application because "[t]he law does not permit this expanded use merely because [the Applicants] want to avoid some expense." *SWC Opening Brief* at 15. However, because Permit 35-14402 does not result in an increase of the historical annual volume pumped under the Applicants' existing water rights, approval of the Application is not in violation of Idaho law.

<sup>9</sup> The SWC's argument is primarily based on a misunderstanding of data relevant to the consideration of what constitutes sufficient mitigation to offset pumping under Permit 35-14402. *See SWC's Opening Brief* at 14-15. Specifically, the difference between the maximum annual diversion volume from the Applicants' existing well (1,522.1 acre-feet) and the historical annual volume pumped under their existing water rights (1,221 acre-feet) is irrelevant to the determination of whether the combined annual volume limit fully mitigates pumping under Permit

ignores the Hearing Officer's analysis and calculations based upon substantial evidence in the record to determine the historical annual volume of ground water beneficially used by the Applicants under their existing water rights. *See* R. at 51-54. This argument also ignores that, where an application proposes an increased diversion rate from ground water and the permit and the applicant's existing ground water rights are limited to the historical annual volume pumped under the existing rights, injury to other water rights is prevented. In other words, the combined annual volume limit mitigates losses of water to holders of existing water rights such that the application may be approved in accordance with Idaho law and the Department's *Amended Moratorium Order*.

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35-14402. The Applicants existing water rights do not authorize diversion of 1,522.1 acre feet, nor does Permit 35-14402 allow such diversion. Rather, as the SWC correctly asserts, the Applicants will be able to divert 1,221 acre-feet in 75 days at a diversion rate of 8.2 cfs, whereas the Applicants could only divert 763.15 acre-feet in 75 days at a diversion rate of 5.13 cfs. *See id.* at 15. In other words, Permit 35-14402 allows the Applicants to divert 457.85 acre-feet over 75 days at a rate of 3.07 cfs. The combined annual volume limit of 1,221 acre-feet requires the Applicants forego pumping that 457.85 acre-feet under their existing water rights. Thus, the combined annual volume limit fully mitigates pumping under Permit 35-14402.

## V. CONCLUSION

The condition of approval requiring that Permit 35-14402 and the Applicants' existing water rights be limited to a combined historical annual diversion volume of 1,221 acre-feet prevents reduction to the quantity of water under other existing water rights in accordance with Idaho Code § 42-203A(5)(a) and the Department's Water Appropriation Rules. The condition also mitigates diversion under Permit 35-14402 in compliance with the Department's 1993 *Amended Moratorium Order*. The Department properly approved the Application. The Department respectfully requests the Court approve the Order.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of October 2015.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14<sup>th</sup> day of October 2015, 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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