IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

Docket No. CV-42-2015-2452

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 REPLY 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 Reply 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*.

INTRODUCTION

Any decision from the Idaho Department of Water Resources ("IDWR" or "Department") must comply with the law and must be supported by substantial evidence. In this case, the *Preliminary Order Issuing Permit*, R. 48, fails on both grounds. The law does not allow the Department to ignore impacts of new diversions by hiding them behind an annual volume determination. Water rights are defined by their elements and any injury and mitigation analysis must consider each element.

Nor does the law allow the Department to rest its decision on pure speculation *without any* supportive evidence. Any decision must be supported by substantial evidence – speculation cannot be the foundation of the decision. Yet, here, there is no evidence to support the findings – only the speculative testimony of the Application explaining what might have been had he stayed within the diversion limits of his water rights. Such a decision cannot be affirmed.

Finally, the Applicant misconstrues and misread the APA and ask the Court to dismiss this appeal – contending that the Coalition failed to exhaust administrative remedies. The law does not require, however, that the Coalition file an exception brief with the Director as a condition of appeal. As such, the Applicant's arguments fail.

ARGUMENT

I. The Court has Jurisdiction to Hear the Coalition's Appeal.

The Applicant asks the Court to rewrite the APA and dismiss this appeal because "the SWC failed to timely file exceptions to the *Preliminary Order* with the Director." *Cook Br.* at 8. He asserts that the "Director should have had an opportunity to review his agency's decision before it was appealed to this Court for review." *Id.* at 16. As such, the Applicant demands that the Coalition's appeal be dismissed and "the matter should be considered concluded and development of 35-14402 should only be subject to the provisions of the *Final Order*." *Id.* at 9. The Applicant's arguments misread the statute.

It should be pointed out that the Department does not join in the Applicant's arguments. Indeed, the Department makes no contention that the Coalition's appeal is inappropriate under the APA. This is undoubtedly because neither the APA, nor the supporting case law, support the Applicant's theory. *See Id.* at 8 ("there are no cases" supporting the Applicant's theory).

There is no dispute that the exhaustion doctrine plays an important role in the review of agency decisions. *Id.* at 8-11. However, the Applicant misreads the APA and misapplies the law on statutory interpretation in an effort to contort the plain language of the APA.

The objective of statutory construction is to derive the intent of the legislature. *Kelso v. State Ins. Fund*, 134 Idaho 130, 134 (2000). Statutory interpretation must begin with the literal words of the statute and those words must be given their plain, usual, and ordinary meaning. *Harrison v. Binnion*, 147 Idaho 645, 649 (2009); *State v. Gill*, 150 Idaho 183, 185 (Ct App. 2010) (language of statute is to be given its plain, obvious, and rational meaning). These mandates have been codified in Idaho Law:

> The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.

I.C. § 73-113(1). If the statute is unambiguous, a court must not construe it but must instead follow the law as written. *Harrison*, 147 Idaho at 649. Indeed, "Legislative intent is reflected first and foremost in the language of the statute itself." *Potlatch Corp. v. U.S.*, 134 Idaho 912, 914 (2000). In the end, the "plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results." *Rahas v. Ver Mett*, 141 Idaho 412, 413 (2005).

Here, the APA plainly allows an appeal of a preliminary order that has become final – even if an appeal to the head of the agency has not been made. The applicable sections are Idaho Code §§ 67-5245, -5270, -5271 and -5273. They provide, in relevant part:

> 67-5245. REVIEW OF PRELIMINARY ORDERS. (1) A preliminary order shall include:
>
> > (a) A statement that ***the order will become a final order without further notice***;
> > ...
>
> (2) The agency head, ***upon his own motion may***, or, ***upon motion by any party shall***, review a preliminary order,

(Emphasis added)

> 67-5270. RIGHT OF REVIEW. (1) Judicial review of agency action shall be ***governed by the provisions of this chapter*** unless another provision of law is applicable to the particular matter.
> ...
>
> (3) A party aggrieved by a final order in a contested case decided by an agency other than the industrial commission or the public utilities commission is ***entitled to judicial review under this chapter if the person complies with the requirements of sections 67-5271 through 67-5279, Idaho Code***.

(Emphasis added).

> 67-5271. EXHAUSTION OF ADMINISTRATIVE REMEDIES. (1) 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).

> 67-5273. TIME FOR FILING PETITION FOR REVIEW. ... (2) A petition for judicial review of a final order ***or a preliminary order that has become final when it was not reviewed by the agency head*** or preliminary, procedural or intermediate agency action under section 67-5271(2), Idaho Code, ***must be filed within twenty-eight (28) days of the service date of the final order, the date when the preliminary order became final***, or the service date of a preliminary, procedural or intermediate agency order, or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon. A cross-petition for judicial review may be filed within fourteen (14) days after a party is served with a copy of the notice of the petition for judicial review.

(Emphasis added).

These provisions create a clear process for review of a preliminary order. First, section 67-5245 provides that a preliminary order may become final "without further notice" and is only subject to review on a motion by a party or from the Director. The statute does not mandate that any filing be made with the Director as a condition of future judicial review. In this case, the Director did not seek to review the Preliminary Order and the Coalition did not file timely exceptions. As such, after 14-days, the Preliminary Order became a Final Order by operation of law.[1]

Section 67-5270 then provides that judicial review is governed by the APA, and that any appeal must "comply with the requirements of sections 67-5271 through 67-5279." I.C. § 67-5270(2). Such appeals are not permitted unless the party has "exhausted all administrative remedies required" by the APA. I.C. § 67-5271(1). As stated above, nothing in section 67-5245 mandates any filings with the Director relative to a preliminary order. To the contrary, the statute provides that a preliminary order may become final without notice.

[1] I.C. § 67-5245 requires that any petition to reconsider must be filed within 14-days.

Finally, section 67-5273, provides a specific time frame for seeking judicial review of "a preliminary order that has become final ***when it was not reviewed by the agency head.***" (Emphasis added).

The Applicant asserts that these statutes "conflict" and are ambiguous. *Cook Br.* at 13-16. He asserts that section 67-5270 is "specific" and must control the Court's decision here. *Id.* He further points to a decision from Utah to support his conclusion that the law mandates appeal of a preliminary order to the Director. *Id.* Cook is wrong.

First, as discussed above, there is no "conflict" or ambiguity in the statute. Each section works in harmony to outline the procedures for challenging and/or appealing a preliminary order. Indeed, the so-called "specific" section 67-5270 points directly to section 67-5273 in discussing when review is appropriate. The Coalition's appeal complies with this statutory procedure.

Further, the Utah case interpreting Utah law does not support the Applicant's contention about the interpretation of Idaho Law. In that case, the Court held that the appellant must exhaust all "available" administrative remedies prior to seeking judicial review. *State Farm Mut. Auto. Ins. Co. v. Indus. Comm's of Utah*, 904 P.2d 236, 237-38 (Utah Ct. App. 1995). The Court drew support from the Utah APA, which also provides that a "party may seek judicial review ***only after exhausting all administrative remedies available.***" *Id.* at 238 (emphasis added). The Idaho law is different – requiring that a party "exhausted all administrative remedies ***required***" by the APA. I.C. § 67-5271 (emphasis added). There is a stark difference between "available" remedies and "required" remedies. As stated above, while, under Idaho law, a petition to the Director is an "available" remedy, it is not a "required" remedy. Indeed, nothing in the Idaho APA "required" that the Coalition file a petition with the Director for review as a condition precedent

to seeking judicial review. The Applicant points to no such requirement – even admitting that there is no case law on the issue. *Cook Br.* at 8.

As such, the Court has jurisdiction to hear the Coalition's appeal and should reject the Applicant's argument.

II. Idaho Law does not Condone an Increased Diversion Rate Beyond the Expectations of the Existing water Rights Without Proper Mitigation.

The law demands that the Department consider whether a new division will "reduce the quantity of water under existing water rights." I.C. § 42-203A(5)(a). Such a reduction will occur if the "amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim." IDAPA 37.03.08.045.01.a-a(i). According to the Department and Applicant, only offsetting a "volume" of water will mitigate the impacts of new diversions. R. 51 ("to prevent reduction to other water rights, the combined annual volume limit must not exceed the historical maximum annual volume diverted"); *IDWR Br.* at 15 ("the combined annual volume limit mitigates losses of water to holders of existing water rights such that the application may be approved"); *Id.* at 11 ("the appropriate focus of the inquiry to determine whether such [increased] diversion will reduce the quantity of water to existing rights centered on whether there will be an ***increase in historical annual volume*** diverted") (emphasis added); *Cook Br.* at 19-20 (same). In other words, the Respondents would have the Court believe that, so long as a volume of water is mitigated, other impacts caused by the new diversion, including the increased rate of diversion, are not material. The law does not support this myopic view of mitigation.

A water right is limited by more than its volume. There are several elements, including the season of use, an instantaneous diversion rate, and the priority date. *See e.g.* Exs. 103-108 (existing water rights for the Applicant). All elements constrain one another, providing the

boundaries within which a water right may be used. *See* Ex. 201 at 8, ¶ 12 (volume is "constrained and limited by the flow rate authorized by the water right"). The appropriateness of mitigation, therefore, must be weighed against all impacts of a water right.

For example, when water is diverted at a higher rate in a condensed period of time, there will be impacts to the water supply that were not realized under existing water rights. During an agricultural water user's greatest time of need, water will be diverted at a faster rate, causing an immediate reduction to the total water supply then available. This case provides a prime example. According to the order, the Applicant will be able to divert at a rate of 8.2 cfs during the irrigation season. R. 53. The volume limitation authorized by the Hearing Officer of 1,221 af/year was derived based on the diversion of 5.13 cfs, the authorized rate under the existing water rights, for 120 days. *Id.* Under existing conditions, the water supply is impacted by the diversion of 1,221 af/year over 120 irrigation days.

However, altering those diversions, such that the same 1,221 af will be diverted in only 75 days, as will happen at a diversion rate of 8.2 cfs, will change the impacts of those diversions. For those 75 days, the water supply will experience a higher draw down as more water is diverted than was historically used. The condensed diversions will alter the timing of impacts on the water supply, including Snake River reach gains. Yet, the Department ignores these impacts – instead concluding that a limitation of 1,221 af per year will result in no impacts to the water supply. *Supra.* Importantly, neither the Applicant nor the Department provide any support for their contention that these compressed diversions will not impact the water supply for existing ground and surface water rights.[2] There are no model runs demonstrating that such condensed

[2] The Applicant points to certain testimony from the Coalition's expert, Greg Sullivan, to conclude that "the rate at which a certain volume is pumped from the ESPA would not injure the SWC." *Cook Br.* at 22. No analysis was prepared or presented on this matter and the Hearing Officer did not rely on this testimony in the order.

diversions will not impact the water supply. Rather, they focus solely on the annual division volume – apparently concluding that any other impacts caused by condensed diversions are not relevant. In doing so, they ignore the true impacts of the increased diversions. *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"). The Applicant failed to meet his burden of proof and there is absolutely no evidence in the record to support the Department's analysis.

It is undisputed that condensing diversions in the manner authorized under this application will "reduce the quantity of water under existing water rights" during that period of diversion, contrary to the law. *See* I.C. § 42-203A(5)(a). Yet, by allowing the Applicant to divert more water in fewer days, the Final Order has allowed the Applicant to impact other water users and has failed to require any mitigation for those impacts. The law does not allow the Department to ignore the impacts of condensed diversions by cloaking them under an analysis of the annual volume diverted. As such, the decision should be reversed.

III. Substantial Evidence

It is well known and undisputed that the Eastern Snake Plain Aquifer is in a deficit state. For over 20 years, a moratorium has been in place, prohibiting the development of new consumptive water uses without full and complete mitigation. R. 55-56. Notwithstanding the moratorium, conditions have not improved. Conjunctive administration has not improved ground water levels and reach gains necessary to satisfy existing water rights.

Notably, the Surface Water Coalition has seen its water supplies become increasingly stressed. Over a decade ago, the Coalition filed a water right delivery call, seeking to curtail out

of priority groundwater use causing injury to their senior surface water rights. *See A&B Irr. Dist. v. Spackman*, 155 Idaho 640 (2013).[3] The Coalition monitors applications filed throughout the plain, challenging those that will impact the Coalition's water supplies.

Notwithstanding the diminishing water supplies, water users use creative devises to attempt to add new demands on the aquifer. This appeal is about one such application – seeking to increase demands on the aquifer in an attempt to rectify decades of illegal diversions. The Applicant and his predecessor admittedly illegally diverted water in excess of the water rights appurtenant to the real property. R. 49, ¶ 8. At hearing, the Applicant testified that he did not even look at the water right when he purchased the property. T. at 33, ll.21-25 ("Q. So, at the time you bought it, did you look at the water right? A. No. Q. You didn't check into it? A. No.").[4] In fact, when asked whether he would have purchased the property had he known of the limited water supply, the Applicant testified "I probably wouldn't have bought it." T. at 138, ll.3-10.

Rather than check the water rights, however, the Applicant testified that he altered his farming to utilize more water intensive crops and crops that require watering more often. Prior to purchasing the land, it was planted in grain. T. at 34, ll.2-4. It was then planted in alfalfa, which "takes a lot more water" than current crops. T. 13, ll. 13-15. The property was then planted in timothy grass, which uses less water but "requires water more frequently." T. 13, ll. 9-12.

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[3] Recent negotiations between the surface water users and ground water users have led to a monumental agreement that water users hope will turn the tide of a declining water supply and reverse the approximately 240,000 acre-feet annual deficit in the aquifer. *See* http://magicvalley.com/business/agriculture/historic-water-contract-almost-ready/article_7d92bf13-12c6-5ad2-82b2-e7973a2e3b58.html.

[4] The Applicant apparently believes that he is somehow excused from his illegal diversions. *Cook Br.* at 17-18 ("Applicant was not deceitful because he was not aware of the 5.13 c.f.s. limitation until the Spring of 2014"). Yet, the Applicant admitted that he made no effort to discover the nature or limitations of his water rights – simply continuing the illegal diversions of his predecessors. *Supra.*

Unfortunately, the Applicant's long term illegal diversions did not allow the Hearing Officer to conduct an appropriate analysis of what would have been grown on the property and what kind of irrigation system would have been used if the Applicant had diverted legally. This resulted in speculation by the Hearing Officer that is contrary to the evidence in the record. The Department's approval of the permit concludes that the Applicant's historical use should have been or could have been 1,220 af/year. Yet, since the only evidence regarding historical use showed that the Applicant was diverting water far in excess of that allowed under the existing water rights, the Hearing Officer erroneously relied upon the speculative testimony of the Applicant as to what might have happened had he irrigated within the bounds of his water rights. It is just as easy to assume that the Applicant would never have bought the property, as supported by the testimony, or that the Applicant would have rotated fields or grown other crops that require less water. There was no evidence offered concerning the amount of water that would have been used under any of these practices.

The Applicant testified that he would alter his irrigation practices had he limited his diversion to the authorized diversion rate, including rotating through his pivots, R. 52-53; T. 132-36, but provided no evidence to support that testimony. The Applicant provided no evidence about irrigation practices for any other crop. Rather, he testified that he planned to continue growing timothy hay in the next rotation (a crop that "requires water more frequently"). T. 28, ll.12-17 & 13, ll.9-12. The Applicant testified that he would rotate between pivots if his diversions were limited to 5.13 cfs, T. 132-36, yet, he also testified that raising timothy hay under the existing diversion limitation is not practical, T. 22, ll.10-13 (testifying that, had he limited his irrigation to the authorized diversion rate on the timothy hay, "we would have crop loss, crop quality would be down. We'd starve the crop for water."). Although the Applicant testified that he

had, at one time, planted his property in alfalfa, he provided no discussion of how his irrigation practices might have been different as compared to timothy hay.

The Applicant complains that "the Coalition did not present any evidence indicating that the Applicant would not have changes his irrigation practices." *Cook Br.* at 21. Ironically, the Applicant did not provide any evidence to support his testimony. Rather, the testimony in the record speculated that the Applicant may have altered his pivot rotation had he complied with the law and diverted within the bounds of his water rights. The burden of proof rests with the Applicant on this issue, not the Coalition. *See* IDAPA 37.03.08.40.04.b.i ("The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code"). The Applicant failed to meet this burden.

Instead, the testimony in the record is based wholly upon "speculation." In addition to the statements above, the Applicant further speculated that limiting the diversions would "create problems" for irrigation. T. 138, ll.3-10; *see also* T. 22, ll.10-13 (testifying that, had he limited his irrigation to the authorized diversion rate on the timothy hay, "we would have crop loss, crop quality would be down. We'd starve the crop for water."). The testimony in the record was that the Applicant would continue growing timothy hay even though the quality would diminish and crops would be lost. *Supra.* Finally, the testimony in the record was that the Applicant "probably wouldn't have bought" the property had he researched the water rights and discovered the diversion limitations. T. 138, ll.3-10. In short, there was no *evidence* supporting any claim of

altered irrigation practices – only speculative testimony.[5] Absent any evidence to support the findings of the Department's decision, it cannot be upheld. I.C. § 67-5279(3)(d).[6]

In concluding that the Applicant would have legally diverted 1,221 af/year, the Hearing Officer accepted some of the Applicant's speculation about altered irrigation practices and rejected other portions. R. 52-53. Importantly, however, the Hearing Officer ignored the testimony that the Applicant "probably wouldn't have bought" the property and that diversion pursuant to the legal rate would lead to crop loss. *Supra.* In the end, there is no basis to accept 1,221 af/year as a "historical use" for mitigation purposes.

The Department's brief further demonstrates the insufficiency of the record to support this conclusion. According to the Department, "the Hearing Officer calculated the number of days the Applicants pumped ground water in 2012" and "to grow the same crop with a decreased diversion rate of 5.13 cfs, the Hearing Officer reasonably concluded" that an additional 12 days would be needed (from 108 to 120 days). *IDWR Br.* at 10.

Yet, there is nothing in the record to support IDWR's conclusion. To the contrary, the Applicant testified that he needed 149 days. Ex. 101. He further testified that he could not adequately grow timothy hay at a diversion rate of 5.13 cfs. T. 22, ll.10-13 (testifying that, had he limited his irrigation to the authorized diversion rate on the timothy hay, "we would have crop loss, crop quality would be down. We'd starve the crop for water."). When viewed in light of

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[5] Even the Department's response brief provides no attempt to justify the Hearing Officer's conclusion regarding the number of days irrigated. *IDWR Br.* at 9 (merely stating "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").

[6] In his response brief, the Applicant makes much of the "reasonable minds" standard in reviewing the evidence. *Cook Br.* at 17 ("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"). Yet, as stated above, there is <u>no evidence at all</u> to support the conclusions in the Department's decision. Rather, the decision is based purely on speculative testimony about what might have been had the Applicant actually complied with the limitations of his water rights. *Supra.* The fact that the testimony is speculative and of little weight is even more evident in light of the Applicant's testimony that he "probably wouldn't have bought" the property had he known of the limitations. *Supra.*

the evidence and testimony, the conclusion of 120 days makes no sense. Such speculation cannot be the basis for an agency decision and should be reversed.

CONCLUSION

Neither the law nor the facts support the order approving the above application. As such, the Court should reverse the Department and deny the application.

DATED this 4th day of November, 2015.

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