

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

RICHARD PARROTT,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN, in
his capacity as Director of the Idaho
Department of Water Resources,

Respondents,

and

CEDAR RIDGE DAIRY LLC,

Intervenor.

Case No. CV-42-2015-4552

IDAHO DEPARTMENT OF WATER RESOURCES' RESPONSE BRIEF

Judicial Review from the Idaho Department of Water Resources

Honorable Eric J. Wildman, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. STATEMENT OF THE CASE	1
A. NATURE OF THE CASE.....	1
B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND	1
II. ISSUES ON APPEAL	4
III. STANDARD OF REVIEW	5
IV. ARGUMENT	5
A. THE DIRECTOR’S FINDINGS AND CONCLUSIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.	5
B. THE DIRECTOR IS NOT BOUND BY THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER.	8
C. THE DIRECTOR FULLY EXECUTED HIS STATUTORY OBLIGATIONS IN REVIEWING THE TRANSFER APPLICATION.	10
D. PARROTT IS BARRED FROM RAISING THE ISSUE OF FORFEITURE IN THIS JUDICIAL REVIEW PROCEEDING.	12
E. THE COURT LACKS JURISDICTION TO CONSIDER APPLICATION FOR TRANSFER No. 79357.....	12
V. CONCLUSION.....	13
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Cases

Barron v. Idaho Dept. of Water Resources, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).....	5
Crowley v. Critchfield, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007)	12
Dovel v. Dobson, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992)	5
Idaho Power Co. v. Idaho Dep't of Water Res., 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).....	5
Jenkins v. State, Dep't of Water Res., 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).....	12
Tupper v. State Farm Ins., 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998)	5, 8

Statutes

Idaho Code § 42-1701A(4).....	5
Idaho Code § 67-5277	5
Idaho Code § 67-5279(3).....	5
Idaho Code § 67-5279(4).....	5
Idaho Code § 42-202B(3)	11
Idaho Code § 42-222	passim
Idaho Code § 67-5245(7).....	9

I. STATEMENT OF THE CASE

A. Nature of the Case

This is a judicial review proceeding in which Richard Parrott (“Parrott”) appeals a final order issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”) approving a transfer application filed by Thomas Leno (“Leno”). The order appealed is the November 12, 2015, *Amended Final Order Conditionally Approving Transfer*.

B. Statement of Facts and Procedural Background

On May 20, 2014, Leno filed Application for Transfer No. 79380 (“Transfer”), with the Department. R. at 1-32. Ex. at 1-32. The Transfer proposes to move a portion of ground water Water Right 47-17589 from a property located near the Idaho-Nevada border to a dairy approximately 34 miles north.¹ Ex. at 64. The Transfer proposes to use two current and one new well as points of diversion. R. at 3, Ex. at 3. The Transfer further proposes to change the nature of use from irrigation to stockwater and commercial, and change the period of use to year round. R. at 3, Ex. at 3. The stockwater and commercial use will include cleaning both milk and farm equipment as well as cooling and watering cows. Tr. at 17. Leno proposes to limit the allowed diversion volume to 66 acre-feet to prevent an enlargement of use. R at 3, Ex. at 3 and R. at 320-321.

Cedar Ridge Dairy, LLC (“Cedar Ridge”) operates the dairy, known as Dairy #3. R. at 235. Cedar Ridge agreed to purchase the portion of Water Right 47-17589 from Leno once the Transfer was approved by the Department. R. at 25-32, Ex. at 25-32.

¹ The Transfer proposes to move 0.42cfs, 105.9 acre-feet of water for 35.3 acres of land. Water Right 47-17589 is the result of three transfers splitting off a portion of Water Right 47-7106. R. at 298-300. Water Right 47-7106 was decreed in the Snake River Basin Adjudication on June 1, 2010 with a priority date of December 25, 1970. Ex. at 33.

The Department received sixteen protests to the Transfer.² R. at 46-87. The Protestants have domestic wells located 1.7 miles to approximately 2.6 miles from the proposed points of diversion. R. at 315, Ex. at 72. There are also domestic wells located approximately three-quarters of a mile west of the proposed points of diversion. *See Id.*

Cedar Ridge filed a motion to intervene which was granted on March 5, 2015. R. at 475. On March 18 and 19, 2015, the Department conducted an administrative hearing with James Cefalo as the hearing officer. The hearing was held in conjunction with hearings for other related applications for transfer (79357, 79384, and 79466). R. at 888.

The hearing officer issued a *Preliminary Order Approving Transfer* on May 29, 2015. R. at 687-699. On June 1, 2015, the hearing officer issued an *Amended Preliminary Order Approving Transfer* (“Amended Preliminary Order”). The *Amended Preliminary Order* was issued due to a minor error in the transfer approval documents. R. at 706. The hearing officer found that Leno had “satisfied his burden of proof for all criteria set forth in Idaho Code § 42-222.” R. at 717. However, the hearing officer also found that Leno had not provided “enough information to determine the magnitude of impact to nearby domestic wells if the water right proposed to be transferred were diverted during the non-irrigation season.” *Id.* Therefore the hearing officer limited the season of use to the irrigation season (May 1 through September 30). R. at 715. It appears the hearing officer was also concerned with the distance between the current and new points of diversion, so he advanced the priority date of the water right to the date of the Transfer approval. *Id.*

² Protests were filed by Jimmie L. Conder, Michael and Jana Humphries, William D. Hamby, Eric Parrott, Lois M. Rice, Leslie Ellsworth (for herself and 9 other individuals), Pam Ritter, Edward Smith, Victoria Henson, Scott Houtz, Delea Miller (Andrew), Jeanie McCreary, Barbara and Lynn Stephens, Margaret Winsryg and Leroy Elliott, Elizabeth (Betty) Slifer, and Martin F. Hackard. Parrott protested related applications for transfer 79384 and 79466 but not this Transfer. Tr. at 7.

Leno and Cedar Ridge jointly filed *Applicant's Exceptions to Amended Preliminary Order* ("Exceptions") objecting to the restricted season of use and the advanced priority date. R. at 729. The Protestants collectively filed three objections to the *Exceptions*. R. at 761-796, 798-800. The Protestants asked the Director to uphold the *Amended Preliminary Order*, specifically the restricted season of use and the advanced priority date. *Id.*

On October 13, 2015, the Director issued a *Final Order Approving Transfer*. R. at 807-825. The Director received eight requests for reconsideration. R. at 826-856. On November 12, 2015, the Director issued an *Amended Final Order Conditionally Approving Transfer* ("Amended Final Order"). R. at 888-903. The *Amended Final Order* approved the Transfer and declined to impose a shorter season of use or advance the priority date of the water right. R. at 890-891. The Director determined the evidence established that ground water levels in the Berger area are stable or even rising and "[b]ecause the demand from the ground water resource for the uses proposed by transfer no. 79380 is significantly reduced in the winter, the drawdowns attributable to the small additional water diverted will be minimal." R. at 891. The Director cited to both of these findings to support the change from the *Amended Preliminary Order*. R. at 891-892.

Parrott timely filed a *Petition for Judicial Review* on December 9, 2015.

II. ISSUES ON APPEAL

The issues presented are:

- A. Whether the Director's finding and conclusions are supported by substantial evidence in the record.
- B. Whether the Director was bound by the findings and conclusions of the hearing officer.
- C. Whether the Director fully executed his statutory obligations in reviewing the Transfer application.
- D. Whether Parrott is barred from raising the issue of forfeiture in this judicial review proceeding.
- E. Whether this Court has jurisdiction to consider Application for Transfer No. 79357.

III. STANDARD OF REVIEW

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

IV. ARGUMENT

A. The Director's findings and conclusions are supported by substantial evidence in the record.

Parrott suggests the Director's findings and conclusions are not supported by substantial evidence in the record. In his *Opening Brief*, Parrott states the *Amended Final Order* is "just

plain wrong in conclusions of conductivity in the dairy site areas, and conflicting with the actual record.” *Opening Brief* at 4. Parrott further states “[t]he written and transcript record do not confirm Spackman’s conclusions on conductivity.” *Id.* Contrary to Parrott’s suggestion, the Director’s findings and conclusions are supported by substantial evidence in the record. The Director evaluated the evidence before him, applied the evidence to the requirements for approving a transfer and concluded Leno had “satisfied his burden of proof for all of the review criteria set forth in Idaho Code § 42-222.” R. at 902.

The Director shall approve a transfer application so long as the change does not injure other water rights, does not constitute an enlargement, is consistent with the conservation of water resources, and is in the local public interest. Idaho Code § 42-222. On the question of injury, the Director evaluated whether the Transfer would result in unreasonable drawdown of water levels in nearby domestic wells.

At issue in the proceeding was which value of hydraulic conductivity most accurately reflects the hydrologic conditions near Dairy #3. Hydraulic conductivity (“K”) is used when estimating potential effects from ground water pumping. Hydraulic conductivity is a measure of the ease with which water can move through pore spaces or fractures of an aquifer. It is expressed in units of feet per day. If the hydraulic conductivity value is low, the slow transmittal of water toward a pumping well results in a higher drawdown in the pumping well because the pumping well must draw from a greater vertical column in the well to derive water than if the hydraulic conductivity were high. The drawdown around a well created from pumping is known as a cone of depression. A deep cone of depression around a well drilled in material with a low hydraulic conductivity will cause greater drawdown in nearby wells but will cause less drawdown in wells further away.

Cedar Ridge provided an expert report (“Brockway Report”) prepared by Brockway Engineering, PLLC (“Brockway”). R. at 295-398. The Brockway Report provides two different values of hydraulic conductivity. The first value of 55 ft/day is based on a 1998 publication. R. at 306. The second lower hydraulic conductivity value of 15.3 ft/day is based on an average of calculated hydraulic conductivities using data obtained from wells near the proposed points of diversion. R. at 317-318. The Brockway Report estimates a drawdown in the Protestants’ wells of 0.8 to 1.2 inches ($K = 55$ ft/day) or 1.4 to 2.76 inches ($K = 15.3$ ft/day) after twenty years of pumping under the Transfer. R. at 317-318. The Brockway Report does not estimate drawdown effects on non-protestant wells, three-quarters of a mile from the Transfer points of diversion. R. at 312-319.

Parrott’s expert, DuWayne Kimball (“Kimball”), provided a hydraulic conductivity of 0.9 ft/day. Tr. at 104. Kimball estimated drawdown over a shorter period of time than the Brockway Report and used a distance from the proposed points of diversion not related to any specific well. Tr. at 104-105. Kimball estimated that there would be a drawdown of 6.8 feet over a seven month irrigation season, in a well 750 feet from the points of diversion. *Id.*

Since the Brockway Report did not address the effects the Transfer could have on the closest wells to the points of diversion, the Director had to estimate potential drawdown effects in the close non-protestant wells. R. at 891, 899-900. The Director determined “Brockway’s hydraulic conductivity of 15.3 ft/day is excessive.” R. at 891. Therefore the Director turned to other values of hydraulic conductivity to help estimate drawdown impact.

The Director first looked to two non-protestant wells; Well #5, which is close to Dairy #3, and Well #2, one mile west of the proposed points of diversion. R. at 899. These wells were used in Brockway’s 15.3 ft/day hydraulic conductivity calculation. R. at 318. The hydraulic

conductivity around Well #5 is 0.4 ft/day and around Well #2 is 3.6 ft/day. *Id.* The Director then considered Kimball's estimate of drawdown and his value of hydraulic conductivity. R. at 899. The Director determined the lower values of hydraulic conductivity are reasonable. *Id.* While the Director did not use a specific value of hydraulic conductivity, he estimated pumping impacts extrapolating from the Brockway Report estimates and a lower hydraulic conductivity. R. at 897. The Director determined "the cone of depression will likely be fairly flat at three-quarters of a mile from the pumping well and, at most, would be several inches." R. at 891. The Director further found that "[b]ecause the nearest domestic wells are three-quarters of a mile away, and because of the small quantity of water proposed to be pumped, the drawdowns in wells three-quarters of a mile away will not injure the domestic water right holders." *Id.*

The Director fully considered the evidence when analyzing possible injury. The Director examined all of the evidence about possible drawdown in not only the Protestants' wells but the wells of non-protestants that are closer to the proposed points of diversion. The Director's injury analysis even included information provided by Parrott's expert. R. at 900. When an agency is faced with conflicting evidence, the agency's findings must be sustained on appeal if the findings are supported by substantial and competent evidence. *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). Because the Director's decision is supported by substantial and competent evidence, the Court should affirm the Director's finding that the Transfer will not cause injury to nearby domestic water right holders.

B. The Director is not bound by the findings and conclusions of the hearing officer.

Parrott asks the Court to "reaffirm" the hearing officer's conclusions in the *Amended Preliminary Order* "on winter 'cow cooling water' and on no 1970 priority date." *Opening Brief* at 5. Parrott's argument fails because the Director is not bound by the findings and conclusions

of the hearing officer in the *Amended Preliminary Order* and the Director's findings and conclusions are supported by substantial evidence in the record.

Idaho Code § 42-222 sets for the standard for evaluating an application for transfer. The hearing officer found "Leno has satisfied his burden of proof for all of the review criteria set forth in Idaho Code § 42-222." R. at 717. This notwithstanding, the hearing officer imposed limits on the season of use to when water is flowing in the nearby canal system. R. at 715. The hearing officer determined there was not "reliable data about the impacts to nearby domestic wells during the non-irrigation season" and without that information it was reasonable to limit the season of use of the Transfer. *Id.*

The Director, however concluded it was not necessary to limit the season of use to just the irrigation season. The Director disagreed with the hearing officer's conclusion that there was insufficient evidence on impacts to nearby wells. The Director is not bound by the findings and conclusions of the hearing officer. Idaho Code § 67-5245(7). To evaluate potential impacts to nearby wells, the Director relied on information about the stability of the aquifer, Cedar Ridge's reduced use of the Transfer water during the non-irrigation season, and that there would only be a couple of inches of drawdown in nearby wells. R. at 891-892.

Two of the presented experts represented that the aquifer water levels are stable. The Brockway Report evaluated 35 years of well data from two wells, one 6.5 miles west of the proposed point of diversion, and one 3.0 miles west. R. at 307-308. The Brockway Report concluded that the data indicate the aquifer is stable. R. at 309. The Protestants' expert, Ed Squires, agreed the aquifer levels are stable. Tr. at 215-216. Cedar Ridge's manager, Ryan Visser ("Visser"), testified that the major use of the Transfer water would be during the summer. Tr. at 17-23. As discussed above, the Director determined that the drawdown would be at most

several inches. R. at 897. The Director found that a “drawdown of several inches in domestic wells, either during the irrigation or nonirrigation season is not a sufficient decline in the aquifer” to find injury. R. at 891. The Director reasoned drawdowns in the winter will be minimal and decided to remove the season of use limitation from the Transfer approval. *Id.*

The hearing officer also determined that “in order to protect existing water rights in the Berger area (junior to December 25, 1970), the portion of water right 47- 17589 being transferred must be assigned a priority date of the date of this approval.” R. at 715. The Director reached a different conclusion. The Director found “the existing point of diversion is hydraulically connected to the ground water at the proposed points of diversion.” R. at 900. In addition, the Director determined there would be minimal drawdown effects from the Transfer and “approval of this transfer will not destabilize water levels in the aquifer.” R. at 891-892. The Director then held “the priority date of this transfer should not have been advanced.” R. at 892.

Based on findings of no injury and a hydraulic connection between the existing and proposed points of diversion, the Director determined the Transfer did not need a season of use limit or advanced priority date. The Director’s determinations were within his statutory authority and supported by the record, therefore the Court should affirm the Director.

C. The Director fully executed his statutory obligations in reviewing the Transfer application.

Parrott states the Department “is obligated to investigate the validity of transfer applications, not just fill in the blanks on a transfer form.” *Opening Brief* at 5. The Director must “examine all the evidence and available information” in a transfer application. Idaho Code § 42-222. As discussed above, the Director thoroughly explored whether there would be injury to any water users due to the Transfer. Additionally, the Director evaluated the other factors

outlined in Idaho Code § 42-222: whether there would be an enlargement of the right through the Transfer, whether the Transfer is consistent with the conservation of water resources, and if the Transfer is in the local public interest. R. at 900-901.

The Transfer proposes to limit the authorized diversion volume from 105.9 acre-feet to 66 acre-feet. R at 3, Ex. at 3 and R. at 320-321. The Director determined that 66 acre-feet is the historic consumptive use of that portion of the water right. R. at 901. The Director concluded that limiting the annual diversion volume to 66 acre-feet would prevent enlargement. *Id.*

To determine if the Transfer was consistent with the conservation of water resources the Director considered the proposed use. Visser testified that to cool the cows in the summer, the dairy would use a drench system for evaporative cooling. Tr. at 20-21. The Director stated “no evidence was presented showing that drench systems are not used in other dairies.” R. at 901. The Director also found that “Visser’s calculation of the maximum annual water demand of the drench system is reasonable.” *Id.* Therefore, the Director determined “[t]here is no evidence in the record that the proposed water use would be inconsistent with the conservation of water resources.” *Id.*

Local public interest is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3). The Director reviewed the record and determined there was no evidence presented showing the changes proposed in the Transfer are not in the local public interest. R. at 901.

Idaho Code § 42-222 establishes the statutory requirements the Director must analyze when evaluating an application for transfer. The Director analyzed those factors. The Director approved the Transfer, satisfied there would be no injury, there would not be an enlargement, the Transfer was consistent with the conservation of water resources and the Transfer was in the local public

interest. Because the Director made his decision pursuant to Idaho Code § 42-222 and upon substantial evidence in the record, the Court should affirm the Director's approval of the Transfer.

D. Parrott is barred from raising the issue of forfeiture in this judicial review proceeding.

Parrott states that he “continues to object to [the Transfer] as invalid in basic requirement that the water right to transfer from Leno needs to have been used for 5 previous years.”

Opening Brief at 4. Substantive issues should not be considered for the first time on appeal. *Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007). Parrott's mention that water right 47-17589 might not have been used in the previous five years is the first time he raised the argument. None of the protests to the Transfer mention non-use or forfeiture. R. at 46-87. Review of the transcript yields no mention of non-use or forfeiture of the water right. The Protestants' objections to Leno and Cedar Ridge's *Exceptions* did not raise the issue. R. at 762-781, 798-800. Likewise, the Protestants' petitions for reconsideration did not raise the issue. R. at 836-859. Since non-use or forfeiture is a substantive issue, and Parrott raised the argument for the first time in his *Opening Brief*, the Court should not consider the argument.

Additionally, there is not clear and convincing evidence in the record to support a finding of forfeiture. “[C]lear and convincing proof is required to support a forfeiture.” *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982). Therefore, if the Court decides the issue of forfeiture was raised, there is no basis to support such a finding.

E. The Court lacks jurisdiction to consider Application for Transfer No. 79357.

The Court has already twice determined that Application for Transfer No. 79357 is not part of the scope of this judicial review proceeding in its *Order on Motion to Clarify Scope of Judicial Review Proceeding* (Feb. 4, 2016) and *Order Re: Petitioner's Appeal of the Order on*

Motion to Clarify Scope of Judicial Review Proceedings (Feb. 26, 2016). This judicial review proceeding concerns only Transfer No. 79380, yet Parrott states that he “continues to object to both 79357 and 79380.” *Opening Brief* at 4. Because Parrott did not file a petition for judicial review of the Director’s decision on Application for Transfer No. 79357, within 28 days of issuance of the order, this Court lacks jurisdiction to consider Transfer No. 79357. I.R.C.P. 84(n). The Court determined twice before that Transfer No. 79357 is not within the scope of this proceeding. Parrott is precluded from challenging Transfer No. 79357 in this judicial review proceeding.

V. CONCLUSION

The Director’s *Amended Final Order* was supported by substantial evidence on the record as a whole and the Director considered all factors governing approval of a transfer outlined in Idaho Code § 42-222. As such the Court should affirm the Director’s *Amended Final Order*.

RESPECTFULLY SUBMITTED this 24th day of June, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June 2016, 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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