IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN B. KUGLER Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents. IN THE MATTER OF PERMIT TO APPROPRIATE WATER NO. 35-8359 IN THE NAME OF JOHN B. & DIANE K. KUGLER	Case No. CV 2011-15672 **MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW**

Ruling: The Director's *Final Order Suspending Action and Prohibiting Development* **is affirmed.**

Appearances:

John B. Kugler, Tacoma, Washington, appearing *pro se*;

Andrea L. Courtney, Garrick L. Baxter, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, on behalf of Respondents Idaho Department of Water Resources, and Gary Spackman in his capacity as Interim Director of the Idaho Department of Water Resources.

I.

STATEMENT OF THE CASE

A. Nature of the case.

This case originated on August 15, 2011, when Petitioner John B. Kugler ("Kugler") filed a *Petition for Judicial Review* in the above-captioned action seeking this Court's review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department").[1] The final order under review is the Director's *Final Order Suspending Action and Prohibiting Development* ("*Final Order*") entered on July 18, 2011 in a proceeding before the Department entitled "In the Matter of Permit To Appropriate Water No. 35-8359 in the Name of John B. & Diane K. Kugler." The *Final Order* suspends further action on or development of permit no. 35-8359. Kugler asserts that the Director's *Final Order* is contrary to law in several respects.

B. Course of proceedings and statement of facts.

This matter concerns an application to appropriate water filed by John and Diane Kugler. The application process began on October 4, 1984,[2] when the Kulgers filed an *Application for Permit* with the Department seeking to appropriate 6.0 cfs of groundwater for the irrigation of 313 acres. R., 1-4. On October 4, 1984, the Department completed an *Application for Permit Analysis Sheet*, wherein it determined that the desired point of diversion – T06S R29E S32 NESE within Power County – is located in what has been referred to as the "trust water area."[3] R., 5.

On May 4, 1990, the Department sent the Kuglers a letter informing them that its approval of their application had been delayed "[d]ue to the Swan Falls litigation." R., 8. The

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[1] The case was reassigned by the clerk of the court to this Court on August 16, 2011, pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights*. R., 183–184.

[2] The Table of Contents for the agency record indicates the *Application for Permit* is dated April 13, 1984. However, the *Application* itself indicates a date received of October 4, 1984.

[3] The Department has provided that the trust water area "represents that certain geographical area which includes flows of the Snake River surface water and its tributaries including ground water between Swan Falls and Milner Dam that are in excess of the minimum stream flows as measured at the Murphy Gage, encompassing what is known as the Eastern Snake River Plain Aquifer ("ESPA")." *Respondents' Brief*, p.2. A map of the trust water area is appended to IDWR's Water Appropriation Rules at IDAPA 37.03.08.

letter further provided that should the Kuglers wish to continue with their proposed development plans, they had to complete and return an enclosed questionnaire. R., 8. The Kuglers timely completed and returned the questionnaire to the Department. R., 10. Meanwhile, on May 16, 1986, the Kuglers enrolled the land associated with their application into the Conservation Reserve Program. R., 42–43.

On July 27, 1990, the Department approved the Kuglers' application and issued permit no. 35-8359 in their names. R., 18–19. The permit authorized the appropriation of 6.0 cfs of groundwater for the irrigation of 313 acres, subject to the following condition, among others:

> Any license issued by IDWR pursuant to the permit or portion thereof for the use of trust water is subject to a term review of 20 years after the date of this approval to determine availability of water for the use and to re-evaluate the public interest at the end of the term.

R. 18. The Kuglers subsequently assigned their interest in the permit to Northwest Farm Credit Services, ACA. R., 20.

On November 9, 1994, the Department issued an *Order for Temporary Stay of Development and Notice of Formal Proceedings* ("*Temporary Stay Order*") in a matter entitled "In the Matter of Approved Permits for the Appropriation of Ground Water from the Eastern Snake River Plain Aquifer for Which Proof of Beneficial Use Has Not Been Submitted and is Not Past Due." R., 24–27. The *Temporary Stay Order* directed that all owners of permits to appropriate groundwater within the boundaries of the Eastern Snake Plain Aquifer ("ESPA") "shall, effective immediately upon receipt of this order, temporarily stop further development under the permit until the Director authorizes further development." R., 26. Permit no. 35-8359 was one of the permits to which the *Temporary Stay Order* applied. The stated grounds underlying the issuance of the *Temporary Stay Order* included the Director's issuance of a moratorium order on the processing and approval of applications for permit to appropriate water from the ESPA entered on April 30, 1993, various delivery calls made by senior surface and groundwater right holders against junior priority groundwater rights on the ESPA, and drought conditions that aggravated water shortages experienced by all water right holders. R., 24.

The *Temporary Stay Order* required affected permit holders to complete one of the following actions by February 1, 1995: (1) file proof of beneficial use, (2) submit evidence of substantial investment, or (3) request an indefinite stay in development. R., 26–27. The holder of permit no. 35-8359, which at the time was Northwest Farm Credit Services, failed to timely

respond to the *Temporary Stay Order*, and a *Final Order* cancelling permit no. 35-8359 was issued on February 14, 1995. R., 31–33. The Director subsequently rescinded the cancellation of the permit on April 4, 1995, after Northwest Farm Credit Services assigned the permit jointly to itself and to Kugler, and Kugler filed a *Motion for Reconsideration* of the cancellation. R., 46–47. In addition to rescinding the cancellation, the Director granted Kugler an indefinite stay in the development period for the permit, subject to certain conditions. R., 46–47. The Department subsequently approved three requests for extension of time to submit proof of beneficial use under the permit, extending the deadline until December 1, 2007. R., 53, 60 & 65. On November 1, 2007, the Kuglers filed another *Request for Extension of Time*, requesting that the December 1, 2007, deadline be extended until December 1, 2010. R., 73. The Department did not act on the *Request for Extension of Time*. Instead, on December 6, 2007, the Department issued an *Order Continuing Indefinite Stay in Development Period.* R., 74–76.

In that *Order*, the Department concluded that the ESPA moratorium prohibiting the processing and approval of applications for permit was still in effect and that the conditions resulting in the *Temporary Stay Order* had not been alleviated. R., 75. As a result, the Department directed "that the order granting an indefinite stay in the development period for Permit No. 35-8359 issued by the Department on April 4, 1995 is **CONTINUED**" subject to the following conditions:

1. Additional work by the permit holder in developing a water right under terms of the permit is not authorized until the Department specifically authorizes resumption of work.

2. The permit holder is not authorized to assign ownership of the permit to another party without prior approval of the Department.

3. The Department may rescind or modify the indefinite stay hereby granted if the Eastern Snake River Plain moratorium is modified or rescinded.

R., 75–76. On December 21, 2007, Kugler timely filed a *Request for Reconsideration* with the Department. R., 78. Meanwhile, on January 28, 2008, Northwest Farm Credit Services assigned its remaining interest in permit no. 35-8359 to Kugler. R., 84.

A hearing on Kugler's *Request for Reconsideration* was held on January 21, 2008, with Gary Spackman acting as the hearing officer.[4] On March 23, 2009, the hearing officer issued a

[4] Gary Spackman was not appointed interim director of the Department until July of 2009.

Preliminary Order Suspending Action and Prohibiting Development ("*Preliminary Order*"), directing "that further **action on permit no. 35-8359 is Suspended** and further development is prohibited." R. 107. In support of the determination to suspend further action on the permit, the Director determined that various ongoing delivery calls, decisions by the Department in those calls holding that diversions of ground water in the ESPA are injuring senior water right holders, and the Department's pending review of trust water rights, supported his decision. R., 106–107. Kugler filed a *Petition for Reconsideration* of the *Preliminary Order* with the Department on April 6, 2009. R. 109. The hearing officer issued an *Order* denying Kugler's *Petition for Reconsideration* on April 24, 2009. R., 113–114.

On May 7, 2009, Kugler filed an *Exception and Memorandum* with the Department, raising the following four issues pertaining to the *Preliminary Order*: (1) a lack of evidence in the record that continued development of his permit would significantly effect senior priority water rights; (2) the *Preliminary Order* did not address his request for an extension of time to submit proof of beneficial use; (3) the *Preliminary Order* resulted in a "taking" of property under the U.S. and Idaho Constitutions; and (4) the *Preliminary Order* made no determination or findings about mitigating circumstances that might allow the permit to proceed to development. R., 115–116. On August 23, 2010, Spackman, now acting in his capacity as Interim Director, issued an *Order Granting Augmentation Hearing*, wherein he granted a hearing to augment the existing record, limit to issues one (1) and (4) contained in Kugler's *Exception and Memorandum*. R., 119–122.

On June 14, 2011, the Director held the "augmentation hearing." Kugler represented himself *pro se*, and various Department staff appeared to provide testimony. Also, prior to hearing, on or about March 29, 2011, a document entitled "*IDWR Staff Memorandum*" was submitted to the Director by Department staff that included information on the number of active trust water rights, data regarding the flow of the Snake River at the Murphy Gage from 1980 to 2010, and a simulation of the depletionary effects of Kugler's proposed water use on reaches of the Snake River as modeled by version 1.1. of the Eastern Snake Plain Aquifer Model. R., 128–155.

On July 18, 2011, the Director entered the *Final Order* from which judicial review is sought. R., 166–176. In the *Final Order*, the Director found that Kugler's proposed diversion under permit no. 35-8359, if developed, would jeopardize existing vested water rights held by

senior water users and jeopardize the maintenance of minimum stream flows at the Murphy gage. R., 173. The Director further concluded that Kugler could have, but did not, propose actions to mitigate for the depletions to be caused by his proposed consumptive use of water to protect senior water rights and to justify further development. R., 174. As a result, in the *Final Order* the Director concluded that "further **action on permit no. 35-8359 is Suspended** and further development is prohibited." R., 175. On August 15, 2011, Kugler filed a *Petition for Judicial Review*. R., 181. The parties briefed the issues contained in the *Petition for Judicial Review* and a hearing on the *Petition* was held before this Court on April 23, 2012.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held on April 23, 2012. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or April 24, 2012.

III.
APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, 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 not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall 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 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); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code § 67-5279(4). *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[5] *Id.* The Petitioner (the party challenging the agency decision) 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).

The Idaho Supreme Court has summarized these points as follows:

> The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000) (citations omitted); *see also, Cooper v. Board of Professional Discipline,* 134 Idaho 449, 4 P.3d 561 (2000). 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 Code § 67-5279(3).

IV.
ANALYSIS AND DISCUSSION

A. Permit 35-8359 was issued on July 27, 1990.

As a preliminary matter, there is a dispute between the parties as to when permit no. 35-8359 was issued and to what conditions it is subject. The record in this matter contains a "Permit to Appropriate Water No. 35-08359" dated July 27, 1990 issued in the name of the Kuglers. R.,

[5] Substantial does not mean that the evidence was 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 – whether it be by a jury, trial judge, special master, or hearing officer – 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 eg. 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).

18–19. Notwithstanding, Kugler asserts that the permit at issue in this case was issued on October 4, 1984 – the date he filed the *Application for Permit* with the Department. He further asserts that it was issued without restrictions as to term or other conditions (contrary to the 1990 permit contained in the record which has eight conditions/remarks on its face), and that the 1990 permit contained in the record is a fabrication.

The record in this case establishes that permit no. 35-8359 was issued on July 27, 1990, with the conditions and remarks listed on its face. R., 18–19. There is no evidence in the record to suggest that permit no. 35-8359 was issued prior to that date. While the *Application for Permit* contained in the record depicts that it was "received by" the Department on October 4, 1984, and that it was "recommended for approval," a plain reading of the *Application* in its entirety leaves no doubt that no permit was issued on that date. R., 4. Specifically, the last section of the application entitled "Action of the Director, Department of Water Resources" was never completed by the Director. That section provides:

> This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. _____, and said application is hereby _____."

R., 4. The fact that this section was not completed by the Director on October 4, 1984, establishes that the Director had not examined or approved the *Application for Permit* as of that date. R., 4. Further, the *Application for Permit Analysis Sheet* indicates that the "initial review" was conducted on October 24, 1984, but that the "final regional processing review" was not conducted until July 23, 1990. R., 5. As a result, although the *Application for Permit* was "received" and "recommended for approval" on October 4, 1984, it was not approved on October 4, 1984, and no permit issued in favor of the Kuglers on that date.

Therefore, this Court finds that the record contains only one permit no. 35-8359, and that it was issued on July 27, 1990. The Court further finds that the permit is subject to the eight conditions/remarks contained on the face of the permit. Kugler's assertion that the 1990 permit is a fabrication is a conclusory assertion not supported by further argument in the briefing or by evidence in the record.

B. The Director did not err in a manner specified in Idaho Code § 67-5279(3).

Kugler argues on judicial review that the Director lacked the authority to suspend the development of, or otherwise alter, his water right permit, that the Director's *Final Order* was made upon unlawful procedure, and that the Director's *Final Order* constitutes an unlawful taking of his personal property under both the Idaho and United States Constitutions. For the reasons set forth herein this Court holds that the Director, in his issuance of the *Final Order*, did not err in a manner specified in Idaho Code § 67-5279(3).

i. The plain language of Idaho Code § 42-1805(7) gives the Director the authority to suspend the development of permits to appropriate water.

Under Idaho law, the Department has the "exclusive authority over the appropriation of the public surface and ground waters of the state." I.C. § 42-201(7). When an application for permit to appropriate water is made, the Director is vested with the authority to grant, partially grant, or reject such application if, among other things, it will reduce the quantity of water under existing rights, conflict with the local public interest, or is contrary to the conservation of water resources within the state. I.C. § 42-203A(5). Once a permit is issued the Director has the authority, after notice:

> [T]o suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

I.C. § 42-1805(7). The Department asserts that the above-quoted statute provided the Director with the authority to suspend further action on or development of permit no. 35-8359 in this case.

When interpreting a statute, the Court's primary objective "is to derive the intent of the legislature." *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005). Therefore, the starting point for any statutory interpretation begins with the literal language of the statute itself. *Id.* Where the language of the statute is unambiguous, the court applies the statute's plain meaning. *D & M Country Estates Homeowners Ass'n v. Romriell*, 131 Idaho 160, 165, 59 P.3d 965, 970 (2002). The language of a statute is ambiguous "where reasonable minds might differ as to interpretations." *Hayden Lake Fire Protection Dist.*, 141 Idaho at 312, 109 P.3d at 166.

In this case, the plain language of Idaho Code § 42-1805(7) is unambiguous. Via the plain terms of the statute, the Legislature gave the Director the express authority to suspend issuance or further action on a permit for any of several reasons: (1) to protect existing vested water rights; (2) to ensure compliance with the provisions of chapter 2, title 42, Idaho Code; or (3) to prevent violation of minimum flow provisions of the state water plan. I.C. § 42-1805(7). The record in this case establishes that the Director acted well within his authority under Idaho Code § 42-1805(7) when issuing the *Final Order* suspending further action on or development of permit no. 35-8359.

In his *Final Order*, the Director found that Kugler's proposed diversion under permit no. 35-8359, if developed, would injure existing vested water rights as well as jeopardize the maintenance of minimum stream flows at the Murphy gage[6]:

> 3. The Eastern Snake Plain Aquifer Model ("ESPAM") Version 1.1, predicts that, at steady state, Kuglers' proposed diversion and consumption of water for irrigation will deplete flows in the Snake River by the following amounts:
>
> | | | |
> |---|---|---|
> | Above Milner Dam | 0.68 cfs | 490 acre-feet/year |
> | Below Milner Dam (trust water) | 0.07 cfs | 49.37 acre-feet/year |
>
> 4. During any time that water is not spilling over Milner Dam, Kuglers' proposed diversion and consumptive use of ground water will reduce the quantity of water available to Snake River surface water right holders entitled to divert Snake River water above Milner Dam resulting in injury to the Snake River water right holders.
>
> 5. The proposed development would also deplete spring flows relied upon by aquaculture interests who hold senior priority water rights in the Snake River reach above Milner Dam.
>
> 6. Kuglers' proposed diversion of ground water will deplete flows in the Snake River below Milner Dam. These depletions will reduce the total flow measured at Murphy Gage. The reductions in flow may jeopardize the maintenance of the minimum flows at Murphy Gage.
>
> 7. Senior priority Snake River and spring flow water rights must be protected. The ongoing delivery call decisions by the Department hold that ground water diversions from the Eastern Snake Plain Aquifer are injuring senior water right holders.

[6] The Idaho State Water Plan establishes a zero cfs minimum stream flow on the Snake River at Milner Dam and a 3900 cfs minimum stream flow between April and October at the Murphy gage. IDAPA 37.03.08.030.01(c). *See also,* I.C. § 42-1507 (acknowledging Snake River minimum stream flows set by the Idaho Water Resource Board).

R., 173. The Director further concluded that Kugler could have, but did not, propose actions to mitigate for depletions caused by his proposed consumptive use of water to protect senior water rights and to justify further development of trust water. R., 174. As a result, the Director concluded that "further **action on permit no. 35-8359 is Suspended** and further development is prohibited." R., 175.

The Director's findings of injury to existing senior water rights and jeopardy to the ability to maintain minimum stream flows are supported by the evidence in the record. With respect to injury to senior rights, the *IDWR Staff Memorandum* contained in the record establishes the impacts of diversions under permit no. 35-8359 on Snake River flows using versions 1.1 of the ESPA Model. R., 148–155. The Model results reveal that at steady state diversions under the permit would deplete flows in the Snake River above Milner Dam in the amount of .68 cfs and/or 490.47 acre-feet per year and deplete flows below Milner Dam in the amount of .07 cfs and/or 49.37 acre-feet per year. R., 149. Testimony supporting the Model results was likewise presented before the Director at the June 14, 2011, hearing. Tr., 39–45. Based on this substantial evidence, which was uncontroverted in the record, and given various delivery calls then pending before the Department that resulted in curtailment orders against junior ground water pumpers in the ESPA, the Director determined that Kugler's proposed diversion of ground water would reduce the quantity of water available to Snake River surface water right holders entitled to divert Snake River water above Milner Dam resulting in injury. R., 173.

With respect to the ability to maintain minimum stream flows, the *IDWR Staff Memorandum* established that diversions under permit no. 35-8359 would deplete flows in the Snake River below Milner Dam. The *IDWR Staff Memorandum* also contained a compilation of flow data near the Murphy gage from 1980-2010. R., 146–147. The data establishes that flows on the Snake River have on multiple recent occasions approached the minimum streamflow of 3900 cfs called for in the Swan Falls Agreement and the Idaho State Water Plan, which establish a 3900 cfs minimum stream flow between April and October at the Murphy gage. IDAPA 37.03.08.030.01(c). R., 146–147. Testimony provided at the June 14, 2011, hearing established that in 2005 and 2007 flows at the Murphy gage became very close to falling below the prescribed minimum streamflow, and that in 2007 letters were actually sent to affected water right holders, including those in the trust water area, warning them of potential curtailment as a

result. Tr., 35–37. Based on this substantial evidence, which was uncontroverted in the record, the Director determined that diversions under permit no. 35-8359 would reduce flow at the Murphy gage, and that such a reduction in flow "may jeopardize the maintenance of minimum flows at Murphy Gage." R., 173.

For the forgoing reasons, this Court holds that the Director did not act in excess of the statutory authority of the agency, but rather acted within the express authority granted to him under Idaho Code § 42-1805(7). The Court further finds that his decision to suspend further action on or development of permit no. 35-8259 is supported by substantial evidence in the record, and was not arbitrary, capricious or an abuse of discretion.

ii. The Director did not err in receiving the *IDWR Staff Memorandum* or the testimony of Department staff into evidence.

Kugler argues that the Director violated procedural rules by accepting the *IDWR Staff Memorandum* and testimony of Department staff into evidence at the June 14, 2011, hearing. Kugler cites no authority or case law in support of his argument, and a review of the Idaho Administrative Procedure Act establishes that the Director had the authority to receive and consider the disputed evidence in this case.

When a contested case is initiated under the Idaho Administrative Procedure Act, the agency head may act as the presiding officer at the hearing, or the agency head may appoint a hearing officer to act as the presiding officer. I.C. § 67-5242(2). If the presiding officer in a contested case is not the agency head, the presiding officer may issue a recommended order or a preliminary order from which any party may seek reconsideration. I.C. § 67-5243. Once reconsideration is sought, the presiding officer may issue a written order disposing of the request. I.C. § 67-5243(3). Thereafter, parties are permitted to file exceptions to the recommended order or motion for the review of a preliminary order. I.C. §§ 67-5244 & 67-5245. Once exceptions or a motion for review has been filed, the agency head may either: (1) issue a final order, (2) remand the matter for additional hearings, or (3) hold additional hearings. I.C. §§ 67-5244(2) & 67-5245(6).

In this case, Kugler Filed a *Petition for Reconsideration* of the hearing officer's *Preliminary Order* on April 6, 2009. R. 109. The hearing officer issued a written order disposing of Kugler's *Petition* on April 24, 2009. R., 113–114. Thereafter, Kugler filed his

Exception and Memorandum with the Department. R., 115–116. On August 23, 2010, the Director exercised his authority to hold an additional hearing, and issued an *Order Granting Augmentation Hearing*. I.C. §§ 67-5244(2)(c) & 67-5245(6)(c). On February 15, 2011, the Director filed a *Request for Staff Memorandum* addressing (1) information about the number of active trust water rights issued by the Department for a term of years; (2) data regarding the flow of the Snake River at the Murphy Gage from 1980 to 2010; and (3) the depletionary effects of Kugler's proposed pumping and water use on reaches of the Snake River as modeled by the Eastern Snake Plain Aquifer Model. R., 125-126. On or about March 29, 2011, the *IDWR Staff Memorandum* was submitted to the Director. R., 128–155.

At the hearing held on June 14, 2011, Kugler objected to the introduction of the *IDWR Staff Memorandum* into the record, as well as to the testimony of the various Department staff who testified regarding the *Memorandum*. Tr., 7, ll.12–18, 8–9, 15, ll.11–12. On judicial review, Kugler argues that the *Final Order* was made upon unlawful procedure as a result of the introduction of the disputed evidence.[7] This Court disagrees. Once exceptions are filed to a recommended order, or a motion to review is filed with respect to a preliminary order, the agency head exercises "all of the decision-making power that he would have had if the agency head had presided over the hearing." I.C. §§ 67-5244(3) & 67-5245(7). Idaho Code § 67-5251 further provides that official notice may be taken of "generally recognized technical or scientific facts within the agency's specialized knowledge," provided:

> Parties shall be notified of the specific facts or material noticed and the source thereof, including any *staff memoranda and data*. Notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material noticed. Parties must be afforded a timely and meaningful opportunity to contest and rebut the facts or material so noticed. When the presiding officer proposes to notice staff memoranda or reports, a responsible staff member shall be made available for cross-examination if any party so requests.

I.C. § 67-5251(4) (emphasis added).

In this case, the *Order Granting Augmentation Hearing* dated August 23, 2010, informed Kugler that the Department would present expert witnesses at the June hearing regarding the

[7] Kugler also insinuates impropriety in the fact that the hearing officer in this case, Gary Spackman, was also the agency head that held the hearing on June 14, 2011, and issued the *Final Order*. The Court notes however that the record reflects that Kugler did not raise an objection to Gary Spackman presiding over the June hearing. However, even if an objection were raised, the Court finds that the plain language of Idaho Code § 67-5242(2) expressly allows the agency head to be the presiding officer over a contested case hearing.

impact of diverting water at the points of diversions proposed by Kugler, and that Kugler "shall have an opportunity to present any evidence on the subjects following presentation of Department testimony." R., 120. Kugler was also served with a copy of the *Request for Staff Memorandum* as well as the *IDWR Staff Memorandum* itself on February 15, 2011, and March 30, 2011, respectively. R., 124–127, 128–129. The hearing did not occur until June 14, 2011. Furthermore, at the hearing on June 14, 2011, the Director gave Kugler the opportunity to present his own evidence and cross-examine the expert witnesses called by the Department. Tr., 6, ll.11–25, 9, ll.12–20. Therefore, this Court holds that Kugler was given notice of the *IDWR Staff Memorandum* as well as the expert testimony to be presented at the June 14, 2011, hearing well before the hearing date. The Court further finds that Kugler also had a timely and meaningful opportunity to contest and rebut the *IDWR Staff Memorandum* and that the responsible staff members were made available for cross-examination.

Kugler also argues that there was insufficient evidence in the record to support the *Preliminary Order*. Further, that it was not until he filed the *Petition for Reconsideration* and the Director ordered the augmentation hearing that the Director was able to supplement the record with sufficient evidence to support the *Preliminary Order*. Kugler questions the lawfulness of this procedure. For the reasons previously discussed, the Director indeed had the authority to conduct further hearings including the taking of additional evidence. *See* I.C. § 67-5244 and 67-5245.

However, even without the evidence taken at the augmentation hearing, the Court finds the record was sufficient to support the issuance of the *Preliminary Order*. The *Preliminary Order* did not invalidate Kugler's permit; rather it suspended further action and prohibited further development. Support for the *Preliminary Order* was based on several pending delivery calls filed against junior groundwater pumping in the ESPA. Further, various permits and licenses issued for groundwater in the trust water area, including Kugler's permit,[8] were issued with 20 year terms that were coming due for review. The *Preliminary Order* suspended Kugler's permit until such reviews could take place and a determination could be made regarding the availability of water in the trust area for continued use under existing conditional permits and licenses or for further appropriation. The basis for the *Preliminary Order* therefore would

[8] Kuglar's argument relies in part on his assertion that the permit was issued without conditions and was not located in the trust area. However, for reasons previously discussed, Kuglar's permit included conditions as well as an acknowledgement that the permit was for the use of water located in the trust area.

presumably apply to all permits similarly situated to Kugler's until an inventory of available trust water could be completed. The *Preliminary Order* made clear that:

> This order does not prevent the Director from reviewing continued development of permit no. 35-8359 if:
>
> 1) The Director determines that protection and furtherance of the public interest justifies continued development of a permit; or
>
> 2) The Director determines that continued development and use of water will have no effect on prior water rights because of its location, insignificant consumption of water or mitigation provided by the permit holder to offset injury to other rights.

R., 107.

Thus it is clear that the *Preliminary Order* was not based on the impact of Kugler's permit and left open that determination for a later date. That later date arrived when Kugler filed the *Petition for Reconsideration* and the Director ordered the augmentation hearing. The augmentation hearing provided Kugler the opportunity to present evidence concerning the depletive effects, if any, of his particular permit as well as the opportunity to present evidence on mitigation. Consistent with the purpose of the hearing the Director presented evidence of the depletive effects of Kugler's permit.

Therefore, for the reasons stated above, this Court holds that the *Final Order* was not made upon unlawful procedure.

iii. At the time the Director issued the *Final Order*, Kugler did not have a vested water right.

Kugler asserts that at the time the Director issued the *Final Order* he had a protected property right in permit no. 35-8359. He argues further that the Director's *Final Order* suspending the development of permit no. 35-8359 constituted an unconstitutional taking of his property right under the Idaho and United States constitutions.

The Idaho Supreme Court recently addressed the point in time that a water right vests in an applicant under the statutory method of appropriation in *Idaho Power Co. v. Idaho Department of Water Resources*, 151 Idaho 266, 255 P.3d 1152 (2011). The Court concluded that "a water right does not vest until the statutory procedures for obtaining a license are

complete, including the issuance of a license." *Id.* at 275, 255 P.3d at 1161. The Court summarized those statutory procedures as follows:

> I.C. § 42–103 specifically requires an individual wishing to appropriate water to abide by the statutory procedures laid out in title 42 of the Idaho Code before obtaining a water right, and no longer allows water to be appropriated via the constitutional method. The first step under the statute is for the applicant to apply to the Department for a permit. I.C. § 42–202. Next, the Department publishes notice of the proposed diversion and provides interested parties the opportunity to protest the application. I.C. § 42–203A. After holding a hearing regarding any protests to the application, the Department determines whether to grant the permit based on the statutory criteria laid out in I.C. § 42–203A(5). I.C. § 42–203A(5). If the applicant is granted a permit, the applicant then has a specified period of time to submit proof that the applicant has completed actual construction of the project and applied the water to full beneficial use. I.C. §§ 42–204 & 42–217. The Department is then required to conduct a field examination to confirm that the water user has completed construction and applied the water to beneficial use. I.C. § 42–217. If, based on the proof submitted by the applicant and the field examination, the Department "is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the [D]epartment shall issue to such user or users a license confirming such use." I.C. § 42–219(1). On the other hand, "[i]n the event that the [D]epartment shall find that the applicant has not fully complied with the law and the conditions of permit, it may issue a license for that portion of the use which is in accordance with the permit, or may refuse issuance of a license and void the permit." I.C. § 42–219(8).

Id. at 274, 255 P.3d at 1160. The Court made clear that all of the above-quoted statutory steps must be completed before a water right vests in an applicant. *Id.* at 275, 255 P.3d at 1161.

In this case, Kugler filed an application and received a water right permit, but it is factually undisputed that no proof of beneficial use has been submitted to the Department with respect to the permit, and that at no time has a license been issued. Thus, under Idaho law, Kugler has not yet obtained a vested right to develop and use the water sought in his *Application for Permit*, but rather has obtained only an inchoate or contingent right. *See e.g., In re Hidden Springs Trout Ranch, Inc.,* 102 Idaho 623, 625, 636 P.2d 745, 747 (1981) (an "applicant gains but an inchoate right upon filing of the application which may ripen into a vested interest following proper statutory adherence"). Since Kugler did not have a vested right at the time the Director issued his *Final Order*, the Director's decision to suspend further action on the permit as expressly authorized under Idaho Code § 42-1805(7) did not constitute an unconstitutional

taking. It follows that the Director did not act in violation of constitutional or statutory provisions.

C. The issue of whether Kugler is entitled to a well driller's permit is not properly before this Court.

Kugler argues that the Director has wrongfully refused to issue him a well drilling permit. Kugler improperly raises this issue on judicial review. The Idaho Administrative Procedure Act provides that a person aggrieved by a "final agency action" is entitled to seek judicial review. I.C. § 67-5270(2). However, "a person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required." I.C. § 67-5271. "Absent a statutory exemption, the exhaustion of an administrative remedy is a pre-requisite for resort to the court." *Dept. of Agric. v. Curry Bean Co.*, 139 Idaho 789, 792, 86 P.3d 503, 506 (2004). Moreover, the Idaho Supreme Court has directed that "generally the exhaustion doctrine implicates subject matter jurisdiction because a district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted." *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005).

In this case, there is no indication in the record that Kugler has applied for a well driller permit with the Department as required by Idaho Code § 42-235. More importantly there is no indication in the record that the Director has taken any final action with respect to such a request if one has been made. The *Final Order* of the Director from which judicial review was taken makes no determination with respect to any request for a well driller's permit, but rather addresses only the status of Kugler's permit to appropriate water. Therefore, the issue of whether Kugler is entitled to the issuance of a well driller's permit is not properly before this Court and will not be considered.

D. Kugler has failed to establish prejudice to a substantial right.

In addition to failing to establish that the Director erred in a manner specified in Idaho Code § 67-5279(3), Kugler has failed to establish prejudice to a substantial right as required by Idaho Code § 67-5279(4). At the time the Director issued his *Final Order*, Kugler had not yet submitted proof of beneficial use under permit no. 35-8359, nor had a license been issued. Therefore, as stated above, Kugler did not have a vested right to develop and use the water

sought in his *Application for Permit*. Given that Kugler had not obtained a vested right, and that the Director had the express authority under Idaho Code § 42-1805(7) to suspend the issuance or further action on permit no. 35-8359, no substantial right of Kugler's was prejudiced when the Director issued his *Final Order*.

E. The Court does not have the authority to grant Kugler the relief he requests in a judicial review proceeding.

In his briefing on judicial review, Kugler requests that this Court direct the Director to "immediately issue a well drilling permit to appellant and grant a reasonable extension of time in which to complete the irrigation system so that proof of application to a beneficial use can be provided to the IDWR." *Appellant's Br.*, p.6. Idaho's Administrative Procedure Act provides that in reviewing an administrative appeal, a reviewing court's actions are limited to either affirming the agency action, or setting it aside, in whole or in part, and remanding it for further proceedings as necessary. I.C. § 67-5279. Therefore, even if Kugler were successful in his arguments before this Court, the Court would not be in a position to grant the relief he requests in this judicial review proceeding. *See e.g., Idaho Power v. Idaho Department of Water Resources*, 151 Idaho 266, 255 P.3d 1152 (2011) (holding, that "even if requiring the issuance of a license by operation of law was a viable remedy for Idaho Power, this Court would not be in the position to grant such a remedy in a judicial review proceeding").

V.
CONCLUSION

Based on the foregoing, the Director's *Final Order Suspending Action and Prohibiting Development*, dated July 18, 2011, is **affirmed.**

Dated May 23, 2012

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW was mailed on May 23, 2012, with sufficient first-class postage to the following:

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