

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	PRELIMINARY ORDER
FOR PERMIT NO. 25-14428 IN THE)	DENYING MOTION FOR
NAME OF BLACK HAWK HOA AND)	SUMMARY JUDGMENT AND
<u>IRON RIM RANCH HOA</u>)	DENYING APPLICATION

BACKGROUND

On October 13, 2015, Black Hawk HOA and Iron Rim Ranch HOA (collectively referred to as the "Applicants") filed Application No. 25-14428, seeking a permit to divert 0.76 cfs from ground water for domestic use at seventy-six homes within the Applicants' subdivisions.¹ The Applicants amended Application 25-14428 on October 22, 2015, making minor adjustments to the proposed points of diversion and place of use.

The Department published notice of Application 25-14428 in The Post Register (Bonneville County) on November 5 and 12, 2015. A joint protest was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, and Minidoka Irrigation District (collectively referred to as the "Coalition"). On October 3, 2016, Idaho Ground Water Appropriators, Inc. ("IGWA"), filed a *Petition to Intervene* ("Petition"). IGWA's Petition was denied on October 18, 2016, for failure to state a substantial reason for the delay in filing the Petition. *Order Denying Petition to Intervene* at 3-4.²

On October 7, 2016, the Applicants filed a *Motion for Summary Judgment* ("Motion"), seeking "a determination, as a matter of law, [that] the [protestants] cannot suffer a legally cognizable injury to their water rights from [Application 25-14428] to service a multiple ownership subdivision with ground water from a single well as long as each subdivision lot (or

¹ Black Hawk Subdivision and Iron Rim Ranch Subdivision together encompass 141 individual subdivision lots. The Applicants own water right 25-7669, which authorizes the diversion of 1.05 cfs for domestic use (limited to 13,000 gpd and ½ acre of irrigation per lot) for sixty-five lots. Application 25-14428 is intended to cover the domestic use at the remaining seventy-six lots. In 2013, the Applicants obtained Permit 25-14395, which authorizes in-house domestic use for the same seventy-six lots described in Application 25-14428. No outside irrigation is authorized under Permit 25-14395. Application 25-14428 represents the full domestic use (inside culinary use and outside domestic irrigation up to ½ acre) for the seventy-six lots and is intended to replace Permit 25-14395.

² On October 20, 2016, IGWA filed a *Petition for Reconsideration of Order Denying Petition to Intervene*. The hearing officer issued an *Order Denying Petition for Reconsideration* on November 10, 2016. By rule, the *Order Denying Petition to Intervene* and *Order Denying Petition for Reconsideration* are interlocutory orders. See IDAPA 37.01.01.710. On November 29, 2016, IGWA filed a *Motion to Designate Order Denying Petition to Intervene and Order Denying Petition for Reconsideration as Recommended or Preliminary Orders* ("Motion to Designate"). IGWA asked the hearing officer to designate the *Order Denying Petition to Intervene* and *Order Denying Petition for Reconsideration* as recommended or preliminary orders to allow for immediate appeal of the orders to the Director. Because of the issuance of this preliminary order, IGWA may now "in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head." IDAPA 37.01.01.730.02(b) (emphasis added). Accordingly, the hearing officer need not address IGWA's Motion to Designate.

unit) is limited to the same water use parameters contained in the definition for an exception to the requirement to file an application for permit set forth in Idaho Code § 42-111 (13,000 gpd and no more than irrigation of up to ½ acre of land)." *Motion*, page 4. On October 26, 2016, the Coalition filed a *Response to Motion for Summary Judgment* ("Response").

STANDARD OF REVIEW

The Department's Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize the filing of motions for summary judgment. The rules do, however, authorize the filing of pre-hearing motions, which would include motions for summary judgment. *See* IDAPA 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (*see* IDAPA 37.01.01.052), the Department relies on the standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment. A motion for summary judgment may be granted if a hearing officer determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* I.R.C.P. 56. In this case, the parties have not identified any genuine issues of material fact that would prevent the hearing officer from issuing a decision on the Applicants' Motion.

FINDINGS OF FACT

1. Application 25-14428 proposes to divert 0.76 cfs from ground water for domestic use at seventy-six homes. The proposed points of diversion are two existing ground water wells which divert water from the Eastern Snake Plain Aquifer ("ESPA") under existing domestic ground water rights owned by the Applicants.

2. The Applicants propose to supply up to 13,000 gallons per day per home and allow up to ½ acre of irrigation per home for all of the seventy-six homes described in Application 25-14428.

3. Irrigation is a consumptive use of water. There is a hydrologic connection between the ESPA and the Snake River. *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 197 (2016); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). Accordingly, any new consumptive use of ground water within the ESPA has the potential to reduce the quantity of water under existing rights from the Snake River and springs connected to the ESPA.

4. The domestic use proposed in Application 25-14428 (including up to ½ acre of irrigation per home) will reduce flows in the Snake River above Milner Dam. *Motion*, ¶¶ 24-27, pages 12-14.

5. The members of the Coalition own and divert water rights from the Snake River above Milner Dam. *See Response*, page 2.

6. The domestic use proposed in Application 25-14428 (including ½ acre of irrigation per lot at seventy-six lots) will reduce the quantity of water in the Snake River above

Milner Dam by approximately 85.9 acre-feet per year, which equates to a continuous reduction of flow in the Snake River of approximately 0.12 cfs. *Motion*, ¶ 25, page 13.

7. The domestic use at a single home within the Applicants' subdivisions (if it includes ½ acre of irrigation) will reduce the quantity of water in the Snake River above Milner Dam by approximately 1.1 acre-feet per year, which equates to a continuous reduction of flow in the Snake River of approximately 0.002 cfs. *Motion*, ¶ 27, page 14.

RELEVANT STATUTORY PROVISIONS

Idaho Code § 42-226 states, in part:

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use.

Idaho Code § 42-229 states, in part:

The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application permit and license procedure as provided in this act

Idaho Code § 42-227 states:

The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of environmental quality and providing further that the drilling of such wells shall be subject to the [well driller] licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

Idaho Code § 42-111 states:

(1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:

(a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or

(b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

(2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.

(3) Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section. The purpose of this limitation is to prohibit the diversion and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process for developing a right to the use of water pursuant to chapter 2, title 42, Idaho Code.

Idaho Code § 42-203A(5) sets forth the criteria for evaluating applications for permit:

In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The applicant bears the ultimate burden of persuasion for the criteria listed in Idaho Code § 42-203A(5). IDAPA 37.03.08.040.04.c.

Rule 20.11 of the Department's Conjunctive Management Rules (IDAPA 37.03.11) states, in part:

A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code . . . provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury.

Section 3, Article XV of the Idaho Constitution states, in part:

Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

ANALYSIS

Ground water within the state of Idaho is property of the state. Generally, the right to divert ground water can only be acquired by filing an application for permit. Diverting ground water for "domestic purposes," as defined in Idaho Code § 42-111, is not subject to the permit process. In other words, ground water rights for "domestic purposes" can be acquired through diversion and use of water; no permit is required. The term "domestic purposes" includes "[t]he use of water for homes . . . including the irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day . . ."

The term "domestic purposes" does not include water for multiple ownership subdivisions "unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b)" of Idaho Code § 42-111 (total diversion of 0.04 cfs and 2,500 gallons per day).³ Therefore, homeowners within a multiple ownership subdivision seeking to divert water from a community well in excess of the diversion rate and volume limitations set forth in

³ The term "domestic purposes" and the beneficial use of "domestic" are not the same. For example, water may be diverted by a multiple ownership subdivision for "domestic" use, even though the subdivision does not meet the definition of "domestic purposes" set forth in Idaho Code § 42-111. Water rights for subdivisions often identify the beneficial use as "domestic." Further, there are many beneficial uses, other than domestic, which may fit within the definition of "domestic purposes" in Section 42-111. Stockwater use, for example, may meet the definition of "domestic purposes" if the total daily diversion volume does not exceed 13,000 gallons per day. Commercial use may meet the definition of "domestic purposes" if the diversion rate does not exceed 0.04 cfs and the daily diversion volume does not exceed 2,500 gallons per day.

subsection (1)(b) are not exempt from the permitting process and must obtain a recorded water right (either collectively or individually) prior to diverting ground water for domestic use.

Every application for permit filed with the Department is subject to the review criteria set forth in Idaho Code § 42-203A(5). Therefore, the Applicants must demonstrate that the water use proposed in their application will not “reduce the quantity of water under existing water rights.” Idaho Code § 42-203A(5)(a).

The Applicants acknowledge that the domestic use proposed in Application 25-14428 will result in a reduction of flows in certain reaches of the Snake River and would therefore reduce the quantity of water under existing rights. *See Motion*, ¶¶ 24-27, pages 12-14. The Applicants argue, however: “[U]nder Idaho law, the use of water for domestic purposes, including the irrigation of up to ½ acre while using no more than 13,000 gallons per day has been deemed by the Idaho Legislature to cause no cognizable injury to anyone else – it is *de minimus*.” *Motion*, page 19. The Applicants further argue: “Use of the label *de minimus* for domestic uses means as a matter for law that no injury can occur to the Coalition, and there is no need for the [Applicants] to address factual claims of injury in this proceeding.” *Id.* “The actual impact is not an impact that is of consequence in the law.” *Id.*

The term “*de minimus*” is not found in Title 42, Idaho Code. The term has been used by the Snake River Basin Adjudication (“SRBA”) Court to designate a subset of water rights which were deferrable in the adjudication. *See Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimus Domestic and Stock Water Claims* (SRBA Court, June 28, 2012) (“SRBA Order”). According to the SRBA Order, the term *de minimus* does not include “water for multiple ownership subdivisions . . . unless the use meets the diversion rate and volume limitations set forth in subsection (b) above [0.04 cfs and 2,500 gallons per day].” *SRBA Order*, pages 2-3. The SRBA Order only addresses the question of whether a claim must be filed in the SRBA for certain water uses. It does not limit or alter the Department’s scope of review under Idaho Code § 42-203A(5). More importantly, it does not declare that the water uses designated as *de minimus* are non-injurious or that such uses cannot cause a legally cognizable injury to other water rights.

The Applicants assert that the Idaho Legislature has designated a group of domestic uses that cannot, as a matter of law, cause a legally cognizable injury to existing water rights. The Applicants, however, do not cite any statute or other document from the Idaho Legislature which explicitly creates such a group. Idaho Code §§ 42-111 and 42-227 together define a subset of domestic uses which are not subject to the application-permit-license process described in Chapter 2, Title 42, Idaho Code. Sections 42-111 and 42-227 simply identify which proposed uses must be pursued through an application for permit and which uses are exempt from that process. These statutes do not make any determination of injury or non-injury caused by certain types of water use.

In addition to broad arguments about *de minimus* classifications, the Applicants cite three specific sources to support their argument that their proposed water use cannot injure other water rights: (1) Idaho Constitution, Article XV, Section 3; (2) Rule 20.11 of the Department’s

Conjunctive Management Rules (IDAPA 37.03.11); and (3) moratorium orders issued by the Department. Each of these sources will be discussed separately.

1. Article XV, Section 3

Article XV, Section 3 establishes a preference system for various beneficial uses of water within the state. Diversion of water for domestic purposes is given priority over other beneficial uses, such as irrigation (agricultural use). Section 3 makes it clear, however, that the implementation of the preference system is "subject to such provisions of law regulating the taking of private property for public and private use." Idaho Const., Article XV, Sec. 3.

The Applicants argue that the preference system of Section 3 creates a free pass for any injury caused by domestic uses. The Applicants believe Section 3 protects domestic water users from addressing injury concerns or providing mitigation when existing water rights are impacted by domestic uses.

Section 3 does not support the Applicants' argument. Section 3 does not state that domestic uses cannot, as a matter of law, reduce the quantity of water under existing water rights. Nor does Section 3 state that the injury resulting from a domestic use should be considered negligible or *de minimus*.

Section 3 also creates other beneficial use preferences. For example, the diversion of water for mining or milling purposes within an organized mining district has a preference over agricultural uses. Under the interpretation proposed by the Applicants, a large milling operation (within a designated mining district) could obtain a new consumptive-use water right from the upper Snake River system without having to account for or mitigate for injury to any of the existing irrigation water rights in the system. Such an outcome is directly contrary to the prior appropriation doctrine.

2. Rule 20.11 of the Conjunctive Management Rules (IDAPA 37.03.11)

Rule 20.11 shields ground water rights for "domestic purposes" (as defined in Idaho Code § 42-111), recorded and unrecorded, from delivery calls filed by certain senior water right holders.⁴ The Applicants argue that the exclusion of these water rights for "domestic purposes" from delivery calls is another indication that domestic water users cannot cause a legally cognizable injury to existing water rights.

The Applicants assign more meaning to Rule 20.11 than is supported by the plain language of the rule. Rule 20.11 does not make any determination about injury or non-injury. It merely identifies what types of water rights are subject to a delivery call under the Conjunctive Management Rules. Further, in *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 881, 154 P.3d 433, 452 (2007), the Idaho Supreme Court determined that Rule 20.11 and Article XV, Section 3 "can be read together and applied in accordance with the Constitution," noting that the Conjunctive Management Rules "do not exclude the possibility of

⁴ Rule 20.11 recognizes that the holder of a domestic water right can make a delivery call against other holders of domestic water rights when suffering material injury.

a takings claim” by senior water users whose water rights have been taken by domestic water users. In so holding, the Idaho Supreme Court recognized that junior domestic water users can cause legally cognizable injury to existing senior water users.

3. Moratorium Orders of the Department

On April 30, 1993, the Department issued an *Amended Moratorium Order* (“Moratorium”) restricting the “processing and approval of presently pending and new applications for permits to appropriate water from all surface and ground water sources within the Eastern Snake River Plain Area” *Moratorium*, page 4.

“The moratorium does not apply to any application for domestic purposes as such term is defined in section 42-111, Idaho Code.” *Moratorium*, Order ¶ 5, page 5. “For the purposes of this exception, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered provided each unit satisfies the definition for the exception of requirement to file an application for permit as described in [Section 42-111].” *Id.*

The proposed points of diversion listed in Application 25-14428 are not located within the Eastern Snake River Plain Area as defined by the *Moratorium*. However, the Applicants argue that, by issuing the Moratorium with an exclusion for multiple ownership subdivisions (where each unit is limited to 13,000 gpd and ½ acre of irrigation), the Department “determined that any injury caused by domestic uses (including injury from use of a community well in a subdivision) was *de minimus* and, therefore, not legally cognizable to prevent the development of domestic uses of water.”⁵ *Motion*, page 18.

The exceptions or exclusions set forth in the Moratorium merely govern what types of applications can continue to be processed and evaluated by the Department. They are not a final determination of injury or non-injury. The Moratorium cannot be used to trump or circumvent the statutory review criteria required for all applications for permit. Further, because the proposed points of diversion listed in Application 25-14428 are not located within the Eastern Snake River Plain Area as described in the Moratorium, the Moratorium does not prevent the Department from processing Application 25-14428 and evaluating it based on all of the review criteria listed in Idaho Code § 42-203A(5).

Summary

The Applicants ask the Department to declare, as a matter of law, that the domestic use proposed in Application 25-14428, where each unit is limited to 13,000 gpd and ½ acre of irrigation, cannot cause a legally cognizable injury to existing water rights connected to the ESPA, including the water rights held by the Coalition. The Applicants would have the

⁵One might argue that it would be inconsistent for the Department to adopt a moratorium on issuing new permits based on injury concerns and then exclude a certain category of water use from the moratorium which the Department considered injurious. If there is an inconsistency, the proper way to address such an inconsistency would be to amend the moratorium order and remove the exclusion, not to approve applications that are contrary to the application review criteria set forth in Idaho Code § 42-203A(5).

Department classify such domestic use as beyond the reach of legal injury. The Applicants have not identified any statutory provisions that support such a determination. Further, the constitutional provisions, administrative rules and Department orders identified by the Applicants do not insulate domestic uses from the injury review set forth in Idaho Code § 42-203A(5)(a). These sources do not make any explicit determinations on injury caused by domestic uses.

In the absence of a statute, rule or order specifically declaring applications for domestic uses to be non-injurious to senior water rights, the Department must review each application for domestic use on a case-by-case basis to determine if the proposed water use will reduce the quantity of water under existing water rights. Idaho Code § 42-203A(5)(a). In this case, the Applicants acknowledge that the proposed water use will, in fact, reduce the quantity of water under existing rights. *Motion*, ¶¶ 24-27, pages 12-14. The total consumptive use proposed in Application 25-14428 would reduce the quantity of water in the Snake River above Milner Dam by approximately 85.9 acre-feet per year, which equates to a continuous reduction of flow in the Snake River of approximately 0.12 cfs. *Motion*, ¶ 25, page 13.

Multiple ownership subdivisions present a unique challenge for injury review. Idaho law does not require lot owners within multiple ownership subdivisions to pursue joint permit applications. Each lot owner within a subdivision could file a separate application, describing domestic use for a single home with water diverted from a community well. In this case, the Applicants filed a joint application to cover seventy-six homes, but could have filed seventy-six separate applications, each describing domestic use at a single home, with diversion from a community well.

Because the proposed water use could have been proposed through seventy-six separate applications, each proposing domestic use for one home, it is important for the Department to evaluate the impact of domestic use at a single home within the subdivision when evaluating potential injury under Idaho Code § 42-203A(5)(a). Using the Department's transfer tool, the Applicants estimate that the cumulative impacts of a single home domestic use from the Applicants' community well(s) would be approximately 1.1 acre-feet per year. *Motion*, ¶ 27, pages 14. This equates to a continuous reduction to the Snake River flow of 0.002 cfs. *Id.*

Although small, 1.1 acre-feet per year and 0.002 cfs of continuous flow is a reduction to the quantity of water under existing water rights. The Applicants must, therefore, provide mitigation to offset the reduction before Application 25-14428 can be approved. The Applicants have not proposed any mitigation to offset the calculated reduction. Therefore, Application 25-14428 should be denied based on reduction of the quantity of water under existing water rights.

Local Public Interest Factors

The Applicants identify a number of public interest factors that support issuing water permits for multiple ownership subdivisions. *Motion*, pages 20-21. These items fall within the local public interest review described in Idaho Code § 42-203A(5)(e). If, as this order requires, applicants for domestic use at a multiple ownership subdivisions must demonstrate no injury to existing water rights, subdivision developers may forgo building community water systems and

instead require lot owners to drill individual domestic wells, thereby avoiding the permitting process altogether.

There can be no doubt that the current statutory structure creates a disincentive for subdivisions to construct community wells. Drilling individual domestic wells rather than community wells may have some undesirable results. Drilling individual wells in a subdivision rather than a community well increases the risk of contamination of the aquifer. Further, a community system would likely be monitored for water quality by the Idaho Department of Environmental Quality, whereas individual wells would not be. Finally, a community system could be monitored by a watermaster to prevent over-pumping. Diversions from individual domestic wells are not easily regulated.

The current statutory structure also creates a disincentive for single-home domestic water users (who meet the definition of "domestic purposes" in Idaho Code § 42-111) to pursue a recorded water right. As shown above, a single-home domestic use from the ESPA, if it includes irrigation, can have a small, but measurable, impact to senior surface water rights hydraulically connected to the ESPA. As such, applicants pursuing domestic rights for single home use might be required to mitigate for potential impacts to senior rights. Many single-home domestic ground water users, who would prefer to obtain a recorded water right, may be deterred from doing so under the threat of mitigation obligations.

Although these local public interest factors may favor approval of Application 25-14428, these factors cannot be used to eliminate or overcome the injury review under Idaho Code § 42-203A(5)(a). The local public interest review criterion is distinct from the injury criterion and the two should not be conflated. Local public interest factors cannot be used as a justification to waive or ignore injury concerns. The Department must apply the existing laws as written.

CONCLUSIONS OF LAW

1. Pursuant to Idaho Code § 42-203A(5)(a) and Rule 40.04 of the Department's Water Appropriation Rules (IDAPA 37.03.08), an applicant seeking a permit to appropriate the waters of the state of Idaho must demonstrate that the proposed water use will not "reduce the quantity of water under existing water rights." This includes applicants seeking permits for domestic use at multiple ownership subdivisions (where each unit will divert less than 13,000 gallons per day and irrigate less than ½ acre).

2. Idaho's water laws do not designate a class of domestic water uses that are deemed *de minimus* or non-injurious. Although, Idaho Code §§ 42-111 and 42-227 define a subset of water users that are exempt from filing an application for permit, these statutes do not declare that the exempt uses are non-injurious as a matter of law. Therefore, the Applicants' Motion must be denied.

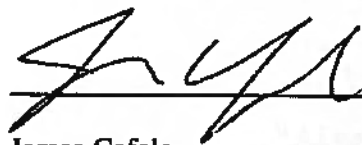
3. The Applicants acknowledge that their proposed water use will reduce the quantity of water under existing water rights on the Snake River. See *Motion*, ¶¶ 24-27, pages 12-14. The Applicants have not identified any plan to mitigate for the impact to existing water rights. See IDAPA 37.03.08.045.01.iv. Therefore, Application 25-14428 must be denied.

ORDER

IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by the Applicants, Black Hawk HOA and Iron Rim Ranch HOA, is **DENIED**.

IT IS FURTHER ORDERED that Application for Permit No. 25-14428 filed in the name of Black Hawk HOA and Iron Rim Ranch HOA is **DENIED**.

Dated this 13th day of January 2017.

A handwritten signature in black ink, appearing to read 'J. Cefalo', is written over a horizontal line.

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of January, 2017, true and correct copies of the document described below were served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed to the following:

Document Served:

Preliminary Order Denying Motion for Summary Judgment and Denying Application

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