

AUG 30 2011

By _____

Clerk

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

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

TWIN FALLS CANAL COMPANY and
NORTH SIDE CANAL COMPANY,

Petitioners,

vs.

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

Respondents,

and

THE IDAHO GROUND WATER
APPROPRIATORS, INC., THE MUD LAKE
WATER USERS, INC., INDEPENDENT
WATER USERS, JEFFERSON CANAL CO.,
MONTEVIEW CANAL CO., PRODUCER'S
CANAL CO., AND FREMONT-MADISON
IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF LICENSED WATER
RIGHT NO. 01-7011 IN THE NAME OF
TWIN FALLS CANAL COMPANY AND
NORTH SIDE CANAL COMPANY

) Case No. CV-2010-5377

)
) **MEMORANDUM DECISION**
) **AND ORDER ON PETITION**
) **FOR JUDICIAL REVIEW**

Ruling: The Director's October 18, 2010 *Amended Final Order* is **affirmed**.

Appearances:

John K. Simpson and Shelley M. Davis of Barker Rosholt & Simpson, LLP, Boise, Idaho, attorneys for North Side Canal Company and Twin Falls Canal Company.

Michael C. Orr, Clive J. Strong, and Garrick L. Baxter, Deputy Attorneys General of the State of Idaho, Boise, Idaho, attorneys for the Idaho Department of Water Resources and Gary Spackman in his capacity as Interim Director of the Idaho Department of Water Resources.

Candice M. McHugh of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for the Idaho Ground Water Appropriators, Inc.

Rob L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, Idaho Falls, Idaho, attorneys for the Mud Lake Water Users, Inc., Independent Water Users, Jefferson Canal Co., Montevue Canal Co., Producer's Canal Co., and Fremont-Madison Irrigation District.

I.

STATEMENT OF THE CASE

A. Nature of the case.

This case originated when Petitioners North Side Canal Company and Twin Falls Canal Company (collectively, "Canal Companies") filed a *Petition for Judicial Review* in Twin Falls County district court seeking judicial 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 *Amended Final Order* issued on October 18, 2010 by Interim Director Gary Spackman in the following administrative proceeding: In the Matter of Licensing Water Right Permit No. 01-7011 In the Name of Twin Falls Canal Company and North Side Canal Company. The *Amended Final Order* placed certain conditions in the license for water right 01-7011 regarding subordination and term of years which will be covered in detail below. The Canal Companies assert in their *Petition for Judicial Review* that the Director's inclusion of these conditions in his *Amended Final Order* is contrary to law and requests that this Court reverse the same.

¹ The case was reassigned by the clerk of the court to this Court on November 18, 2010, 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*.

B. Factual and procedural background.

This matter concerns the licensing of water right permit number 01-7011 in the name of the Canal Companies. The permitting process began on March 30, 1977, when the Canal Companies filed an application for permit with the Department seeking the right to divert 12,000 cfs of water from the Snake River at Milner Dam for year-round hydropower purposes. R., 4940-4947. The Department approved the application on June 29, 1977, and issued permit no 01-7011 subject to the following conditions:

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before June 1, 1982.
- c. Other: A measuring device of a type approved by the Director shall be permanently installed and maintained as part of the diverting works.

R., 4943. The permit did not contain a subordination condition, or a condition limiting the water right to a term of years.

The Canal Companies subsequently requested, and were granted, an extension of time until June 1, 1987, to submit proof of beneficial use under the permit. R., 2898. In February of 1987, the Canal Companies submitted a second request for extension of time to submit proof of beneficial use. R., 2899. Prior to the second request for extension, the case of *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983) had worked its way through the Idaho court system, raising and addressing various issues regarding hydropower subordination in the Snake River Basin and the authority of the Department to subordinate hydropower water rights. In addition, Idaho Code § 42-203B, which among other things authorizes the Department to subordinate hydropower rights to future upstream consumptive uses, was enacted by the Idaho Legislature and went into effect on July 1, 1985 – prior to the Canal Companies' second request for extension.

As a result of these and other developments, talks between the Canal Companies and the Department concerning the permit turned to the issue of hydropower subordination at Milner Dam. R., 4932-4938, 5062-5068, 2925-2933. In a letter dated April 13, 1987, the Department notified the Canal Companies that it planned to add the following subordination condition to water right permit 01-7011 as a condition to granting their pending extension request:

The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of this permit and

shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of this permit.

R., 2925.

In a response letter dated May 8, 1987, the Canal Companies raised several concerns with the Department's subordination condition and proposed the following amendments to the condition:

The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River basin of the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River basin of the state of Idaho initiated later in time than the priority of this permit.

R., 2927-2930. The primary substantive change proposed by the Canal Companies was their request that water right 01-7011 not be subordinated to future groundwater recharge rights. In a subsequent correspondence dated November 18, 1987, former Director R. Keith Higginson notified the Canal Companies that the Department would adopt the amended language proposed by the Canal Companies. R., 2932. As such, the above-quoted language from the Canal Companies' May 18, 1987, letter is the subordination condition that appears in water right permit 01-7011.

The Canal Companies subsequently applied for, and were granted, two more extensions of time to submit proof of beneficial use, ultimately extending the deadline to November 1, 1993. R., 2900-2902. On that date, Canal Companies submitted proof that they had completed the Milner hydropower project and that water under water right permit 01-7011 had been put to beneficial use. R., 2904. The field examination was performed on October 6 and October 21, 1993, and a field examination report dated October 29, 1993, recommended that the water right be licensed for a total diversion rate of 5,714.70 cfs of water from the Snake River at Milner Dam for year-round hydropower purposes. R., 2906-2923.

In 2006 and subsequently in 2007, the Canal Companies verbally requested that the Department issue a license for water right permit 01-7011. In response, on September 5, 2007, the Department issued a *Notice of Intent to Issue License*. R., 1659-1661. In the *Notice*, the

Department informed the Canal Companies that it would “accept and consider written comments from the Permit Holders and other interested persons or entities addressing the form of the subordination condition that should be included on the license for Water Right No. 01-7011.” R., 1660. The Canal Companies disagreed with the Department’s decision to allow further comments and proceeded to file a mandamus action with the district court in Jerome County Case No. CV 2007-1093. R., 1844-1864. The Canal Companies requested that the Court issue an order compelling the Department to close any protest or comment period and to issue a license for water right permit 01-7011 in accordance with Idaho Code § 42-219. R., 1844-1864. The mandamus action was dismissed by the district court for the failure of the Canal Companies to exhaust their administrative remedies and because the district court determined that the issuance of a license was not a ministerial act subject to mandamus. R., 3305-3319.

The Department proceeded to issue the license for water right 01-7011 on October 20, 2008, for the diversion of 5,714.70 cfs of water from the Snake River for year-round hydropower purposes. R., 2479-2494. In its *Final Order* dated October 20, 2008, the Director determined that the license would be subject to the following pertinent conditions of approval:

1. The diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state of Idaho that are initiated later in time than the priority of this water right and shall not give rise to any right or claim against any junior-priority rights for the depletionary or consumptive beneficial use of water, other than hydropower, within the Snake River Basin of the state of Idaho initiated later in time than priority of water right no. 01-7011.

...

5. The diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

R., 2492-2493. Condition one quoted above will be referred to herein as the “Subordination Condition.” Condition five quoted above will be referred to herein as the “Term of Years Condition.”

On November 4, 2008, the Canal Companies filed a *Protest and Petition for Hearing* with the Department, protesting the Director's adoption of the Subordination Condition and the Term of Years Condition in his *Final Order*.² R., 2507-2510. The Canal Companies protested the Subordination Condition on the grounds that it expanded the scope of subordination set forth in the permit for water right 01-7011 to include subordination of the right to groundwater recharge. R., 2507-2510. The Canal Companies protested the Term of Years Condition on the grounds that the permit contained no such condition. R., 2507-2510. The Department designated the matter a contested case and appointed Gerald F. Schroeder as the presiding Hearing Officer. R., 2511-2513. Before the Hearing Officer, *Petitions to Intervene* were filed by the Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Montevieu Canal Company, Producer's Canal Company, and Fremont-Madison Irrigation District (collectively, "Upper Snake Water Users"), the Idaho Ground Water Appropriators, Inc. ("IGWA")³, and the Idaho Water Resource Board. R., 2514-2517, 2523-2529, 2534-2538. On March 27, 2009, the Hearing Officer issued an *Order* granting the *Petitions to Intervene*. R., 2694-2696.

The Hearing Officer ultimately issued two recommendations pertinent to this proceeding. The first, issued on April 29, 2010, was an *Opinion and Order Granting Motions for Summary Judgment and Recommendation* addressing whether the Director could, at licensing, alter or expand the scope of subordination set forth in the permit to include subordination of the right to groundwater recharge. R., 5573-5593. The Hearing Officer concluded that the Director had the authority to alter the scope of subordination set forth in the permit at licensing, and recommended that the Subordination Condition remain in the license. *Id.* The second recommendation, issued on July 30, 2010, was a *Findings of Fact, Conclusions of Law and Recommendation* addressing whether the Director could, for the first time at licensing, include a condition in the license for water right 01-7011 limiting the license to a specific term of years. R., 6293-6304. The Hearing Officer recommended that the Term of Years Condition specified in the *Final Order* be deleted from the license on the grounds that if the Director chooses to

² The Canal Companies also protested the addition of a new volumetric limitation element adopted by the Director in his *Final Order* with respect to water right 01-7011; however, that issue was resolved before the Department and is not before this Court on judicial review.

³ Technically the *Petition to Intervene* was not filed by IGWA, but by certain of its members including the Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Ground Water District, and Madison Ground Water District.

include such a condition he is required to do so “either at the time a permit is issued or ‘as soon thereafter as practicable. . . .’ ” R., 6296-6297.

The Director, after considering the recommendations of the Hearing Officer, issued his *Amended Final Order* regarding the license for water right 01-7011 on October 18, 2010. R., 6305-6328. The Director accepted the Hearing Officer’s recommendation with respect to the Subordination Condition and rejected the Hearing Officer’s recommendation with respect to the Term of Years Condition. As such, both the Subordination Condition and the Term of Years Condition remained in the license for water right 01-7011 in the Director’s *Amended Final Order*. On November 12, 2010, the Canal Companies filed a *Petition for Judicial Review* asserting that the Director’s inclusion of the Subordination Condition and the Term of Years Conditions in the *Amended Final Order* is contrary to law and requests that this Court reverse the same. The parties briefed the issues contained in the *Petition for Judicial Review* and a hearing on the *Petition* was held before this Court on May 16, 2011.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held on May 16, 2011. At the hearing the parties agreed that the then forthcoming decision in Idaho Supreme Court Docket No. 37348 – an appeal in the *Matter of Licensed Water Right No. 03-7018 in the Name of Idaho Power* – may have some bearing on the consideration and/or resolution of this matter. As such, the parties requested that this Court delay issuing a written opinion in this matter pending the Idaho Supreme Court’s issuance of its decision in Docket No. 37348. The parties further requested that they be given the opportunity to submit supplemental briefing in response to the Idaho Supreme Court’s written decision.

The Idaho Supreme Court issued its written opinion in Docket No. 37348 on May 26, 2011. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 255 P.3d 1152 (2011). On June 7, 2011, this Court entered a *Scheduling Order Re: Supplemental Briefing*, wherein the Court allowed the parties to file supplemental briefing “limited to applying or distinguishing the Idaho Supreme Court’s decision in Docket No. 37348 to the facts of this

case.” The last of the parties’ supplemental briefing was filed on July 22, 2011. Therefore, this matter is deemed fully submitted for decision on the next business day or July 25, 2011.

III.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”), Chapter 52, Title 67, I.C. § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 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. I.C. § 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.

I.C. § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265.

The petitioner 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. I.C. § 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.⁴ *Id.* The Petitioner also bears the burden of documenting and

⁴ 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).

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 competent evidence in the record The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (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. I.C. § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct. App. 1996).

IV.

ANALYSIS

- A. The Department did not exceed its authority, act unlawfully, or act arbitrarily or capriciously by including the Subordination Condition in the license for water right 01-7011.**

The Canal Companies argue that the Director exceeded his authority, acted unlawfully, and acted in an arbitrary and capricious manner when he inserted the Subordination Condition in the license for water right 01-7011, subordinating that water right to "all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state of Idaho that are initiated later in time than the priority of this water right." In support of their position the Canal Companies set forth a variety of arguments. Each will be addressed in turn.

- i. The Canal Companies did not acquire a vested right in water right 01-7011 prior to the time the license for that right was issued.**

One of the Canal Companies' arguments on judicial review is that they acquired a vested right in water right 01-7011 prior to licensure, and that their vested right was compromised when

the Director issued the license for water right 01-7011 with a subordination condition that differed from the condition placed in the permit for that right. The Idaho Supreme Court recently addressed the issue of when a water right vests under the statutory method of appropriation under Idaho law. In *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 275, 255 P.3d 1152, 1161 (2011) (hereinafter, “*Idaho Power Case*”), the Court held that “a water right does not vest until the statutory procedures for obtaining a license are completed, including the issuance of the license.” In their *Supplemental Briefing*, the Canal Companies concede that based upon the Court’s analysis in the *Idaho Power Case* they could not have acquired a vested right in water right 01-7011 prior to licensure. *Appellants’ Supp. Br.*, p.3. Given the analysis in the *Idaho Power Case* and the concession made by the Canal Companies, this Court need not address the issue beyond stating that the earliest point in time the Canal Companies could have obtained a vested right in water right 01-7011 was on October 20, 2008 – the date the license for that right was issued.

ii. The Director was not required to place a condition in the license for water right 01-7011 subordinating groundwater recharge rights to that right under Idaho Code §§ 42-234 or 42-4201A.

The Canal Companies argue that the versions of Idaho Code §§ 42-234 and 42-4201A in effect at the time of licensing required the Director to include a condition in the license for water right 01-7011 subordinating water rights for groundwater recharge to that right. When the Director issued the license at issue here, Idaho Code § 42-234 was entitled “Ground water recharge projects – Authority of department to grant permit.” It provided in pertinent part as follows:

(2) The legislature hereby declares that the appropriation and underground storage of water for purposes of ground water recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue a permit for the appropriation and underground storage of unappropriated waters in an area of recharge. *The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.*

I.C. § 42-234(2) (1994) (emphasis added). Idaho Code § 42-4201A was entitled “Recharge of ground water basins – Director’s authority to issue permit.” I.C. § 42-4201A (1994). At the

time of licensing, it contained the exact same italicized provision that is quoted above. In 2009, the Legislature repealed Idaho Code § 42-4201A in its entirety, and amended Idaho Code § 42-234, removing the language directing that groundwater recharge be secondary to all prior perfected water rights.

The Department disagrees that Idaho Code §§ 42-234 (1994) or 42-4201A (1994) required the Director to include a condition in the license subordinating water rights for groundwater recharge to the hydropower water right. The Department points out that the statutes relied upon by the Canal Companies do not state that groundwater recharge shall be “subordinated” to all prior perfected rights, but rather that they shall be “secondary” to all prior perfected rights. Moreover, the Department argues that the plain language of Idaho Code § 42-203B(6) is controlling here, and that it specifically grants the Director the authority needed in this case to include the Subordination Condition in the license for water right 01-7011. That statute provides as follow:

The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

I.C. § 42-203B(6) (emphasis added).

This Court finds that the Department had the authority pursuant to the plain language of Idaho Code § 42-203B(6) to insert the Subordination Condition in the license for water right 01-7011. The language of that statute is specific to the licensing and subordination of hydropower water rights, which is what we are dealing with here. *See e.g. Walker v. Shoshone County*, 112 Idaho 991, 994, 739 P.2d 290, 293 (1987) (providing that as a general rule, “a specific statute will control over a more general one”).⁵ The language of Idaho Code § 42-203B(6) is clear in its grant of authority to the Director to subordinate hydropower water rights to subsequent depletionary uses. The Idaho Supreme Court recently confirmed that to be the case in the *Idaho Power Case*. The Court established that under the circumstances of that case, which are similar to the circumstances here, Idaho Code § 42-203B(6) “gave the Department the specific authority

⁵ The plain language of former Idaho Code §§ 42-234 and 42-4201A granted the Director the authority to issue permits specifically for groundwater recharge. Water right 01-7011 is not a groundwater recharge right.

to subordinate hydropower water rights in a permit or license to the water rights of subsequent upstream depletionary uses . . .” *Idaho Power Case*, 151 Idaho at 269, 255 P.3d at 1155.

Therefore, there is no doubt the Director had the authority to place the Subordination Condition in the license for water right 01-7011 at the time of licensing.

This Court further finds that neither Idaho Code §§ 42-234 (1994) nor 42-4201A (1994) placed any limitations on the Director’s authority to place a subordination condition in the license for water right 01-7011. It is important to note that former Idaho Code §§ 42-234 and 42-4201A legislated the administration of groundwater recharge rights. The plain language of those statutes made clear the Legislature’s intent that in the arena of administration, groundwater recharge water rights would receive water only after all prior perfected water rights were first satisfied, *including* those water rights that contained subordination provisions. The fact that the Legislature included the “secondary” language in the statutes is itself evidence of this intent. There would be no reason to state that groundwater recharge water rights are “secondary” to all prior perfected water rights (this is simply a restatement of the prior appropriation doctrine) unless the intent was to make them “secondary” to all prior perfected rights *including* those that contained subordination provisions. This was clearly the intent of the Legislature, as evidenced further by its inclusion of the following provision in the statutes at issue: “The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes *that may otherwise be subordinated* by contract. . . .” I.C. §§ 42-234 (1994) or 42-4201A (1994).

Contrary to the arguments of the Canal Companies, there is no language in former Idaho Code §§ 42-234 or 42-4201A requiring the Director to place a remark in the license for water right 01-7011 directing that subsequently perfected groundwater recharge water rights “shall be secondary” to that right. Such an action on the part of the Director would have been simply unnecessary as redundant. The plain language of the statutes themselves provided for that benefit. While the statutes were in effect, the Canal Companies were certainly entitled to utilize the statutory benefits of former Idaho Code §§ 42-234 or 42-4201A in their favor in the context of administration, notwithstanding the Director’s inclusion of the Subordination Condition in the license for water right 01-7011.

However, by making the argument the Director was required to place a remark in the license for water right 01-7011, in effect reiterating the statutory benefits of former Idaho Code

§§ 42-234 and 42-4201A , the Canal Companies are attempting to freeze state policy in regard to the administration of recharge rights in time and in their favor. State law and policy is not static and may change over time. When the license for water right 01-7011 was issued, it was the policy of the state to treat groundwater recharge as a secondary use to all other prior perfected water rights for the purposes of administration, including those water rights containing subordination remarks. I.C. §§ 42-234 (1994) and 42-4201A (1994). Since that time the policy of the state has changed, and groundwater recharge water rights are no longer “secondary to all other prior perfected water rights” for the purposes of administration except to the extent they would otherwise be under the prior appropriation doctrine.⁶ These changes are reflected in the Legislature’s repeal of Idaho Code § 42-4201A and amendment of Idaho Code § 42-234 in 2009. While the Canal Companies were entitled to utilize the statutory benefits contained in former Idaho Code §§ 42-234 and 42-4201A while they were effective under the plain language of the statutes themselves, the Director was not required to place a remark in the license for water right 01-7011, or any other hydropower right, simply reiterating those statutory benefits.

When interpreting a statute, a court’s primary objective is to derive the Legislature’s intent in enacting the statute. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005). Therefore, statutory interpretation begins with the literal language of the statute. *Id.* If the statutory language is unambiguous, this Court need not engage in statutory construction and should apply the statute’s plain meaning. *Id.* Since the statutes at issue here are clear and unambiguous for the reasons stated above, it is unnecessary for the Court to engage in statutory construction. The Court finds that the Director had the authority to include, and did not err by including, the Subordination Condition in the license for water right 01-7011 at the time of licensing under the plain language of Idaho Code § 42-203B(6).

⁶ The Court notes that Idaho Code § 42-4201 still provides that a small isolated group of groundwater recharge rights held by aquifer recharge districts located in Jerome, Lincoln, Gooding and Twin Falls Counties are “secondary to all prior perfected water rights, including those held by any privately-owned electrical general company to appropriate waters in the reaches of the Snake River downstream from the Milner Diversion for purposes of hydropower generation.”

- iii. **The Director's decision to subordinate water right 01-7011 in the permit did not preclude the Director from subsequently conditioning the license for water right 01-7011 with the inclusion of the Subordination Condition.**

The Canal Companies attempt to distinguish this case from the *Idaho Power Case* on the grounds that in this case the Director exercised his authority under Idaho Code § 42-203B prior to licensure, whereas in the *Idaho Power Case* he did not. Specifically they argue that former Director Higginson exercised the subordination authority of Idaho Code § 42-203B(6) in his May 18, 1987, letter approving the Canal Companies' second request for extension of time to submit proof of beneficial use. The Canal Companies acknowledge the authority of the Director to subordinate hydropower water rights under Idaho Code § 42-203B(6), but assert that once the Director exercises that authority in the licensing process, he may not do so again. In effect, the Canal Companies argue the license for water right 01-7011 needs to mirror the permit with respect to subordination. This Court disagrees.

In the *Idaho Power Case* the Idaho Supreme Court rejected a very similar argument made by the Idaho Power Company. In that case the Director inserted a term condition in the license for water right 03-7018 – a hydropower water right held by Idaho Power – even though he did not include that term condition in the permit for that right. Idaho Power argued that since the Director placed no term condition in the permit, he was required to place no term condition in the license. In effect, Idaho Power argued that the license for water right 03-7018 needed to mirror the permit for that right with respect to term. The Supreme Court disagreed, holding that the plain language of Idaho Code § 42-203, stating “the director shall also have the authority to limit a permit or license for power purposes to a specific term,” gives the Department the authority to include a term condition in the license even where that term condition was not included in the permit. 151 Idaho at 272, 255 P.3d at 1158. The Court went onto provide that “[t]he Legislature’s use of the disjunctive ‘or’ specifically gives the Department the authority to include a term condition at the licensing stage, not just at the permitting stage.” *Id.* at 273, 255 at 1159. As such, the Court rejected Idaho Power’s argument that the license for water right 03-7018 needed to mirror the permit with respect to term.

This Court finds the same analysis applies here to the Subordination Condition. The plain language of Idaho Code § 42-203B(6) provides “[t]he director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream

beneficial depletionary uses.” (emphasis added). As with the term condition, the Legislature’s use of the disjunctive “or” gives the Department the authority to include a subordination condition at the licensing stage, not just at the permitting stage. Whether the Director chooses to place a subordination condition in a permit, or whether he chooses not to place a subordination condition in a permit, is a distinction without a difference. Neither action or omission precludes the Director from subsequently exercising his statutory authority under Idaho Code § 42-203B(6) to place a subordination condition in the license for the water right, and the license need not mirror the permit with respect to subordination. Had the Legislature intended that a hydropower license mirror a permit with respect to subordination, it could have included language to that effect in Idaho Code § 42-203B(6). However, as the statute is written, there is no language supporting the Canal Companies’ arguments in this respect.

The Canal Companies additionally argue that the 1987 letter from former Director Higginson to the Canal Companies constituted a final order which was never appealed by any party. As a result, they assert that the Director was bound to issue a license in conformity with the permit once beneficial use was made in accordance with the permit. The Canal Companies’ argument in this respect is part and parcel with its argument that it obtained a vested right in water right 01-7011 prior to licensing, and with its argument that once the Director exercises his 42-203B(6) authority in the licensing process, he may not do so again. For the same reasons, it is unavailing.

It has already been established that the Canal Companies did not acquire a vested right in water right 01-7011 at any time prior to licensing. *Idaho Power Case*, 151 Idaho 266, 275, 255 P.3d 1152, 1161 (2011). It has also been established that a license for a hydropower water right need not mirror the permit with respect to subordination. In his *Opinion and Order Granting Motions for Summary Judgment and Recommendation*, the Hearing Officer found as follows:

According to the [1987] letter “[t]he department will use the amended language which you suggested in your letter for the subordination condition to be placed as a condition of approval on the extension request, since the approval being sought is in connection with a permit, rather than an application for permit.” This was a step in the process of obtaining a license with vested rights. Reliance upon the Director’s statement must be assumed to be reasonable for purposes of summary judgment, but there were additional steps necessary before any rights became vested, including proof of beneficial use and review by the Director before issuance of a license to assure that the terms of the license are consistent with the law and State Water Plan.

R., 5586. The Director adopted the findings of the Hearing Officer in this respect in his *Amended Final Order*. For the reasons stated above, this Court finds that the Director did not err in so finding.

iv. The Director did not act arbitrarily or capriciously by including the Subordination Condition in the license for water right 01-7011.

In placing the Subordination Condition in the license for water right 01-7011 the Director explained in detail his reasons for choosing to exercise his Idaho Code § 42-203B(6) authority. For instance, in his *Amended Final Order* the Director reasoned that the Subordination Condition was necessary to, among other things, prevent another Swan Falls situation, comply with the comprehensive state water plan, and to encourage the optimum development of the State's water resources. R., 6305–6328.

The Court notes that Idaho Code § 42-203B(6) was enacted as a result of the settlement of the Swan Falls controversy. In addressing the Swan Falls Agreement in his *Opinion and Order Granting Motions for Summary Judgment and Recommendation*, the Hearing Officer found that “[t]he potential of hydropower rights limiting the further development of agriculture, as well as limiting agriculture water rights acquired subsequent to the Idaho Power rights, became a possibility in the Swan Falls controversy.” R., 5584. The Idaho Supreme Court has noted that the purposes of the Swan Falls Agreement and Idaho Code § 4-203B concerning subordination “was to make available more water for future appropriators and to assist in the expansion of other beneficial uses of the water in the Snake River.” *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). In his *Final Order* the Director specifically found that Idaho Code § 42-203B(6) was intended to be exercised so as to prevent another Swan Falls:

12. When explaining the legislation that became Idaho Code § 42-203B(6) to members of the Senate Resources and Environment Committee, the proponents of the legislation stated that the provision was intended “to make sure that as best we can foresee we do not get ourselves into another Swan Falls situation in the future.” Minutes, Senate Resources and Environment Committee, January 18, 1985, p.9 (Pat Kole); *see also id.* (“The primary reason I see [section 203B(6)] there is to avoid Swan Falls reoccurring again.”) (Ken Dunn).

R., 2487.

In the context of the administration of water, various issues may arise that can frustrate the legislative intent behind Idaho Code § 42-203B where a hydropower water right is subordinated to some, but not all, future upstream beneficial depletionary uses. An example is illustrative. Take a series of hypothetical water users on a common source. Water User A holds the senior right on the source – a hydropower water right that contains a subordination condition subordinating it to all subsequent upstream beneficial depletionary uses *except* for groundwater recharge. Water User B holds a groundwater recharge right on the source which is immediately junior to Water User A in priority. Water Users C and D hold irrigation water rights on the source, with priority dates junior in priority to Water User B.

If Water User A is short water, he cannot call Water Users C and D because his right is subordinated to those rights. He can, however, call Water User B as his right is not subordinated to groundwater recharge. As a result of Water User A's call, Water User B now finds his water right turned off to satisfy Water User A. This is where the potential issue arises. There is nothing in Water User B's water right preventing him, as the senior user, from calling Water Users C and D to satisfy his right. He does just that and Water Users C and D find their water rights turned off to satisfy Water User B. In effect, the subordination provision in Water User A's hydropower right is circumvented. Water User A turns off Water User B, who in turn turns off Water Users C and D. Such a result is inconsistent with the intent behind Idaho Code § 42-203B.

The geographic location of the point of diversion and place of use for the hydropower right results in a conundrum, that absent a full subordination provision, could not be reconciled with the provisions of Idaho Code § 42-203B(2), which provides in relevant part, as follows:

For the purposes of the determination and administration of the rights to the use of the waters of the Snake River or its tributaries downstream from Milner dam, no portions of the waters of the Snake River or surface or groundwater tributary to the Snake River upstream from Milner dam shall be considered.

I.C. § 42-203B(2). The hydropower facility is located at Milner dam. Consequently, the ability to seek administration of recharge rights above Milner dam would frustrate the clear intent of the statute by allowing the Canal Companies to demand flows arising above Milner dam that in conjunction with the use of the right will be discharged below Milner dam.

This Court finds that the Director's exercise of his authority in this case is consistent with the legislative intent behind Idaho Code § 42-203B and with the authority granted therein.

Therefore, the Director did not act arbitrarily or capriciously by including the Subordination Condition in the license for water right 01-7011.

B. The Department did not exceed its authority by including the Term of Years Condition in the license for water right 01-7011.

The Canal Companies originally argued to the Court that the Director acted arbitrarily, capriciously and erred as a matter of law by adding the Term of Years Condition to water right 01-7011 for the first time at licensing under Idaho Code § 42-203B and IDAPA 37.03.08.050.03. In their *Supplemental Briefing*, the Canal Companies concede that based upon the Idaho Supreme Court's analysis in the *Idaho Power Case*, the Director has the authority in this case to apply the Term of Years Condition to the license for water right 01-7011 for the first time at licensing pursuant to Idaho Code § 42-203B. The Canal Companies maintain however that the Director acted arbitrarily, capriciously and erred as a matter of law by adding the Term of Years Condition to water right 01-7011 for the first time at licensing under IDAPA 37.03.08.050.03.

As a precursor to taking up the Canal Companies' argument with respect to IDAPA 37.03.08.050.03, it is instructive to review the Court's analysis as set forth in the *Idaho Power Case*. In that case, Idaho Power challenged the authority of the Director under Idaho Code § 42-203B to include a term of years condition in the license for its hydropower water right 03-7018 at Brownlee Dam where the Director failed to first include such a condition in the permit for that right. The Supreme Court's analysis of the issue turned on its construction of Idaho Code § 42-203B, which provides in pertinent part as follows:

(6) The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. . . . The director shall also have the authority to limit a permit or license for power purposes to a specific term.

...

(7) The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend

The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The

term of years, once established, shall not thereafter be modified except in accordance with due process of law.

I.C. § 42-203B(6)&(7) (emphasis added).

The Court held that the plain language of Idaho Code § 42-203B(6) and (7) gives the Department the authority to include a term condition in a license even if such a term was not included in the original permit. *Idaho Power Case*, 151 Idaho at 273, 255 P.3d at 1159. The Court ruled the Legislature's use of the disjunctive "or" in Idaho Code § 42-203B(6) and (7), when discussing the Director's authority to limit a permit or license for power purposes to a specific term of years, expressly indicates the Department can exercise its authority to limit hydropower rights at either the permitting or licensing stage.⁷ *Id.* While the Court addressed the Director's authority under Idaho Code § 42-203B, it declined to consider Idaho Power's argument that the Director violated IDAPA 37.03.08.050.03 by including a term condition in the license because the issue was raised in that case for the first time on appeal. *Id.* at 278–79, 255 P.3d at 1164–65.

The Canal Companies argue in this case that IDAPA 37.03.08.050.03 does not allow the Director to apply a term of years condition to hydropower water rights for the first time at licensing because the rule does not contain the alternative "license" language contained in Idaho Code § 42-203B. That rule provides:

Applications and Existing Permits That Are Junior and Subordination. Applications and existing permits approved for hydropower generation shall be junior and subordinate to all rights to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. *A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code.*

IDAPA 37.03.08.050.03 (emphasis added). The Canal Companies argue that the above-quoted rule bars the Director from adding a term condition at licensing if there was no such condition in the permit. This Court disagrees.

⁷ While the Court found that the last paragraph of Idaho Code § 42-203B(7) demonstrates the Legislature's intent to have the term condition included in the permit, or as soon thereafter as is practicable, the Court noted that that portion of the statute "is forward-looking and is meant to apply to all permits issued after the effective date of the statute."

IDAPA 37.03.08.050.03 was adopted by the Department in July 1993, well after the Department issued the permit for water right 01-7011 in 1977. At the time of its adoption, the Department did not expressly provide that the last sentence of the rule pertaining to term conditions would apply retroactively to pre-existing hydropower permits. To the contrary the Department argues, and this Court agrees, that the plain language of the rule, when read in its entirety, establishes that the requirement that “a permit issued for hydropower purposes shall contain a term condition” was intended to apply to term conditions in future permits. Pertinent to the Court’s analysis is the Department’s express use of the term “existing permits” in discussing subordination conditions in sentence one of the rule, and the absence of that same term in discussing term conditions in the last sentence. This signifies the intent of the rule that the section regarding the subordination condition would apply to existing permits, while the section regarding term conditions would apply to future permits. No administrative rule is retroactive unless the enacting body expressly declares that it is. *Cf. Hill v. America Family Mut. Ins. Co.*, 150 Idaho 619, 628, 249 P.3d 812, 821 (2011) (holding, “[n]o statute is retroactive unless the Legislature expressly declares that it is”). This Court holds that the last sentence of IDAPA 37.03.08.050.03 addressing term conditions is forward-looking, and does not apply to permits issued prior to its adoption. Therefore, the Court finds that the Director did not act arbitrarily, capriciously or err as a matter of law when he added the Term of Years Condition to water right 01-7011 for the first time at licensing under IDAPA 37.03.08.050.03.

The Canal Companies further argue that the Department’s past practices in dealing with the application of term conditions to hydropower water rights establishes that the Department has previously, in practice, taken the position that the condition is applied to a hydropower permit if it is going to be applied at all. The Canal Companies rely upon the testimony of one of the Department’s witnesses regarding the Department’s past actions when applying term limits to certain other hydropower water rights. The Canal Companies also refer the Court to the back files for certain other licensed hydropower rights that contain a term limit condition. This Court finds the argument of the Canal Companies in this respect to be unavailing and irrelevant to this proceeding.

In the *Idaho Power Case* the Idaho Supreme Court addressed similar arguments presented by Idaho Power regarding the Department’s past practice with regard to term conditions in hydropower water rights. In response to those arguments, the Court instructed that

“the Department’s decision regarding whether or not to add a term condition to a permit or license in other cases is not relevant to this appeal.” *Idaho Power Case*, 151 Idaho at 279, 255 P.3d at 1165. It further provided that “[j]ust because the Department may have decided not to exercise its authority to add a term condition in a license in another case does *not* mean that the department lacks the authority to implement such a term condition in this case.” *Id.* Therefore the Idaho Supreme Court declined to review other water rights issued by the Department in that case. *Id.* In this case, the Department’s past practice with respect to how it chose to deal with other hydropower water rights is not relevant to this case. As stated above, under the facts and circumstances of this case, the Director had the authority to apply the Term of Years Condition to the license for water right 01-7011 for the first time at licensing pursuant to Idaho Code § 42-203B and IDAPA 37.03.08.050.03.

C. Substantial prejudice.

In their *Supplemental Brief*, the Canal Companies argues that as a result of the Director’s *Amended Final Order*, a substantial right of the Canal Companies will be affected. Since the Canal Companies have not established to this Court that the Respondents erred in a manner specified in Idaho Code § 67-5279(3), no substantial right of the Canal Companies has been prejudiced. However, if the Respondents had erred as specified in Idaho Code § 67-5279(3), this Court finds that the Canal Companies improperly raised the issue of prejudice to a substantial right for the first time in their *Supplemental Briefing*.

In the *Scheduling Order Re: Supplemental Briefing* issued by the Court in this matter, the Court allowed the parties to file supplemental briefing following the issuance of the Idaho Supreme Court’s decision in the *Idaho Power Case* “limited to applying or distinguishing the Idaho Supreme Court’s decision in Docket No. 37348 to the facts of this case.” The *Scheduling Order* did not permit the parties to raise new arguments on judicial review not raised in their opening briefing. This Court will not address arguments raised for the first time in the *Supplemental Briefing* beyond the scope of those issues specifically identified in this Court *Scheduling Order*. See, e.g., *Suitts v. Nix*, 141 Idaho 706, 708 117 P.3d 120, 122 (2005) (holding, “this Court will not consider arguments raised for the first time in the appellant’s reply brief,” and further stating that a reviewing court looks only to the initial brief on appeal for the issues presented).

D. Attorney's fees on judicial review.

In their opening brief on judicial review, the Canal Companies requested an award of attorney's fees on judicial review pursuant to Idaho Appellate Rule 40 and Idaho Code § 12-117. In their reply brief on judicial review, the Canal Companies withdrew their request for attorney's fees. Therefore, the issue is not before the Court and need not be addressed.

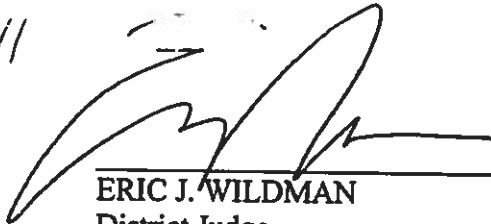
V.

CONCLUSION

Based on the foregoing, the Director's October 18, 2010 *Amended Final Order* is affirmed.

Dated

August 30, 2011


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 August 30, 2011, with sufficient first-class postage to the following:

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