District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho

AUG - 2 2016

By _____ Clerk
_____ Deputy Clerk

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

RICHARD PARROTT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his capacity as Director of the Idaho Department of Water Resources, Respondents, and CEDAR RIDGE DAIRY LLC, Intervenor.	Case No. CV-42-2015-4552 **MEMORANDUM DECISION AND ORDER**

I.

STATEMENT OF THE CASE

A. Nature of the case.

This case originated when Richard Parrott filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). Under review is the Director's *Amended Final Order Conditionally Approving Transfer* issued on November 12, 2015 ("*Final Order*"). The *Final Order* conditionally approves application for transfer number 79380 in the name of Thomas Leno. Parrott asserts that the *Final Order* is contrary to law and requests, among other things, that the Court set it aside and reinstate the decision of the hearing officer.

B. Course of proceedings and statement of facts.

This matter concerns an application to transfer water filed by Thomas Leno.[1] R., p.1. The application seeks to transfer a portion of water right 47-17589.[2] *Id.* at 5. Water right 47-17589 is an irrigation right. *Id.* It authorizes the diversion of 1.21 cfs of ground water for the irrigation of 102.5 acres near the Idaho-Nevada border under a December 25, 1970, priority date. *Id.* at 6. The total volume of water that may be diverted under the right is 307.5 acre-feet annually. *Id.* The proposed transfer seeks to take some of the water presently used for irrigation – 0.42 cfs and/or 66 acre-feet annually – and convert it for use associated with a dairy operation located in Berger, Idaho. *Id.* at 2-3. The portion of water right 47-17589 that is at issue will be referred to herein as "the split portion."

To accommodate the dairy operation, the transfer application seeks changes to the nature of use, period of use, point of diversion, and place of use elements of the split portion. *Id.* at 2-5. With respect to nature of use, it seeks to change the authorized use from "irrigation" to "commercial" and "stockwater." *Id.* With respect to period of use, it seeks to change the authorized period of use from "04/01 to 11/01" to a year-round use. *Id.* With respect to point of diversion, it seeks three new points of diversion located approximately 34 miles north of the existing points of diversion. *Id.* The application seeks a similar change in location with respect to place of use. *Id.*

The transfer application was protested by Jimmie Conder, Michael Humphries, William Hamby, Eric Parrott, Lois Rice, Leslie Ellsworth, Kathleen Atwell, Verlyn Broek, Mary Beth Curtis, Christopher Schmahl, Sandra Schmahl, Lynn Jaynes, Fred Jaynes, William Mannen, Christine Mannen, Pam Ritter, Edward Smith, Victoria Henson, Scott Houtz, Delea Miller, Jeanie McCreary, Barbara Stephens, Lynn Stephens, Margaret Winsryg, Leroy Elliott, Elizabeth Slifer, and Martin Hackard. *Id.* at 46-87. The protestants are ground water right holders residing in the vicinity of the points of diversion proposed by the transfer. *Id.* Among other things, they assert the proposed transfer will injure their existing water rights. *Id.* Cedar Ridge Dairy, LLC ("Cedar Ridge") operates the dairy to be benefited by the transfer. On March 5, 2015, Cedar Ridge was permitted to intervene in the administrative proceeding. *Id.* at 474-477.

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[1] Although the transfer application is made in the names of "Thomas and Dorothy Leno," Dorothy Leno has passed away.

[2] Water right 47-17589 is owned by Leno. Ex. 2; R., p.892.

An administrative hearing was held before the Department on March 18 and 19, 2015. Tr., 1-394. Department employee James Cefalo acted as hearing officer. *Id.* at 6. On June 1, 2015, he issued an *Amended Preliminary Order* approving the transfer. R., pp.707-721. However, despite finding that "the changes proposed by Leno will not injure existing water rights," he placed two material restrictions on the approval. *Id.* at 715. First, he limited the period of use of the split portion to May 1 through September 30, thereby denying the Leno's request to use it year-round. *Id.* at 715 and 717. In so doing, he found that "Leno did not provide enough information to determine the magnitude of impact to nearby domestic wells if the water right proposed to be transferred were diverted during the non-irrigation season." *Id.* at 717. Second, he advanced the priority date of the split portion in times of shortage:

> [B]ecause of the large distance between the existing point of diversion for water right 47-17589 and the proposed points of diversion . . ., in the event of water right administration in the Berger area, the split portion of water right 47-17589 should bear a priority date equal to the date of this approval.

Id.

Exceptions to the *Amended Preliminary Order* were filed by Cedar Ridge and Leno. *Id.* at 220-245. They challenged the hearing officer's restrictions on both season of use and priority. *Id.* Numerous protestants objected to the exceptions. *Id.* at 761-769; 798-800. On November 12, 2015, the Director issued the *Final Order*. *Id.* at 888-906. The Director agreed that the transfer should be approved, but disagreed with the season of use and priority restrictions placed on the transfer by the hearing officer. *Id.* at 890-892. The Director approved the transfer for year-round use and did not advance the priority date in times of shortage.[3] *Id.* at 902. On December 8, 2015, Parrott filed the instant *Petition* asserting that the Director's *Final Order* is contrary to law. The case was reassigned by the clerk of the court to this Court on December 11, 2015. Parrott filed an *Amended Petition* on that same date. On December 29, 2015, the Court entered an *Order* permitting Cedar Ridge to appear as an intervenor. The parties subsequently briefed the issues raised on judicial review. A hearing on the *Amended Petition* was held before the Court on July 18, 2016. The parties did not request the opportunity to submit additional

[3] The only condition the Director placed upon transfer approval in his *Final Order* was that Leno and Cedar Ridge provide "payment of the expert deposition fees incurred . . . for their deposition of Ed Squires in the amount of $665.00." R., p.902.

briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on July 19, 2016.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. 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). The court shall affirm the agency decision unless it 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). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4).

III.

ANALYSIS

Idaho Code § 42-222 governs water right transfers. It requires that any person who desires to make a change to the point of diversion, place of use, period of use, or nature of use of a water right shall make application to the Department for approval of such change. I.C. § 42-222(1). The Director may approve a transfer application provided, among other things, no other water rights are injured thereby. *Id.* In this case, the Director found that Leno's application does not result in injury and approved the transfer. For the reasons set forth below, the Director's *Final Order* is affirmed.

A. The Director's finding that the proposed transfer will not result in injury to existing water rights is supported by substantial evidence in the record and must be affirmed.

Parrott argues that the Director's finding of no injury is it not supported by substantial evidence in the record.[4] Among other things, he asserts that the Director "is underestimating drawdown to local home wells if a commercial user comes online." Parrott Brief, p. 4. Further, that "[t]he written and transcript record do not confirm [the Director's] conclusions of conductivity." *Id.* It is Parrott's position that the evidence supports the restrictions on season of use and priority implemented by the hearing officer. Moreover, it is his position that those restrictions are necessary to avoid injury to existing water rights. The Court thus turns to whether the Director's finding of no injury is supported by substantial evidence in the record.

Under Idaho law, a reviewing court shall not overturn an agency's decision that is based on substantial evidence in the record, even if the evidence in the record is conflicting. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Substantial evidence does not require that the evidence be uncontradicted. *Ricketts v. Easter Idaho Equipment, Co., Inc.*, 137 Idaho 578, 580, 51 P.3d 392, 394 (2002). Rather, the evidence need only be of a sufficient quantity and probative value that reasonable minds could conclude that the finding was proper. *Id.* The Petitioner 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). In this case, the Court finds that ample substantial evidence supports the Director's finding of no injury.

i. The Director's finding that ground water levels are stable at the proposed points of division is supported by substantial evidence in the record.

In evaluating potential injury to existing water rights, the Director first examined the current state of ground water levels in the Berger area. After reviewing the evidence he found that "[g]round water levels in the area of the proposed point of diversion are stable" and that "[m]onitoring wells in the area do not show a significant decline in aquifer levels over the last 35 years." R., p.898. The Director's findings are supported by substantial evidence the record. Brockway Engineering, PLLC, prepared an expert report evaluating the current status of ground

[4] Parrott's challenge of the Director's *Final Order* is limited to the Director's finding of no injury to existing rights. He does not challenge the Director's findings with respect to the other criteria set forth in Idaho Code § 42-222.

water levels at the proposed points of diversion ("Brockway Report").[5] *Id.* at 295. The Brockway Report evaluates multiple ground water monitoring wells located within a ten mile radius of the proposed transfer. *Id.* at 306-309. These wells have been maintained and measured by the United States Geologic Survey and/or the Department. *Id.* at 306.

The Brockway Report concludes that ground water levels in the area of the proposed transfer are, and have been, stable:

> The average combined static water level in wells 11S15E-07ACB1and11S15E-02BBB1 over the last 34 years is 227.7 feet below ground surface. The static water measurements have fluctuated between a depth of 220 feet and 235 feet below ground surface since 1980. Because the fluctuation over the last 34 years is constant and *there is no indication from these wells the aquifer water table is decreasing or increasing, it can be concluded that ground water aquifer is stable.* The trendlines for both 11S15E-07ACB1 and 11S15E-02BBB 1 indicated that there is no statistical variation of water level over the last 34 years.
>
> The water level data for monitoring wells 11S15E02BBB and 11Sl5E07ACA were subjected to a trend analysis using the Mann-Kendall non-parametric method. The Mann-Kendall method is a standard technique for analysis of trends in hydraulic systems. To remove seasonal effects from the data from these two wells a water-year average was calculated including only those years with more than two readings per year. This resulted in 30 values for 11S15E02BBB and 18 values for 11S15E07 ACA. *At the 95% confidence level, no increasing or decreasing trend was detected in either well.* This confirms the qualitative result indicated by visual inspection of the well data.

R., p.309 (emphasis added).

Ed Squires, an expert witness retained by the protestants, agreed with the Brockway Report conclusion:

> Q. [Ed Smith] All right. We'll move onto that. Mr. Squires, there has been significant discussion in the process in these proceedings about the long-term monitoring the hydrographs from the two USGS monitoring wells presented by the applicants . . . . *Do you agree with the Brockway conclusion that aquifer levels are stable?*
>
> A. [Ed Squires] *I do.* I think that as I -- is there an exhibit number on that?
>
> Q. [Ed Smith] Exhibit 10 for 79384.

[5] Cedar Ridge retained Brockway Engineering, PLLC, as an expert witness in this matter.

> A. [Ed Squires] You know, I guess I would say that it's what we have, and, you know, it's better than a lot of data just in terms of the length of the record and this is a pretty long record.
>
> . . . .
>
> *But, overall, I would agree with Dr. Brockway. But I think it might just be not these water levels in the two closest monitoring wells, but I think all of the monitoring wells in that area generally don't show any serious declines.*

Tr., pp.215-216 (emphasis added).

Both the Brockway Report and the testimony of Ed Squires constitute substantial evidence in support of the Director's finding that ground water levels in the area of the proposed points of diversion are stable. Parrott does not point the Court to any conflicting evidence on this issue. Therefore, the Director's first finding with respect to no injury (i.e., that ground water levels are presently stable) must be affirmed.

ii. The Director's finding that the proposed transfer will not result in the unreasonable drawdown of ground water levels is supported by substantial evidence.

Given that ground water levels in the area are stable, the Director next turned to the anticipated effects of the proposed transfer on those levels. Under Idaho law, prior appropriators of ground water are protected in the maintenance of reasonable ground water pumping levels. I.C. § 42-226. Thus, the Director evaluated whether the diversion of ground water under the proposed transfer would result in the unreasonable drawdown of ground water levels in nearby wells. The Director found that Leno demonstrated "the proposed change will not result in unreasonable drawdown (injury) to domestic water rights located near the proposed points of diversion." R., p.900. The Director's finding is supported by substantial evidence in the record.

In evaluating the effects of the proposed transfer on local ground water levels, the Director relied upon scientific reports and testimony provided by expert witnesses. The Brockway Report contains two scientific studies evaluating ground water impacts in the area of the proposed transfer over a diversionary period of twenty years. *Id.* at 312-319. These studies utilize the Winflow 3.05 analytical element modeling software. *Id.* The first study is based on a hydraulic conductivity value of 55 ft/day.[6] *Id.* at 313. This value is based on a regional

[6] Hydraulic conductivity "is [a] characteristic of an aquifer that describes how fast water flows though the aquifer material." R., p.305. "This characteristic has units of feet per day." *Id.* "The tighter packed the aquifer materials

Transient Model Report developed by Cosgrove, et al, in 1998. *Id.* at 306, 313. With respect to the protestants' wells, the first study estimates a maximum drawdown of 0.8 to 1.2 inches following a twenty-year period of diversion under the proposed transfer. *Id.* at 317. The Report states that such "drawdowns are very small and are negligible relative to the observed seasonal fluctuations of the water table and the normal operation of a domestic well." *Id.*

The second study is based on a hydraulic conductivity value of 15.3 ft/day. *Id.* This value is based on data obtained from local well logs and utilizing pump test data from those well logs. *Id.* at 317-318. Using this more conservative value, the second study estimates a drawdown to the protestants' wells of 1.4 to 2.76 inches following a twenty-year period of diversion under the proposed transfer. *Id.* The Report again asserts that such drawdowns "are very small and are negligible relative to the observed seasonal fluctuations of the water table and the normal operations of a domestic well." *Id.* Based on these studies, the Brockway Report concludes that "there will be no significant drawdown as a result of Transfer 79380 in the domestic wells of the Protestants." *Id.* at 319.

DuWayne Kimball, an expert witness retained by the protestants, challenged the Brockway Report's conclusion at the administrative hearing:

> Q: [Parrott] The Brockway expert report, page 3, communicates there will not be any significant impact upon the ground water levels or any existing water rights, including the protestants' domestic wells. Please provide your opinion on the accuracy of that statement, which was there would be no injury.
>
> . . .
>
> A: [Kimball] Okay. At this point I don't think the data or the information there is any conclusive evidence that there will not be injury to the protestants. Part of that deals with the transmissivities of the hydraulic conductivities that were chosen, being more from a much broader perspective, a broader aquifer perspective, not at the localized level.
>
> I think there are some concerns, and one thing that did come up at the deposition is what the impacts would be. And they asked if I would run some calculations, and I said that I did. . . .
>
> So I ran a Theis equation. . . . The impacts that I came up with that was 6.8 feet over a one-year irrigation season, which is quite a bit different or quite a bit more than the information that Brockway has provided in their report.

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are, such as clay or solid rock, the lower the hydraulic conductivity will be or the slower the water will move through the aquifer." *Id.*

Tr., pp.102-104.

There are several problems with Kimball's analysis that are identified by the Director. First, Kimball assumes a hydraulic conductivity of 0.9 feet/day and an annual diversion volume of 124.8 acre feet, which is twice as much as the annual diversion volume proposed in the transfer. R., p.899. Second, Kimball's prediction of a 6.8-foot drawdown represents the worst case scenario for a well located 750 feet from the proposed points of diversion. *Id.* Given that no well, protestant owned or otherwise, is located only 750 feet from the proposed points of diversion, the relevancy of the Kimball analysis is questionable.[7] As a result, the Director reasoned that the actual drawdown to existing wells would be much less than 6.8 feet. *Id.* at 900.

With respect to the ground water rights held by the protestants, the Director placed weight and relied upon the Brockway Report to support his finding of no injury. As directed by statute, this Court will not substitute its judgment for that of the Director as to the weight of evidence on questions of fact. I.C. § 67-5279(1). With respect to ground water rights held by non-protestants, the Director relied on both the Brockway Report and Kimball's analysis to support his finding of no injury. R., p.900. The Brockway Report's scientific studies were specific to the anticipated effect of the transfer on the protestants' wells. *Id.* at 312-319. Therefore, the Director did not rely solely on those studies to make his finding of no injury with respect to ground water rights held by those who did not protest the transfer.[8] *Id.* at 898-900. However, by relying on the scientific studies and modelling in the Brockway Report, and upon the analysis of Kimball, the Director was able to extrapolate that the proposed transfer will not injure any existing water rights. *Id.* Both the Brockway Report and the testimony of Kimball constitute substantial evidence in support of the Director's finding of no injury. Therefore, the Director's second finding with respect to no injury (i.e., that the proposed transfer will not result in the unreasonable drawdown of ground water levels) must be affirmed.

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[7] The Director found the closest well of a protestant was Parrott's well and that is located approximately 1.7 miles from the proposed points of diversion. The Director also found that the closet well of someone other than a protestant was approximately ¾ of a mile from the proposed points of diversion. R., p.895.

[8] Some of the ground water right holders who did not protest the transfer divert closer to the proposed points of diversion than do the protestants. R., p.897.

iii. The Director's finding that there is a hydraulic connection between the existing point of diversion and the proposed points of diversion is supported by substantial evidence in the record.

Last, to complete his injury analysis the Director evaluated whether there is a hydraulic connection between the existing point of diversion authorized under water right 47-17589 and the points of diversion proposed under the transfer. There was significant and conflicting evidence presented at the administrative hearing on this issue. R., p.900. However, the Director found that "the weight of the evidence establishes that ground water at the Leno well is hydraulically connected to the ground water underlying the location of the proposed point[s] of diversion." R., p.900. The Court finds that the Director's finding in this respect is supported by substantial evidence in the record.

The existing and proposed points of diversion are located within IDWR Administrative Basin 47. On February 6, 2014, the SRBA District Court issued a *Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 47* ("*Partial Decree*"). Ex.3. The *Partial Decree* instructs that:

> The following water rights from the following sources of water in Basin 47 shall be administered separately from all other water rights in Basin 47 in accordance with the prior appropriation doctrines as established by Idaho law:
>
> | WATER RIGHT NO. | SOURCE |
> |---|---|
> | None | None |

Id. The *Partial Decree* further instructs that "all . . . water rights within Basin 47 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law." *Id.* Therefore, the Director's finding of connectivity is supported by, and consistent with, the SRBA District Court's *Partial Decree* and must be affirmed.

B. The Director did not abuse his discretion or act contrary to law by approving the transfer without the season of use and priority restrictions implemented by the hearing officer.

Unlike the hearing officer, the Director approved Leno's application for transfer without season of use or priority restrictions. R., p.902. In so doing, Parrott argues that the Director committed error and that this Court should reaffirm the decision of the hearing officer. The

Court disagrees. The discretion to grant or deny an application for transfer is vested in the Director. I.C. § 42-222. After evaluating a proposed transfer, the Director may "approve the change in whole, or in part, or upon conditions," provided the criteria set forth in Idaho Code § 42-222 are met. In this case, the Director evaluated all of the criteria set forth in Idaho Code § 42-222 in relation to the proposed transfer and found each to be satisfied. R., pp.898-901. As such, the Director had the express statutory authority to approve the transfer upon the conditions he saw fit. His decision to approve the transfer without season of use or priority restrictions does not, therefore, constitute an abuse of discretion and is not contrary to law. It follows that the Director's decision to approve the transfer without such restrictions must be affirmed.

C. The Court cannot grant the relief requested by Parrott.

The scope of relief that may be granted by a reviewing court in a judicial review proceeding is limited. I.C. § 67-5279(3). A reviewing court may either affirm an agency action or set it aside, in whole or in part, and remand for further proceedings. *Id.* In this case, the primary relief sought by Parrott is the reversal of the Director's *Final Order* and the reinstatement of the hearing officer's decision.[9] Even if Parrott was successful on judicial review, he would not be entitled to that relief. *Id.* At most, this Court could set aside the Director's *Final Order* and remand the matter to the Director for further proceedings as necessary. Furthermore, since the approval of the proposed transfer will not result in injury to Parrott's water right, Parrott has failed to establish prejudice to a substantial right and is not entitled to relief under Idaho Code § 67-5279(4).

D. The Court cannot consider substantive issues raised for the first time on appeal.

Parrott argued in briefing and at oral argument that the transfer should be invalidated due to Leno's alleged non-use of the water right for the previous five years. Parrott is in effect asserting forfeiture. Parrott conceded at oral argument that the issue was not raised in the proceedings below. The Court's review of the record confirms Parrott's acknowledgment. Substantive issues raised for the first time on appeal cannot be considered by a reviewing court.

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[9] In addition to this relief, Parrott prays that this Court find "the amended order is jumbled in nature to read" and require "monitoring & public made aware quarterly (water use)." *Amended Petition for Judicial Review*, p. 2. Even if Parrott's arguments on the merits were successful, he would not be entitled to such relief on judicial review. I.C. § 67-5279(3).

Crowley v. Critchfield, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007). Forfeiture is a substantive issue requiring a fact specific determination and a heightened standard of proof. The issue was not raised by any of the protestants nor was any evidence presented on the issue. Cedar Ridge was therefore denied the opportunity to respond to an allegation of forfeiture or present evidence to the contrary. Finally, because the issue was not raised the Department did not make findings and a determination on the issue. Consequently there is nothing for this Court to review as concerns forfeiture. Accordingly, the Court cannot consider the issue of forfeiture for the first time on appeal.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Director's *Amended Final Order Conditionally Approving Transfer* issued on November 12, 2015, **is hereby affirmed.**

Dated August 2, 2016

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on August 02, 2016, with sufficient first-class postage to the following:

GARRICK L BAXTER
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

PAUL L ARRINGTON
163 2ND AVENUE WEST
PO BOX 63
TWIN FALLS, ID 83303-0063
Phone: 208-733-0700

TRAVIS L THOMPSON
163 2ND AVENUE WEST
PO BOX 63
TWIN FALLS, ID 83303-0063
Phone: 208-733-0700

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

RICHARD PARROTT
1389 E 4400 N
BUHL, ID 83316
Phone: 208-308-7113

Julie Murphy
Deputy Clerk