District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho
DEC 14 2015
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**

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| A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, TWIN FALLS CANAL COMPANY and NORTH SIDE CANAL COMPANY,<br><br>Petitioners,<br><br>vs.<br><br>THE IDAHO DEPARTMENT OF WATER RESOURCES,<br><br>Respondent,<br><br>and<br><br>KARL T. COOK and JEFFREY M. COOK,<br><br>Intervenors. | Case No. CV-42-2015-2452<br><br>**MEMORANDUM DECISION AND ORDER** |
| IN THE MATTER OF APPLICATION FOR PERMIT NO. 35-14402<br><br>In the name of Jeffrey M. Cook | |

## I.

## STATEMENT OF THE CASE

### A. Nature of the case.

This case originated when the Coalition filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department").[1] The order under review is the *Preliminary Order Issuing Permit* entered on May 15, 2015. The *Preliminary Order* approves application for permit number 35-14402 in the names of Karl and Jeffrey Cook (collectively "the Cooks"). The Coalition asserts that the *Preliminary Order* is contrary to law and requests that this Court set it aside and remand for further proceedings.

### B. Course of proceedings and statement of facts.

This matter concerns an application to appropriate water filed by the Cooks. R., pp.1-5. The application was filed on August 29, 2014. *Id.* It seeks to appropriate 3.07 cfs of ground water for the irrigation of 560 acres in Jefferson County.[2] *Id.* The proposed point of diversion is a pre-existing ground water well that services the Cooks' property. *Id.* at 1. Aside from the application, the Cooks hold six other ground water rights for the irrigation of the same 560 acres. *Id.* at 3; Ex. 103-108. Those rights are diverted via the Cooks' well and cumulatively permit them to withdraw ground water at rate of diversion of 5.13 cfs up to a maximum diversion volume of 2,187.8 acre-feet annually. *Id.* The intent of the application, as stated therein, is to authorize the withdrawal of water via the well at a higher rate of diversion "with ***NO INCREASE*** in the decreed Diversion Volume . . . ." R., p.3. In other words, the Cooks' application seeks an additional water right to withdraw ground water at a higher rate of diversion on the representation that they will not increase their total annual diversion volume as a result of the new appropriation. *Id.*

The Cooks' application was protested by the Coalition. *Id.* at 10-12. Among other things, the Coalition asserted that the Cooks failed to establish the new appropriation will not

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[1] The term "Coalition" refers collectively to the A&B Irrigation District, Burley Irrigation District, American Falls Reservoir District #2, Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company.

[2] Although the Cooks' application seeks to appropriate 5.0 cfs on its face, the Cooks clarified and confirmed at the administrative hearing that they intended only to seek the appropriation of 3.07 cfs. R., p.48. Ex.101, p.4.

reduce the quantity of water under existing water rights. *Id.* An administrative hearing was held before the Department on April 24, 2015. Tr., pp.1-202. Department employee James Cefalo acted as hearing officer. *Id.* at 5. On May 15, 2015, he issued his *Preliminary Order*, finding that the proposed appropriation will not reduce the quantity of water under existing water rights so long as it is appropriately conditioned. *Id.* at 53. To ensure no injury, the hearing officer held that "Permit 35-14402 and the existing ground water rights on the Cooks' property should be limited to a combined maximum annual diversion volume of 1,221 acre-feet." *Id.* at 56. The hearing officer proceeded to issue Permit to Appropriate Water No. 35-14402 in the names of Karl and Jeffrey Cook with the following conditions:

> 3. Rights 35-7280, 35-7281, 35-13241, 35-14334, 35-14335, 35-14336 and 35-14402 when combined shall not exceed a total diversion rate of 8.20 cfs, a total annual maximum diversion volume of 1,221 af at the field headgate, and the irrigation of 560 acres.
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> 4. To mitigate for the depletion of water resulting from the use of water under this right and to prevent injury to senior water right holders, the right holder shall never exceed the combined annual volume limit included in the conditions for this right.
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> 5. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 120.
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> 6. Prior to diversion of water under this right, the right holder shall install and maintain a totalizing measuring device of a type approved by the Department as a part of the diverting works.
>
> . . .
>
> 9. Noncompliance with any condition of this right, including the requirement for mitigation, is cause for the director to issue a notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water.

*Id.* at 57.

On June 25, 2015, the Coalition filed the instant *Petition for Judicial Review*, asserting that the hearing officer's *Preliminary Order* is not supported by substantial evidence in the record and is contrary to law. The case was reassigned by the clerk of the court to this Court on that same date. The parties subsequently briefed the issues raised on judicial review. On

October 26, 2015, the Court entered an *Order* permitting the Cooks to appear as intervenors. A hearing on the *Petition* was held before the Court on December 3, 2015. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day or December 4, 2015.

## 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). 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. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). 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).

## III.

## ANALYSIS

### A. The hearing officer's *Preliminary Order* is affirmed.

An application for permit to appropriate water is evaluated against the criteria set forth in Idaho Code § 42-203A. One criterion is whether the proposed appropriation "will reduce the

quantity of water under existing water rights."[3] I.C. § 42-203A(5). If so, the Department may deny the application. *Id.* However, an application that may otherwise be denied because of injury to another water right "may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the director." IDAPA 37.03.08.045.01.a.iv.

The hearing officer recognized that the appropriation proposed by the Cooks constitutes a consumptive use of water. R., p.51. As such, without mitigation the appropriation will reduce the quantity of water available under existing water rights. *Id.* To prevent such a reduction, the hearing officer required mitigation from the Cooks in the form of a cutback in the annual diversion volume authorized under their other six water rights. *Id.* at 56. He ultimately determined that if the maximum diversion volume of the new appropriation and the other six water rights is limited to 1,221 acre-feet annually, the new appropriation will not reduce the quantity of water under existing water rights. *Id.*

To reach this determination the hearing officer engaged in the following analysis. First, he calculated that the Cooks are authorized to divert up to 2,187.7 acre-feet of water annually under their existing six water rights. *Id.* at 49. Next, recognizing that the Cooks have never diverted that full volume, the hearing officer computed the Cooks' actual authorized historical use under the existing rights. *Id.* at 51-553. He examined the record to find which year in the last fifteen the Cooks diverted the most water. *Id.* His examination revealed that the highest water use occurred in 2012. *Id.* at 49-50. He recognized, and it is undisputed in the record, that the Cooks have historically withdrawn ground water at a higher rate of diversion than that authorized under their existing rights.[4] *Id.* This made the hearing officer's task more difficult. However, the hearing officer took steps to account for the unauthorized diversion to make sure it did not work to the Cooks' advantage. *Id.* Importantly, he undertook the task of analyzing how much water the Cooks would have diverted in 2012 *had they been limited to their authorized diversion rate of 5.13 cfs. Id.* Had the Cooks been so limited, the hearing officer found they would have diverted 1,221 acre-feet of ground water in 2012. *Id.* at 53.

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[3] The Coalition does not challenge the hearing officer's findings that the additional criteria set forth in Idaho Code 42-203A(5) have been satisfied.

[4] The evidence in the record establishes that the Cooks were unaware that their historic water use was not consistent with their water rights until Spring 2014. Tr., p.12. Once they were aware, the Cooks filed the instant application for permit in an attempt to address the issue.

Finally, the hearing officer determined that if the Cooks' new appropriation and existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the new appropriation will be fully mitigated and will not reduce the quantity of water under existing water rights. *Id.* at 53. By so limiting the rights, he reasoned that "[t]he volume of water diverted under the proposed permit will be offset by a corresponding reduction in the volume pumped under the existing rights." *Id.* The Coalition argues that the hearing officer's findings in these respects are not supported by substantial evidence in the record and are contrary to law. Each will be addressed in turn.

**i. The hearing officer's findings pertaining to whether the proposed appropriation will reduce the quantity of water under existing water rights is supported by substantial evidence in the record.**

The Coalition argues that the findings pertaining to whether the proposed appropriation will reduce the quantity of water under existing water rights are not supported by substantial evidence in the record. It first asserts that the hearing officer's calculations of what the Cooks' water usage would have been in 2012 had they been limited to their authorized diversion rate are unsupported and must be disregarded. It asserts the data in the record only establishes the Cooks' historic water usage based on inflated and unauthorized diversion rates. This is true in a strict sense. The historic use data in the record reflects diversion rates by the Cooks that exceed that authorized under their rights. However, it is misplaced to insinuate that the hearing officer is incapable of evaluating the evidence and deducing, based on that evidence, what the Cooks' water usage would have been in 2012 had they been limited to their authorized diversion rate. The hearing officer, based on his experience and expertise, is certainly capable of engaging in such an undertaking.[5]

The Court finds that the hearing officer's calculations are supported by substantial evidence in the record. The record includes data of the Cooks' actual water usage and power usage in 2012. Ex. 1. This data was collected by the Department as part of its Water Management Information System. *Id.* It is the power usage data in which the hearing officer took particular interest. R., pp.52-53. From the data, he deduced that the Cooks used 1,466,800 kWh of power in 2012. *Id.* The hearing officer calculated that power usage equated to 108 days

[5] Likewise, the experts retained by the parties, one of whom is an engineer and the other a hydrologist, are qualified of engaging in such an undertaking.

of pumping that year. *Id.* at 52. Then, the hearing officer added twelve days of pumping to the equation based on the testimony of Jeffrey Cook, who testified as to how irrigation practices would have been altered had they been limited to their authorized diversion rate of 5.13 cfs,. *Id.* at 52-53. He made the factual finding that had the Cooks been so limited, they would have pumped water for 120 days in 2012. *Id.* Utilizing the following equation, the hearing officer computed that had the Cooks diverted water for 120 days in 2012 at their authorized diversion rate, they would have diverted 1,221 acre-feet of water that year: "120 days *5.13 cfs = 6.15.6 cfs-days * 1.9835 af/cfs-day = 1,221 acre-feet." *Id.* at 53. The Court finds the hearing officer's calculations to be supported by substantial evidence in the record. The evidence includes the record of the Cooks' preexisting water rights, historic water and power usage data collected via the Department's Water Management Information System, and the testimony of Jeffrey Cook. Ex. 103-108; Ex. 1; Tr., pp.22-27, 35-43, 132-140.

The Coalition next asserts that the hearing officer's finding that the appropriation will not reduce the quantity of water under existing rights is unsupported by substantial evidence. This Court disagrees. The new appropriation authorizes the Cooks to divert water via their well at a higher rate of diversion than previously. However, the record establishes that the annual withdrawal of ground water from the aquifer will not increase as a result of the new appropriation. That such is the case is evidenced by the conditions placed on the appropriation by the hearing officer. Those conditions limit the Cooks' use of water under the new appropriation and their existing rights to "a total annual maximum diversion volume of 1,221 af at the field headgate." R., at 57. Since 1,221 acre-feet is what the Cooks' would have diverted historically under their existing rights had they been limited to their authorized rate of diversion, the new appropriation will not result in any more water being withdrawn from the aquifer on an annual basis than that which was already occurring.

Notwithstanding, the Coalition argues that the new appropriation authorizes the Cooks to divert the volume of water authorized under their rights in a shorter amount of time, resulting in the reduction of the quantity of water under existing rights. This assertion is not supported by the record. As set forth above, substantial evidence supports the hearing officer's finding that the amount of water withdrawn from the aquifer on an annual basis will not increase as a result of the new appropriation. Ex. 103-108; Ex. 1; Tr., pp.22-27, 35-43, 132-140. With respect to the fact that the water may be withdrawn in a shorter amount of time, the Coalition's own expert

testified that the timing of withdrawal will not reduce the amount of water existing under the Coalition's water rights:

> Q. Okay. Back on IDWR Exhibit 1. Do you see that in 2012 [the Cooks] pumped 1522 acre-feet?
>
> A. Yes.
>
> Q. Okay. And do you think that that's a -- well, let me ask this way. If that amount was pumped out very quickly or over a drawn-out period, does that increase the impacts aquiferwide? Would it hurt your clients any more or less than whether it was diverted more quickly or less quickly?
>
> A. I would say no.

Tr., p.163.[6] Therefore, based on the foregoing, the Court finds the hearing officer's finding pertaining to whether the proposed appropriation will reduce the quantity of water under existing water rights to be supported by substantial evidence in the record.

**ii. The *Preliminary Order* is not contrary to law and must be affirmed.**

The Coalition argues that the *Preliminary Order* results in an enlarged diversion rate beyond the Cooks' existing water rights and therefore is contrary to law. As discussed above, an application for permit to appropriate water is evaluated against the criteria set forth in Idaho Code § 42-203A. The hearing officer found that the Cooks' application satisfied all of the criteria set forth in that statute. On judicial review, the Coalition challenges only the hearing officer's findings that the proposed appropriation will not reduce the quantity of water under existing water rights. Since the hearing officer's finding on this criterion is supported by substantial evidence in the record, for the reasons set forth above, it will not be disturbed. Since all of the statutory criteria set forth in Idaho Code § 42-203A have been satisfied, the hearing officer's *Preliminary Order* issuing the permit is not contrary to law, but rather consistent with it.

Notwithstanding, the Coalition argues that the *Preliminary Order* is inconsistent with prior precedent established by the Department *In the Matter of Application to Appropriate Water*

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[6] As a general matter, withdrawing water at a faster rate without increasing the annual volume diverted has the potential to impact existing rights as a result of the expanded cone of depression. However, the record supports the hearing officer's finding that the Coalition's water rights would not be impacted. As concerns other existing rights, no other water right holders protested the application.

*No. 27-12155 in the Name of the City of Shelley*. In the City of Shelley matter, the City filed an application to appropriate ground water. Ex. 202, p.1. The Department found that without mitigation, the application would reduce the quantity of water under existing rights. *Id.* at 11. Among other forms of mitigation, the City proposed limiting the annual volume of water diverted under its existing rights and its new appropriation to that volume already authorized under its existing rights. *Id.* at 12-13. It is important to note that the City did not propose limiting the annual volume to that which it had actually diverted historically, but rather that total volume authorized under its existing rights. *Id.* The Department rejected the proposed mitigation on the grounds that new appropriation could still result in more water being diverted annually from the aquifer by the City than that which it has actually diverted historically.[7] *Id.*

The City of Shelley matter is distinguishable from the instant proceeding. In the City of Shelley matter, it was possible that the City could withdraw more water from the aquifer annually as a result of its proposed appropriation than it ever had historically. Such is not the case here. By placing appropriate limitations on his approval of the Cooks' application, the hearing officer assured that the Cooks' annual withdrawal of ground water from the aquifer as a result of the new appropriation will not exceed that which they have legally diverted historically.

Last, the Court notes that the Department has implemented a moratorium restricting the processing and approval of new application for permits to appropriate water from ground water sources within the Eastern Snake Plain Area. *Amended Moratorium Order* (April 30, 1993). However, by its express terms, the *Amended Moratorium Order* does not prevent the Director from reviewing an application for permit if:

> The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water *or mitigation provided by the applicant to offset injury to other rights.*

*Amended Moratorium Order*, p.5. The hearing officer determined that if the Cooks' new appropriation and existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the new appropriation will be fully mitigated and will not reduce the quantity of water under existing water rights. *Id.* at 53. That is, "[t]he volume of water diverted under the proposed permit will be offset by a corresponding reduction in the volume pumped under the

[7] The Department ultimately approved the City of Shelley's application for permit, albeit as a result of alternative forms of mitigation proposed by the City not discussed here.

existing rights." *Id.* For the reasons set forth above, the Court finds the hearing officer's finding in this respect to be supported by substantial evidence in the record and will not be disturbed.

In sum, the Court finds that the hearing officer's *Preliminary Order* is consistent with Idaho Code § 42-203A, the Department's decision in the City of Shelley matter, and the Department's *Amended Moratorium Order*. It follows that the Coalition's argument that the *Preliminary Order* is contrary to law is unavailing.

**iii. The hearing officer's *Preliminary Order* is affirmed on the additional grounds that the Coalition has failed to establish its substantial rights have been prejudiced.**

Under Idaho Code § 67-5279(4), a decision of the Department must be affirmed unless the petitioner can establish that its substantial rights have been prejudiced. In this case, it cannot be said that the *Preliminary Order* prejudices the Coalition's substantial rights. The Coalition holds senior natural flow and storage water rights on the Snake River. However, as set forth above, the evidence in the record establishes that the Cooks' annual withdrawal of ground water from the aquifer will not increase as a result of the new appropriation. Nor will the fact that the water may be withdrawn in a shorter amount of time impact the Coalition's rights. Tr., p.163. Therefore, the Coalition has failed to establish that its water rights are prejudiced by the *Final Order*.

**B. The Cooks' argument that the Court lacks subject matter jurisdiction over the *Petition for Judicial Review* is inconsistent with IDAPA.**

The Cooks' assert the Court lacks subject matter jurisdiction over the Coalition's *Petition for Judical Review* on the grounds that the Coalition failed to exhaust its administrative remedies. They argue the Coalition was required to motion the Director to review the hearing officer's *Preliminary Order* prior to seeking judicial review of that *Order*. This Court disagrees.

IDAPA provides that either an agency head, or someone other than the agency head (i.e., a hearing officer), may preside over a contested case proceeding before an agency. I.C. § 67-5242(2). Where someone other than the agency head acts as the presiding officer, he may issue one of two types of orders. I.C. § 67-5243. He may issue a recommended order, which becomes a final order of the agency *only* after review by the agency head. I.C. § 67-5243(1)(a). Or, he

may issue a preliminary order which becomes a final order of the agency *unless* the agency head, on its own motion or upon motion of a party, reviews it. I.C. §§ 67-5243(1)(b) & 67-5246(3). In this case, the hearing officer, who was not the agency head, issued a *Preliminary Order*. The record reflects that the Director did not review the *Preliminary Order* on his own motion, nor did any party timely motion him to so review the *Order*. Therefore, the *Preliminary Order* subsequently became a final order of the Department via operation of law. I.C. §§ 67-5243(1)(b) & 67-5246(3).

The Cooks' argument that the *Preliminary Order* is not subject to judicial review is inconsistent with IDAPA. Idaho Code § 67-5270 sets forth the requirement that an agency action must be "final" before judicial review is available. Idaho Code § 67-5271(1) sets forth the concomitant requirement that judicial review may not be sought by an individual until he "has exhausted all administrative remedies required in this chapter." I.C. § 67-5271(1). These two provisions go hand in hand. When read together they establish the general principle that a person may not seek judicial review of an agency action before the administrative process has finished. The agency process in this case finished once the hearing officer's *Preliminary Order* became a final order of the Department via operation of law. Hence, this is not a situation where the Coalition is attempting to seek judicial review prior to the agency completing its administrative process.

The Cooks' argument is also contrary to the plain language of Idaho Code § 67-5273(2). That statute provides that a petition for judicial review of "a preliminary order that has become final *when it was not reviewed by the agency head* . . . must be filed within twenty-eight (28) days of the . . . date when the preliminary order became final. . . ." I.C. § 67-5273(2) (emphasis added). Contrary to the Cooks' argument, the plain language of this statute expressly acknowledges that a party may seek judicial review of a preliminary order that has become final when it was not reviewed by the agency head. The Cooks' position renders the plain language of this statute meaningless and must be rejected. *See e.g., Brown v. Caldwell School Dist. No. 132*, 127 Idaho 112, 117, 88 P.2d 43, 48 (1995) (setting forth rule of statutory construction that a statute should be interpreted so as to give effect to all of its language, and that courts do not presume that the legislature performed an idle act by using meaningless statutory language).

## IV.

## ORDER

Therefore, based on the foregoing, IT IS ORDERED that the *Preliminary Order Issuing Permit* issued on May 15, 2015 **is hereby affirmed.**

Dated December 14, 2015

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 December 14, 2015, with sufficient first-class postage to the following:

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