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John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company*

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

*Attorneys for American Falls Reservoir Dis-
trict #2 and Minidoka Irrigation District*

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JUN 01 2015

**DEPARTMENT OF
WATER RESOURCES**

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

IN THE MATTER OF APPLICATION FOR
PERMIT NOS. 35-14402

EXCEPTIONS BRIEF

In the name of the Jeffrey M. Cook

COMES NOW, the Protestants, A&B IRRIGATION DISTRICT, AMERICAN FALLS
RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION
DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY and
TWIN FALLS CANAL COMPANY, by and through their attorneys of record, and hereby submit
this Exceptions Brief to the Director of the Idaho Department of Water Resources, pursuant to
IDWR Rule of Procedure 730.02(b). For the reasons discussed herein, the Director should re-
verse the Hearing Officer's *Preliminary Order Issuing Permit* ("Preliminary Order" or "P.O.").

INTRODUCTION

The issue presented in the above application is whether the Department can approve an
application for Permit that seeks to increase the diversion rate under established water rights.

The issue is complicated by the fact that the Applicants and predecessors in interest unlawfully diverted in excess of their allowed diversion rate of 5.13 cfs for in excess of 20 years. The Hearing Officer granted the permit authorizing a diversion rate in excess of the original water rights with a volume limitation of 1,221 afa – based on the Hearing Officer’s calculation of the annual volume of water that may have been diverted under the established water rights using the Applicants’ historical irrigation practices. According to the Hearing Officer, “if the proposed permit and the Cook’s existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the proposed permit will be fully mitigated.” *P.O.* at 6, ¶ 19.

Approval of this application sets a dangerous precedent for water use on the Snake River Plain and throughout Idaho. Few irrigators divert the entire volume of water authorized by their water rights. Shoulder season lack of demand, crop type, stoppages for various reasons such as harvest, weather conditions, maintenance and other factors result in less than the authorized volume being used. The reasoning in this decision would allow any farmer who uses a lower volume of water than authorized under existing water rights to request an increase in diversion rate – thus removing more water from the aquifer in a shorter period of time and increasing the rate that water is used. Under the premise of this Preliminary Order, so long as those increased diversions remain within the historical volume used, then “the proposed permit [would] be fully mitigated.”

The law does not support the Hearing Officer’s decision. Accordingly, the Director should reverse the Hearing Officer’s Preliminary Order and deny the application.

PROCEDURAL HISTORY

Through the above application, Jeffrey M. Cook seeks a new water right so that he can increase his diversion rate from 5.13 cfs (as authorized under his existing water rights) to 8.2 cfs.

Although this application was only recently filed, the owners of the Cook property have diverted water at this higher rate (i.e. 8.2 cfs) since at least 2006. *P.O.* at 2, ¶ 7.

To mitigate for the new diversion, Cook offered to reduce the total volume authorized under his existing water rights from 2,187 afa to 1,522 afa. The offer of 1,522 afa was based on calculations by Cook's expert and represented the volume diverted in 2012 using a diversion rate exceeding that allowed under the water rights – the highest diversion volume on the Cook property over the last 15 irrigation seasons. *P.O.* at 2 ¶ 10 & at 5, ¶ 8. No testimony was provided that either Cook or his predecessors in interest ever diverted more than 1,522 afa for irrigation of the Cook property in any irrigation season.

At a hearing on the above application, speculative testimony was presented that, had Cook diverted within the authorized limits of the existing water rights (i.e. at a rate of 5.13 cfs), he would have used water for a longer period of time during the irrigation season. *P.O.* at 3, ¶¶ 13-15 (discussing irrigation practices) & at 5, ¶ 9. In approving the application, the Hearing Officer considered the evidence presented by Cook as to the use of water during the irrigation season. Some of the testimony about increased use was rejected. *P.O.* at 5, ¶¶ 11-13 ("The arguments advanced by RMEA in support of a 149-day pumping period are not persuasive"). Other testimony was accepted. *P.O.* at 5-6, ¶¶ 15-17. In the end, relying upon a speculative calculation,¹ the Hearing Officer concluded that Cook would have irrigated for 120 days had he been limited to the 5.13 cfs diversion rate. *P.O.* at 6, n.1. Based on this, the Hearing Officer approved the Permit with a volume limitation of 1,221 afa. *P.O.* at 6, ¶¶ 18-19 & n.1. According to the

¹ The evidence was uncontroverted that the Applicants grew timothy grass on the property, a crop that requires irrigation during almost all of the irrigation season. However, no evidence was presented that the applicant would grow the same crop if he were to comply with the diversion rate stated on the water right. In fact, the Applicant testified that he did not fully understand the diversion rate of the water rights when he purchased the property, and if he had realized that the water rights had a restricted diversion rate, he probably would not have purchased the property.

Hearing Officer, if “the proposed permit and the Cook’s existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the proposed permit will be fully mitigated.” *P.O.* at 6, ¶ 19.

ARGUMENT

The Hearing Officer’s decision to authorize an increased diversion rate based on a limited diversion volume is contrary to the law and Department precedent. This issue first came to the Department *In the Matter of Application to Appropriate Water Right No. 27-12155 in the Name of the City of Shelley*. There, Shelley sought a new groundwater right with a diversion rate of 3.34 cfs for municipal purposes. *Ex. 202* at 1. As part of the mitigation for the new consumptive uses, Shelley offered to limit “the total annual volume diverted to the total volume authorized by Shelley’s perfected water rights.” *Id.* According to Shelley, no injury would result because there would be no additional volume of water authorized for diversion. *Id.* at 12-13; *see also Ex. 200* at 2 (“Shelley argues, based on a presumption that it is entitled to the annual volume described above and the volume is not exceeded by an increased flow rate, that the protestants cannot be injured”).

On summary judgment, the Hearing Officer rejected this mitigation plan.

The extent of a water right is bounded by the beneficial use of the water under the water right. A municipality has the ability to grow into its water right within reasonable limits. These limits include the express components that define the municipal water rights. One of these components is the flow rate. A reasonable exercise of a municipal water right is the construction of additional storage or additional delivery line capacity to address relatively short term demands on the system. These reasonable expansions of a municipal system are recognized within the expansion flexibility of a municipal system.

Shelley argues, however, that a new water can authorize significant additional flow rate, and that any additional volume diverted would, as a matter of law not injure another water user even though the increased volume could not have been physically diverted under the flow rate authorized by the existing water rights. Adoption of this argument by the Department could result in a

license to significantly increase the flow rate, and correspondingly increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights, even if the rights do not expressly fix a volume limitation.

Based on the above, the issue presented by Shelley is an issue of fact. The issue is one of whether the increase in flow rate will cause an increase in the annual volume of water diverted that could not be reasonably expected under Shelley's existing municipal water rights. For instance, if the extra flow rate were sought simply to supply fire protection flows to satisfy a fire protection standard, and the only additional volume would be diverted to fight an existing fire, the facts would probably dictate a conclusion that there is no injury. On the other hand, if additional flow rate would double the total annual volume diverted under the existing municipal water rights, it is more probable that injury could occur.

Ex. 200 at 2.

The Hearing Officer's Preliminary Order, Ex. 201, confirmed that the increased diversion rate would "increase the annual volume diverted" – even if the new diversions were constrained by the volume limitations of the existing water rights:

Approval of this water right application will increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights. The increase in the total volume of water diverted under this right will result in a reduction in the quantity of water available under existing rights. Large annual volumes for municipal water rights, whether implied when no volume is specified or expressly stated in the water right, *are constrained and limited by the flow rate authorized by the water rights.*

Ex. 201 at 8, ¶ 12 (emphasis added). In the Final Order, the Director rejected this portion of Shelley's mitigation plan using identical language as the Preliminary Order. Ex. 202 at 13, ¶ 14.²

The decision in the Shelley matter confirmed that increasing one's diversion rate in an effort to use more water results in an increase of the "annual volume diverted." *Id.* (Such increases would "increase the annual volume diverted beyond what was reasonably expected under

² The Permit was approved based on alternate mitigation provided by the City.

the existing municipal water rights"). This is because diversion volumes "are constrained and limited by the flow rate authorized by the water rights." *Id.*

In this case, the existing water rights authorize a diversion rate of 5.13 cfs and an annual volume of 2,187 afa. Ex. 101 at 5 (chart depicting existing water rights). For at least the last 15 years, neither Cook nor his predecessors in interest have ever diverted more than 1,522 afa for irrigation of the property. Ex. IDWR 1. Indeed, the evidence presented demonstrates that, at a higher diversion rate, Cook will divert more water than "was reasonably expected under the existing" water right. For example, Ex. 101 compares the diversion volumes for irrigation scenarios based on a 5.13 cfs diversion rate, as authorized, and an 8.2 diversion rate, as sought through the application. The information provided shows the following increased diversion volumes based on the diversion rates:

Irr. Days	5.13 cfs	8.2 cfs	Increase
103	1,048.062 afa	1675.264 afa	627.202 afa
164	1,668.758 afa	2667.411 afa	998.653 afa
76.2	775.4 afa	1,239.4 afa	464 afa
149	1,516.1 afa	2,423.4 afa	907.3 afa

Ex. 101 at 5-6.

As shown in the above graph, for 103 days of irrigation, the Applicant could only have "reasonably expected" to divert 1,048.062 afa using the authorized diversion rate. *Id.* This volume increases by 627.202 afa over the same period of time if the diversion rate is increased to 8.2 cfs. In other words, based on the limitations of the water rights, the Applicant could not "reasonably expect" to divert more than 1,048.062 afa within any 103 day period of the irrigation season. The same conclusion applies to the 120 day irrigation season adopted by the Hearing Officer. *P.O.* at 6, n.1. During any 120 day period during the irrigation season, the Applicant could not have "reasonably expected" to divert more than 1,221 afa.

Notwithstanding the precedent from the Shelley proceedings, the Hearing Officer has allowed Cook to divert more water than was "reasonable expected" under the existing water rights. Indeed, by diverting at a higher diversion rate, Cook will be able to divert *more water* in a *shorter period of time* than he could have under the existing rights. At a diversion rate of 5.13 cfs, it would take Cook 120 days to divert 1,221 afa. However, at a diversion rate of 8.2 cfs, Cook will be able to divert the same 1,221 afa in only 75 days.³ Under the existing water rights, Cook could never have "reasonably expected" to divert 1,221 afa in only 75 irrigation days. Rather, as shown above, Cook would only be able to divert 775.4 afa in 76.2 irrigation days. Ex. 101 at 5-6. By allowing Cook to divert more water in fewer days, the Hearing Officer has allowed Cook to exceed the reasonable expectations of the established water rights – contrary to the Shelley decisions.

The Hearing Officer attempts to justify this decision by stating:

If the proposed permit and the Cook's existing water rights are limited to a combined annual diversion volume of 1,221 acre-feet, the proposed permit will be fully mitigated. The volume of water diverted under the proposed permit will be offset by a corresponding reduction in the volume pumped under the existing water rights. In combination, the water rights will not exceed the historical annual volume diverted under the existing water rights.

P.O. at 6, ¶ 19. The Hearing Officer concludes that "the proposed permit and the existing water rights will be limited to a combined annual diversion volume of 1,221 acre-feet. This represents the maximum volume of water reasonably expected to be diverted under the existing water rights based on historical use." *P.O.* at 7, ¶ 23.

The Hearing Officer's decision misreads the Director's conclusions in the Shelley matter. In those proceedings, the Director did not limit the "reasonably expected" determination to the volume that had historically been diverted under the existing water rights. Rather, the Director

³ 1,221 / 1.9835 af / 8.2 cfs = 75 days.

concluded that the volume of water authorized is "constrained and limited by the flow rate authorized by the water rights." Ex. 202 at 13. ¶ 14. In this case, the flow rate of the existing water rights is 5.13 cfs. This rate constrains and limits the volume that can be diverted. By increasing the flow rate to 8.2 cfs, the Hearing Officer has allowed Cook to exceed these constraints and limitations by diverting volumes of water at a fast rate – thereby diverting the 1,221 afa 46 days faster than would be permitted under the established water rights. *Supra*.

Furthermore, in the Shelley matter, the Director confirmed that the "reasonable exercise" of the existing water rights may require the implementation or change of certain controls or practices to maximize his water use. "A reasonable exercise of a municipal water right is the construction of additional storage or additional delivery line capacity to address relatively short term demands on the system." Ex. 200 at 2. In this case, crops and irrigation patterns can be rotated and ponds can be constructed. Rather than take such actions, however, "Cooks seek to obtain a water rights to cover their existing irrigation system, thereby avoiding the expense associated with changing the system." P.O. at 2, ¶ 8. The law does not permit this expanded use merely because Cook wants to avoid some expense. Accordingly, the Director should reverse the Hearing Officer's Preliminary Order and deny the Application.

CONCLUSION

The Hearing Officer's granting of this Permit is contrary to the law and Department precedent. The Hearing Officer has permitted an increased diversion rate that will allow Cook to divert more water in a short period of time. Contrary to the Hearing Officer's decision, Cook should not be permitted to divert at a higher rate and use more water than was "reasonably expected" under the existing water rights. The Director should reverse the Preliminary Order and deny this application.

DATED this 1st day of June, 2015.

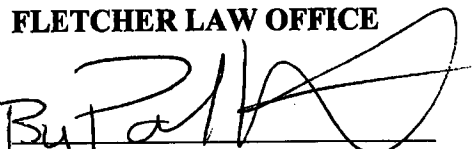
BARKER ROSS HOLT & SIMPSON LLP



Travis L. Thompson
Paul L. Arrington

*Attorneys for A&B, BID, Milner, NSCC,
TFCC*

FLETCHER LAW OFFICE



W. Kent Fletcher

*Attorneys for American Falls Reservoir
District #2 and Minidoka Irrigation Dis-
trict*

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2015, I caused to be served a true and correct copy of the foregoing upon the following by the method indicated:

Gary Spackman, Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720

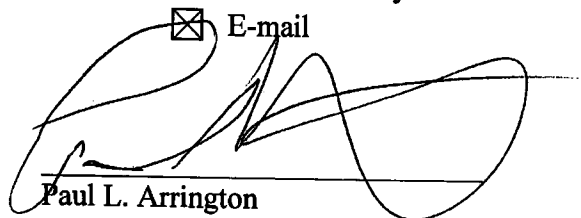
- ☒ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☒ E-mail

James Cefalo, Hearing Officer
IDWR – Eastern Regional Office
900 N. Skyline Dr., Suite A
Idaho Falls, ID 83402-1718
James.cefalo@idwr.idaho.gov

- ☐ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☒ E-mail

Robert L. Harris
**HOLDEN, KIDWELL, HAHN &
CRAPO, P.L.L.C.**
P.O. Box 50130
Idaho Falls, Idaho 83405

- ☐ U.S. Mail/Postage Prepaid
- ☐ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☒ E-mail



Paul L. Arrington