IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

BLACK HAWK HOMEOWNERS ASSOCIATION, INC. an Idaho nonprofit membership corporation; IRON RIM RANCH HOME OWNERS ASSOCIATION, INC., an Idaho nonprofit membership corporation,

Petitioners,

v.

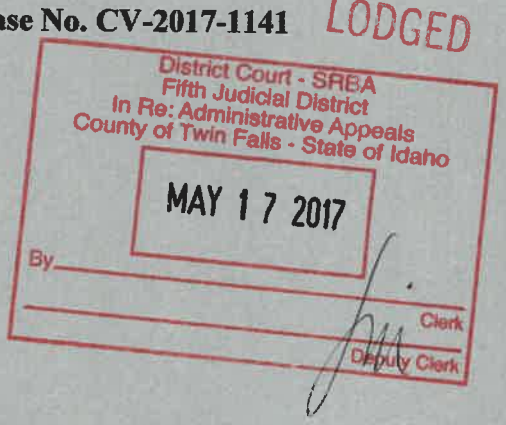
THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent.

IN THE MATTER OF APPLICATIONS FOR PERMIT NO. 25-14428

In the name of Black Hawk HOA and Iron Rim Ranch HOA.

Case No. CV-2017-1141



PETITIONERS' BRIEF

Judicial Review of the *Preliminary Order Denying Motion for Summary Judgment and Denying Application*, entered by the Idaho Department of Water Resources; James Cefalo, Hearing Officer, Presiding.

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Petitioners, Black Hawk Homeowners Association, Inc. and Iron Rim Ranch Home Owners Association, Inc. (together, the "Associations"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Petitioners' Brief.*

I. STATEMENT OF THE CASE.

A. Nature of the Case.

Idaho has long recognized and protected the unique nature and importance of the domestic use of water. Both the prior appropriation doctrine and the preference for domestic uses of water have been enshrined in the Idaho Constitution since its ratification in 1890. The Idaho Legislature by statute; the Idaho Department of Water Resources (the "Department") in rule and ruling; and the Idaho Supreme Court by opinion have all recognized this preference for domestic uses of water. Idaho Code § 42-111—the "domestic exemption"—carefully spells out the amount (and uses) of water that qualify for this protected treatment as a domestic use of water. Despite all of this authority—and the Department's prior actions made on the basis of the domestic exemption—the Department, in this case, chose to treat this application like any other water right application instead of treating it as the domestic use it is.

B. Statement of Facts.

The Associations are related to two subdivisions located in the foothills southeast of Idaho Falls, Idaho, in Bonneville County (the "Subdivisions"). R. at 110. Together, the Subdivisions contain 141 individual lots for the construction of individual homes. R. at 110. Very few groundwater irrigation water rights have been developed in the area of the Subdivisions because most of the irrigation there is accomplished through surface water irrigation. R. at 112-13.

The original developer of the Black Hawk Subdivision, Morgan Construction, submitted an application for a water right permit (referred to herein by its administrative number, "25-7669") to appropriate 1.05 cfs for domestic purposes on 65 subdivision lots (including the irrigation of up to ½ acre per lot). R. at 110. Upon advertisement, 25-7669 was not protested. R. at 110. 25-7669 was issued on April 8, 1999, and included the following conditions:

> 6. The domestic use authorized under this right shall not exceed 13,000 gallons per day per home.
> 7. The irrigation occurring under this domestic use shall not exceed ½ acre within each platted subdivision lot upon which a home has been constructed. This right does not provide for irrigation of common areas or for irrigation of lots upon which homes have not been constructed.

R. at 111. The Department approved an extension of time to submit beneficial use of 25-7669, which extended the proof due date of the permit to April 1, 2009. R. at 111. On July 11, 2005, 25-7669 was assigned to George Z. McDaniel of Blackhawk Ventures LLC. R. at 111. George Z. McDaniel was also involved in the development of Iron Rim Ranch Subdivision. R. at 111. During the development period of 25-7669, the water system developed under this permit was expanded to include the Iron Rim Ranch Subdivision. R. at 111. The water system is monitored and regulated as a public drinking water system by the Idaho Department of Environmental Quality. R. at 111. Proof of beneficial use was submitted on April 1, 2009. On March 17, 2015, ownership of 25-7669 was assigned to the Associations. R. at 111. On July 6, 2015, the Department issued a license for 25-7669. R. at 111. The license contains the following conditions:

> 1. Place of use is within Blackhawk and Iron Rim Ranch Subdivisions.
> 2. Domestic use is for 65 homes.
> 3. The domestic use authorized under this right shall not exceed 13,000

gallons per day per home.

4. The irrigation occurring under this domestic use shall not exceed ½ acre within each platted subdivision lot upon which a home has been constructed. This right does not provide for irrigation of common areas or for irrigation of lots upon which homes have not been constructed.

R. at 111-12. The diversion volume and irrigated acreage limitations on domestic use per lot (or unit) contained in the license for 25-7669 are the same limitations contained in the domestic exemption for homes as set forth in Idaho Code § 42-111(a).

Even before the Associations received the license for 25-7669, they recognized that development in the Subdivisions was rapidly going to exceed the 65 houses for which 25-7669 was obtained. R. at 112. For that reason, the Associations submitted another application for permit (referred to herein by its administrative number, "25-14395"), which sought .40 cfs for domestic purposes for the other 76 houses in the Subdivisions—but specifically did not include the right to irrigate up to ½ acre on each lot. R at 112. After advertisement, 25-14395 was not protested. R. at 112. A permit for 25-14395 was issued on December 29, 2013, with the following relevant conditions:

3. The domestic use authorized under this right shall not exceed 13,000 gallons per day per home.
4. Domestic use is for 76 homes and does not include lawn, garden, landscape, or other types of irrigation.
5. Prior to filing proof of beneficial use for this water right, the right holder shall obtain a water right sufficient to cover all irrigation expected to occur on the 76 residential lots described under this right. Failure to obtain a sufficient irrigation right by the date specified shall be cause to void this water right.

R. at 112. Thus far, the Associations have not been able to purchase a separate irrigation water right in order to meet condition number 5 of the permit for 25-14395 ("Condition 5"). R. at 113.

C. Course of Proceedings.

Because of the Associations' inability to satisfy Condition 5, on October 13, 2015, the Associations submitted the current application for water right permit (referred to herein by its administrative number, "25-14428"). R. at 1, 3, 4. The Associations made some minor changes to 25-14428 in an amended application, which was filed on October 22, 2015. R. at 2, 5. 25-14428 seeks the right to appropriate 0.76 cfs for domestic purposes—both non-consumptive use and the ability to irrigate up to ½ acre per subdivision lot—on 76 lots from a single point of diversion, a community well. R. at 1-3, 113. In 25-14428, the diversion volume and irrigated acreage limitations on the domestic use per lot contained in the application are the same as those contained in the domestic exemption. R. at 103; *see also* Idaho Code § 42-111(a).

Notice of 25-14428 was advertised on November 5th and 12th, 2015. R. at 10-11. On November 17, 2015, 25-14428 was protested by the 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 (collectively referred to herein as the "Coalition"). R. at 12-14. The prehearing conference for 25-14428 was held on January 26, 2016. R. at 26.

As this contested matter proceeded, the determinative issue increasingly became centered on the proper application of the domestic exemption in the context of an injury analysis, the Department's standards concerning the domestic exemption, and its applicability to 25-14428. Additionally, the hearing officer provided the guidance the Department had concerning a 1.2 AFA per lot volumetric limit included by the Department in the issuance of water right permits for

subdivision lots that were subject to the parameters of the domestic exemption.[1] R. at 31-44. Given the nature of the issues involved, the Associations sought a legal determination of the applicability of the domestic exemption to the use and limitations proposed by 25-14428.

On September 23, 2016, the Associations filed their *Petition for Declaratory Ruling* to obtain that legal determination. R. at 45-71. This caused some unintended confusion. Idaho Ground Water Appropriators, Inc. ("IGWA") sought to intervene at this late stage, R. at 72-75, and the Coalition sought to stay proceedings and have this matter reappointed to the Director of the Idaho Department of Water Resources (the "Director"). R. at 77-86.

To clarify their intent, on October 7, 2016, the Associations withdrew their *Petition for Declaratory Ruling*, R. at 136, and filed their *Motion for Summary Judgment*, R. at 103-35. IGWA's *Petition to Intervene* was denied. R. at 162-66; *see also* R. at 382-86 (denying IGWA's petition for reconsideration). Likewise, the Coalition's motion for reappointment was also denied. R. at 159-61. While these other matters were pending, the Department continued proceedings on the Associations' *Motion for Summary Judgment*. The Coalition responded on October 26, 2016. R. at 238-62; *see also* R. at 263-381 (Declaration of Paul L. Arrington with attached exhibits). As the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37, Title 01, Chapter 01) do not provide for movant's reply in support of its motion, the Associations did not submit a reply in support of their *Motion for Summary Judgment*.

Eventually, on January 13, 2017, the Department issued the *Preliminary Order Denying*

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[1] The 1.2 AFA cap per lot is much less than extrapolating 13,000 gpd diverted each day for a full year, which equates to nearly 14.6 AFA.

Motion for Summary Judgment and Denying Application (the "*Final Order*"). R. at 407-20. After fourteen days, the *Final Order* became the final decision of the Department in this matter. *See* Idaho Code § 67-5243(3); *see also* IDAPA 37.01.01.730.01; R. at 419.

On February 23, 2017, the Associations filed their *Notice of Appeal and Petition for Judicial Review of Final Agency Action.* R. at 423-35.

II. ISSUES PRESENTED ON APPEAL.

A. Whether the Department's Final Order and the orders thereby affirmed were made in violation of constitutional or statutory provisions.

B. Whether the Department's Final Order and the orders thereby affirmed were made upon unlawful procedure.

C. Whether the Department's Final Order and the orders thereby affirmed were made without the support of substantial evidence on the record as a whole.

D. Whether the Department's Final Order and the orders thereby affirmed were arbitrary, capricious, or an abuse of discretion.

E. Whether the Department's actions prejudiced a substantial right of the Associations.

F. Whether the Department's actions were made in violation of and contrary to the provisions of certain moratorium orders issued by the Department.

G. Whether the Department erred by not finding that the diversion of water under 25-14428 is *de minimis* under Idaho law.

H. Whether the Department erred in finding that the location of the points of diversion listed in 25-14428 are not encompassed within the above-referenced moratorium orders.

I. Whether the Department erred in finding that the moratorium orders were not a final determination of injury or non-injury.

J. Whether the Department's determination that "applicants pursuing domestic rights for single home use might be required to mitigate for potential impacts to senior rights" is contrary to the provisions of Idaho Code § 42-111.

III. ARGUMENT.

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedures Act (Idaho Code § 67-5201, *et seq.*, hereinafter the "Act"). Idaho Code § 42-1701A. Under the Act, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). Here, where the agency "was required ... to issue an order," the Court must 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 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.

Idaho Code § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. Further, the party challenging the decision must also show that at least one of its substantial rights have been prejudiced. Idaho Code § 67-5279(4).

A. As a matter of law, the impact of a domestic use, when limited on a per unit basis to the scope of the domestic exemption, is *de minimis*.

Idaho law specifies preferential treatment of domestic uses—such as that proposed in 25-14428. This principle is evidenced in (1) Idaho Code § 42-111; (2) moratorium orders issued by the Department in the early 1990s; and (3) how Article XV, § 3 of the Idaho Constitution has been applied in the Department's conjunctive management rules and by the Idaho Supreme Court.

1. Idaho Code § 42-111 demonstrates that, within the limits for domestic uses of water, domestic water may be used without regard for its minimal impact on other water rights.

The *Final Order* claims that the Associations "have not identified any statutory provisions that support" their argument. R. at 415. However, Idaho Code § 42-111 is exactly such a statute—as the Associations have pointed out. *See* R. at 106-08. Idaho Code § 42-111(1) sets forth the scope of what is commonly referred to as the "domestic exemption" because Idaho Code § 42-227 provides that wells drilled for "domestic purposes" (as defined in § 42-111(1)) are not subject to the mandatory water right permitting requirements described under Idaho Code § 42-229. While the *Final Order* does not delve into § 42-111, the significant question raised in this matter centers on how the limited uses authorized under Idaho Code § 42-111 are to be properly considered in the context of an injury analysis for a new water right permit application.

A statute must be construed in accordance with its plain and ordinary meaning. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). "An unambiguous statute would have only one reasonable interpretation," which is then applied by courts and administrative agencies. *Id.* at 896, 265 P.3d at 509. This means that a statute is ambiguous if "reasonable minds might differ or be uncertain as to its meaning." *Stonebrook*

Const., LLC v. Chase Home Fin., LLC, 152 Idaho 927, 931, 277 P.3d 374, 378 (2012) (citation and internal quotation marks omitted).

As to "[t]he use of water for homes," the domestic exemption limits a water user to 13,000 gallons per day and the irrigation of no more than half an acre. Idaho Code § 42-111(1)(a). On the other hand, "water for multiple ownership subdivisions" must be within "the diversion rate and volume limitations set forth in subsection (1)(b)," which is to say it is limited to 2,500 gallons per day at a rate of no more than 0.04 cfs. Idaho Code §§ 42-111(2), 42-111(1)(b). The Associations agree that 25-14428 must still comply with the permitting process—*see* Idaho Code § 42-111(3). The specific application of the domestic exemption to this case turns on whether the proposed use of water under 25-14428 falls within the parameters described by § 42-111(1)(a) or is only entitled to a domestic use up to the limits of § 42-111(1)(b). Thus, the question in this case is: what does it mean for the use of water to be ***for*** something?

The Department views this issue simply, concluding that because the Associations are associated with the Subdivisions, where 25-14428 is proposed to be used, only a single use within the limits of Idaho Code § 42-111(1)(b) would qualify 25-14428 for the domestic exemption. R. at 411. On the other hand, the Associations believe that the use of water ***for homes*** (the plural existing in the statute, *see* Idaho Code § 42-111(1)(a)) is ***different*** from the use of water ***for multiple owner subdivisions*** (as specified in Idaho Code § 42-111(2)).

As used in Idaho Code § 42-111, the word "for" means "meant to be received by" or "to be used in." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 564 (5th ed. 2014). Simply, water is for where it will be used. That is why Sections 42-111(1)(a), 42-111(1)(b), and 42-111(2) each

describe the "use" of water—and Sections 42-111(1)(a) and 42-111(2) relate to the "use" of water "for" different purposes. Using water for homes means the water is received by the homes and used in the homes; *e.g.*, having that water in faucets, shower heads, other water lines, and sprinkler lines. The Associations contend that using water for a multiple owner subdivision must mean something else (or be rendered superfluous, which a court should not do, *Verska*, 151 Idaho at 897, 265 P.3d at 510). Correspondingly, using water for a multiple owner subdivision means the water is received by the subdivision and used by the subdivision; *e.g.*, to irrigate common areas, provide water for a clubhouse, and have water in common faucets and other water lines.

25-14428 only includes water to be used ***for*** 76 houses. R. at 1, 3. 25-14428 will provide water for the use of the occupants of each houses, including the irrigation of half an acre around each. R. at 1, 3. As detailed in the application, 25-14428 limits each house's use of water to 13,000 gallons per day and the irrigation of no more than half an acre. R. at 3 (paragraph 11, referencing Idaho Code § 42-111(1)(a)). 25-14428 does not provide any water for other uses within the Subdivisions, such as irrigation of large open spaces or parks. *See* R. at 1, 3. As a result, the Associations believe that 25-14428 entails domestic use per lot within the meaning of Idaho Code § 42-111(1)(a).

Again, a statute is ambiguous if "reasonable minds might differ or be uncertain as to its meaning." *Stonebrook Const.*, 152 Idaho at 931, 277 P.3d at 378 (citation and internal quotation marks omitted). As described above, the Department proposes one interpretation or application of the domestic exemption to 25-14428 and the Associations propose another. Both are reasonable. This means that Idaho Code § 42-111 is ambiguous. As a result, Idaho Code § 42-111 "***must be***

construed to mean what the legislature intended for it to mean." *J & M Cattle Co., LLC v. Farmers Nat. Bank*, 156 Idaho 690, 694, 330 P.3d 1048, 1052 (2014) (citation and internal quotation marks omitted, emphasis added). In particular, the legislative history of a statute is helpful to the goal of ascertaining the legislature's intent. *See id.* at 695, 330 P.3d at 1053. This includes prior versions of the statutory language at issue. *Id.* (considering language "[p]rior to the Legislature's amendment of [the statute] in 1990"). However, the Court may also look to rational reasoning to ascertain the legislature's intent. *Id.* at 695-96, 330 P.3d at 1053-54 (concluding that the Court's reasoning about the prior forms and amendments to the statute supported the Court's interpretation of the statute).

Here, the prior forms of the domestic exemption are particularly insightful. Session laws from 1951, 1970, 1986, and 1990 show the evolution of the half-acre irrigation limitation in the domestic exemption. *See* R. at 126-28, 130, 132-33, 135 (depicting the referenced session laws). In 1951, the term "domestic purposes" was originally defined as follows:

> "Domestic purposes" is water for household use and livestock, and water use for all other purposes not in excess of 13,000 gallons per day.

1951 Idaho Sess. Laws 425 (ch. 200, § 5); R. at 128. In 1970, the statutory definition of domestic purposes was amended to include the half-acre irrigation limitation for the first time:

> Domestic purposes is water for a single family household use in a sufficient amount for the use of domestic animals kept with and for the use of the household livestock, and water use for all other purposes not in excess of 13,000 gallons per day not to exceed one half (1/2) acre of irrigated land.

1970 Idaho Sess. Laws 542 (ch. 187, § 3); R. at 130. The half-acre limitation carried over into a new statute, Idaho Code § 42-1401A, that was enacted in 1986 as part of a new set of adjudication

statutes. 1986 Idaho Sess. Laws 560-61 (ch. 220, § 3); R. at 132-33. In 1990, the Idaho Legislature set out to standardize the definition of domestic purposes through Title 42 of the Idaho Code. The Legislature removed the definitions of "domestic purposes" previously enacted. 1990 Idaho Sess. Laws 872-73 (ch. 319, § 3); *id.* at 875 (ch. 319, § 6). The legislature then replaced that definition with the language of Idaho Code § 42-111 that, in relevant part, now reads:

> 42-111. DOMESTIC PURPOSES DEFINED.
>
> (1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:
>
> (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
>
> (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.
>
> (2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.

Idaho Code § 42-111; *see also* 1990 Idaho Sess. Laws 870-71 (ch. 319, § 1); R. at 135. This 1990 enactment evidences a continuing development of the definition of the domestic exemption. From 1970 to 1990, the domestic exemption included the same numerical limits it still does (*i.e.*, prohibiting the diversion of any more than 13,000 gallons per day and the irrigation of any more than ½ acre), but was specifically "for a ***single family household*** use." 1970 Idaho Sess. Laws 542 (ch. 187, § 3); R. at 130 (emphasis added). Since 1990, the domestic exemption is available,

with the same numerical limits but for "[t]he use of water for ***homes*** … and for any other purpose in connection therewith." Idaho Code § 42-111(1)(a) (emphasis added); *see also* 1990 Idaho Sess. Laws 870-71 (ch. 319, § 1). This change is significant. In 1990, the definition of the domestic exemption broadened from being for use in a "single family household" to applying to the "use of water for homes." *See* 1990 Idaho Sess. Laws 870-71 (ch. 319, § 1); *compare id.* at 873 (ch. 319, § 3). Thus, the evolving definition of the domestic exemption—which has contracted and expanded again over time—demonstrates that ***the Idaho Legislature contemplated and intended that multiple homes could be served by a community well within the numerical limits of the domestic exemption volume (13,000 gpd) and irrigated acreage limitations (½ acre) and not be subject to an injury analysis for such use***. Because this legislative intent is clear—and undercuts the Department's proposed interpretation of Idaho Code § 42-111—this Court should conclude that the domestic exemption applies to 25-14428 as asserted by the Associations.

2. The text of the Department's Moratorium Orders demonstrate that the Department has also recognized the domestic exemption equivalence of a properly-limited domestic use of water from a community well.

In the early 1990s, then-Director Keith Higginson issued four separate moratorium orders, ***complete with detailed findings of fact and conclusions of law*** concerning injury from ground water pumping to senior surface water right holders (primarily to two members of the Coalition—the Twin Falls Canal Company and the Northside Canal Company). The Department has provided the following brief descriptions of each of the moratorium orders:

a. *Moratorium Order*, dated May 15, 1992: "The original moratorium order dealing with the applications for permit for diversion and use of surface and ground water in the Snake River Basin upstream from the

USGS gauge on the Snake River near Weiser. Note: Amended January 6, 1993."

b. *Order Amending Moratorium Order Dated May 15, 1992*, dated January 6, 1993: "A moratorium order that amended certain parts of the moratorium order originally issued May 15, 1992 dealing with applications for permits from ground and surface water upstream from the USGS gauge on the Snake River near Weiser. The order removed the non-trust water area from the original order. Note: Amended April 30, 1993."

c. *Moratorium Order*, dated January 6, 1993: "A moratorium order designed to replace the May 15, 1992 moratorium order for the non-trust water area. Note: This moratorium expired on December 31, 1997."

d. *Amended Moratorium Order*, dated April 30, 1993: "An amended moratorium order dealing with surface and ground water within the Eastern Snake River Plain area and the Boise River Drainage Area and rescinding redundant Mud Lake and Big Lost River moratorium orders."

IDAHO DEPARTMENT OF WATER RESOURCES, https://www.idwr.idaho.gov/legal-actions/orders/moratorium-orders.html#snake-river (last visited May 9, 2017).

The *Moratorium Order*, dated May 15, 1992, contains the following order:

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

R. at 270. The *Moratorium Order*, dated January 6, 1993, contains the following in the order portion of this document:

> 5. The moratorium does not apply to any application for domestic purposes as such term is defined in Section 42-111, Idaho Code. For the purposes of this exception, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered a domestic use provided each unit satisfies the definition for the exception to the requirement to file an application for permit as described in said code section.

R. at 280. The *Amended Moratorium Order*, dated April 30, 1993, contains the following in the order portion of this document:

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

R. at 289.

These provisions of the moratorium orders take the domestic preference into account and focus on the ***substance*** of the water allowed to be diverted under domestic exemption without the need to obtain a water right, rather than merely its ***form***. In the moratorium orders' proceedings in the early 1990s, two members of the Coalition claimed that they were being injured by the groundwater usage of those with water rights junior to theirs. The Department agreed that the complainants were being injured because of reduced stream flows. *See* R. at 280 (*Moratorium Order*, dated January 6, 1993 (Conclusion of Law No. 6)).

To protect against further impact to the complainants' senior water rights, the then-Director issued the moratorium orders to prohibit issuance of permits for certain types of additional ground water rights, but specifically excepted domestic water uses from the moratoria, ***including*** water rights for community wells for such domestic uses within multiple ownership subdivisions as long as each unit complied with the applicable volume and acreage limitations of Idaho Code § 42-111. R. at 270, 280, 289. Thus, as a factual determination, the Director determined that community wells were qualifying uses within the domestic exemption, as long as the same per-unit restrictions

were imposed on each lot within the applicable subdivision. In other words, the Department determined that any potential impact or injury caused by diversion of water for qualifying domestic uses (including impact or injury from use of a community well in a subdivision) was not legally cognizable to prevent the development of domestic uses of water. This determination was made even though domestic use includes ½ acre of irrigation—a consumptive use of water. In other words, in the moratorium orders, the Department prevented future injury to the senior water right users, but nevertheless determined that the use of water within the limits of the domestic exemption would not cause an injury to those senior water right users that was cognizable.

The Department's interpretation of the moratorium orders and their treatment of permits for subdivision water right permit applications is found in a June 17, 1992 *Administrator's Memorandum, Application Processing No. 53*, prepared by Norm Young, who wrote:

> **Domestic Uses**
>
> **The definition of domestic use is found in Idaho Code § 42-111. Idaho Code § 42-111 describes domestic use as the use of water for homes if the total irrigation does not exceed one-half acre of land and total use does not exceed 13,000 gallons per day. The statute specifically excludes multiple owner subdivisions unless the diversion rate and volume limitations are satisfied.**
>
> **The moratorium did not intend to prohibit development of multiple unit subdivisions served by a single community well. A subdivision with platted lots of less than one-half acre is exempt from the moratorium. A condition must prohibit irrigation or use of water on any lot upon which there is no domestic dwelling constructed. Furthermore, the construction of two or three domestic dwellings on a single lot does not justify irrigation of one-half acre for each of the dwellings. Only one-half acre may be irrigated per single platted lot.**

R. at 42. The first sentence of the second paragraph bears repeating: "The moratorium ***did not intend*** to prohibit development of multiple unit subdivisions served by a single community well." R. at 42 (emphasis added).

The *Final Order* concludes that 25-14428 is outside the area to which the moratorium orders apply, and thus, "the Moratorium does not prevent the Department from processing Application 25-14428 and evaluating it based on all of the review criteria listed in Idaho Code § 42-203A(5)." R. at 414. The Associations agree that the moratorium orders do not apply directly to 25-14428 and the Department must still evaluate 25-14428 under the criteria of Idaho Code § 42-203A(5). However, the *Final Order* ignores the persuasive impact of the Department's own prior policy determination—contained in the moratorium orders—regarding the domestic exemption when a community well is the point of diversion for multiple homes. R. at 414. After a specific petition from two members of the Coalition alleging injury to senior surface water rights, the Department has concluded multiple times in its moratorium orders that water diverted from a community well for multiple homes does not have a cognizable effect upon the aquifer as long as each home is limited to the volume and irrigation acreage limitations specified in Idaho Code § 42-111(1)(a). 25-14428 falls within that predicate and, even though 25-14428's point of diversion lies outside the area of the moratorium orders, that distinction does not alter the injury analysis relative to the treatment of domestic use within the parameters of Idaho Code § 42-111 for 25-14428. That the Department has done so, without any justification or explanation, is arbitrary, capricious, and an abuse of discretion—in addition to failing to stand up to the other standards of Idaho Code § 67-5279(3).

3. Idaho's long-standing policy of favoring domestic uses of water recognizes that domestic use, when properly limited as 25-14428 is, cannot cause a legally cognizable injury to other water users.

Since its ratification in 1890, the Idaho Constitution has included a provision specifying

that domestic uses of water "have the preference over those claiming for any other use." IDAHO CONST., Art. XV, § 3; *see also* 1927 Idaho Sess. Laws 591-92 (H.J.R. No. 13) (the only amendment to Art. XV, § 3, just adding the clause that the State "may regulate and limit the use [of water rights] for power purposes"). This provision is the foundational rationale behind Idaho's long-standing preference for domestic water rights over other types of water rights.

The *Final Order* categorizes the Associations' arguments relative to the constitutional preferences as "creat[ing] a free pass for any injury caused by domestic uses." R. at 413. This is an overstatement of the Associations' position, which is that the this constitutional provision establishes a rationale for the statutory designation of 13,000 gallons per day and irrigation of up to ½ acre described in Idaho Code § 42-111. Not all domestic use gets "a free pass." Rather, only that domestic use designated in Idaho Code § 42-111 is not subject to an injury determination. From that Constitutional foundation, this preference has grown into the domestic exemption, the Department's rules, and Idaho case law.

The favorable treatment of domestic ***water rights***—not just simply domestic ***water use*** under Idaho Code § 42-111—has carried forward into the Department's conjunctive management rules, IDAPA 37, Title 03, Chapter 11 (the "CM Rules"). The CM Rules provide:

> ***A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code***, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(11), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the

> holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury.

IDAPA 37.03.11.020.11 (emphasis added). Thus, while generally first in time is first in right to water, this rule provides that a delivery call (made by a senior water right user) is legally ineffective against a (junior) domestic water right that diverts water within the definition of the domestic exemption. *See id.*; *see also* IDAHO CONST., Art. XV, § 3.

In the context of allegations of injury to non-domestic water users by domestic users, the case of *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 143 P.3d 433 (2007) (cited and referred to herein as "*AFRD#2*") is instructive. The plaintiffs in *AFRD#2* (including all the members of the Coalition) sought a declaration that the CM Rules—both on their face and as the Director sought to apply them in delivery calls—violated the prior appropriation doctrine. The district court sided with the plaintiffs with a 127-page written decision. One of the bases for the district court's finding of unconstitutionality was that domestic and stock water rights were exempt from conjunctive administration. In other words, the district court held that conjunctive administration should not give this class of water rights a free pass.

As reported by the Idaho Supreme Court in its written opinion, the issue on appeal of whether domestic rights may be constitutionally exempt from a delivery call was summarized as follows: "Not specifically raised by [the Department], although raised generally in its argument that the district court erred in voiding the CM Rules in their entirety, is the issue relating the CM Rules' exclusion of domestic and stock water rights from administration." *AFRD#2*, 143 Idaho at 880, 154 P.3d at 451. A reasonable and likely inference from the Idaho Supreme Court's decision

to address this domestic issue in *AFRD#2*—despite the Department's decision not to specifically raise it—is the Court's concern that domestic users' rights are clearly protected and explained.

The Idaho Supreme Court reversed the district court and held that the CM Rules' provisions not requiring administration of domestic and stock water rights did not amount to an unlawful taking of prior vested water rights. The Court held that CM Rule 20.02 incorporates all Idaho law, and therefore, the CM Rules "do not exclude the possibility of a takings claim to provide such compensation. The Rules simply restate the portion of Article XV, Section 3 that gives priority to domestic water users, stating that senior non-domestic users cannot curtail their use via a delivery call." *Id* at 881, 154 P.3d at 452. Accordingly, the Idaho Supreme Court held that a separate takings claim was not prohibited by the CM Rules, and as to the issue of domestic users not being administered in response to a delivery call, "[t]he Rules are sufficient as they are written." *Id.*

AFRD#2 underscores that priority Idaho places on domestic use, and even allows rights within the domestic exemption to be exercised unimpeded in conjunctive administration when pumping for the consumptive portion of domestic use does result in impact to the water rights of calling non-domestic senior users. However, this principle is nothing new—it is specifically incorporated into the Department's moratorium orders. *See* Section III.A.2., *supra*. This domestic preference for multiple home subdivisions is consistent with the policy of not requiring a water right permit for domestic use for a single home, as well as the policy set forth in *AFRD#2* described above upholding the constitutionality of not administering junior domestic users in response to a delivery call by senior non-domestic users.

The Associations assert that the legislative basis for carving out a small category of water use from priority administration is based upon the *de minimis* doctrine. The legal maxim "*de minimis non curat lex*," means "[t]he law does not concern itself with trifles." BLACK'S LAW DICTIONARY 496 (9th ed. 2009). As a legal maxim, it is a "traditional legal principle that has been frozen into a concise expression." BLACK'S LAW DICTIONARY 1068 (9th ed. 2009). It is part of the common law. *See Sivak v. State*, 130 Idaho 885, 888-89, 950 P.2d 257, 260-61 (Ct. App. 1997). As such, this principle "remains in effect unless modified by the legislature." *Hoagland v. Ada Cty.*, 154 Idaho 900, 908, 303 P.3d 587, 595 (2013) (citing Idaho Code § 73-116 (which, since 1863, has incorporated the common law into the corpus of Idaho law)). This specific principle has been applied in Idaho for more than a century. *See Wood Live Stock Co. v. Woodmansee*, 7 Idaho 250, _____, 61 P. 1029, 1030 (1900). It has not been modified by the legislature and is still applied in appropriate circumstances. *See, e.g., Blangers v. State, Dep't of Revenue & Taxation*, 114 Idaho 944, 964, 763 P.2d 1052, 1072 (1988).

The *Final Order* concludes that "[t]he term '*de minimus*' [sic] is not found in Title 42, Idaho Code." R. at 412 (italics added). Largely for that reason, the Final Order is dismissive of the Associations' arguments that any impact caused by 25-14428 would be *de minimis*. R. at 412. However, as a common-law principle, the maxim *de minimis non curat lex*, has no need to be codified (beyond its incorporation into Idaho law via Idaho Code § 73-116) and it would, in fact, be unusual for a common law principle to be codified.

The *Final Order* also notes that the term *de minimis* "has been used by the Snake River Basin Adjudication ('SRBA') Court to designate a subset of water rights which were deferrable in

the adjudication." R. at 412 (citing *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* (filed June 28, 2012)) (underlining added). The referenced SRBA order copies, almost verbatim, the definition of domestic use found in Idaho Code § 42-111. *See Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*, pp. 2-3. As discussed above, this definition includes, rather than excludes, water uses such as those proposed under 25-14428. *See* Section III.A.1., *supra*. The SRBA Court's recognition of the *de minimis* principle supports that it exists and applies to all water rights falling within the definition of the domestic exemption.

In sum, the *Final Order* offers no defensible reason to ignore the application of the *de minimis* principle in the context of 25-14428. The Department's intransigence in the face of Idaho law violates the above-described constitutional and statutory provisions; effectuates an unlawful procedure; and is arbitrary, capricious, and an abuse of discretion. Idaho Code § 67-5279(3). Under Idaho law, the use of water for domestic purposes for a residence, including the irrigation of up to ½ acre while using no more than 13,000 gallons per day has been deemed by the Idaho Legislature to cause no cognizable injury to anyone else—it is *de minimis*. And this is the case even though domestic pumping has a consumptive use component to it and does have an impact, albeit small in quantity, on reach gains to the Snake River that benefit senior surface water right users.

The application of the *de minimis* principle to domestic uses means that, as a matter of law, any injury to senior water right users (including the Coalition) is neither cognizable nor curable and is of no legal consequence. For that reason, there was no need for the Associations to address

factual claims of injury in the proceedings on 25-14428. This is consistent with the moratorium orders from almost 25 years ago, where the Department determined in its moratorium orders that the impact to the two petitioning Coalition members was the same negligible amount whether water was provided for domestic use by individual domestic wells or by a community well (so long as each unit was bound by the same restrictions an individual domestic well would be subject to). *See* R. at 270, 280, 289.

If the Associations drilled an individual well for each lot, there would be no need for a permit, no application, no chance to protest, no injury analysis, and notably no chance to curtail the individual wells. Idaho Code § 42-227; IDAPA 37.03.11.020.11. However, because the Associations are drilling a community well, they are not exempt from the water permitting requirement for this usage. *See* Idaho Code §§ 42-227, 42-229. However, the ***impact*** of individual wells providing water for the Associations' units is the ***same*** as the impact of a community well providing water for the Associations' units as long as each unit supplied from the community well is limited as if it had an individual well. These impacts are depicted on the modeling results explained and depicted in the Associations' *Motion for Summary Judgment*. R. at 113-16. This is the reasoning underlying the exception in the moratorium orders—if the impacts are the same, then to consider the impact of individual wells and community wells differently exalts form over substance.

In this regard, the *Final Order* reserves to the Department a capricious ability to analyze the identical ability to divert water differently. The *Final Order* states that "applicants pursuing

domestic rights for single home use[2] ***might be required*** to mitigate for potential impacts to senior rights. Many single-home domestic ground water users, who would prefer to obtain a recorded water right, may be deterred from doing so under the ***threat*** of mitigation obligations." R. at 416 (emphases added). In other words, the Department concludes that it is required to treat a typical domestic groundwater right applicant and an undocumented domestic user (as allowed by Idaho Code §§ 42-111 and 42-227) differently, even though the water use by the two are ***equivalent*** in every way. There are many reasons why a homeowner may want a water right evidenced with documentation, and based upon a reading of Idaho's water code—the entire statutory scheme of Idaho Code, Title 42—that decision should not subject one type of domestic user to a different standard. Such an approach most certainly exalts form over substance. Nevertheless, by its use of the ambivalent language quoted above, the Department reserves the capricious right to require some applications for domestic water rights (such as 25-14428) to provide mitigation and not require mitigation from other, identical proposed uses when such users only need to seek and obtain a drilling permit for a well that fits under the domestic exemption. This threat of mitigation is more than a mere deterrent or disincentive as described in the *Final Order*, rather, it is the imposition of strict legal obligations that the Department is reserving the ability to impose despite being contrary to the intent of Idaho Code § 42-111 and other provisions of Title 42 of the Idaho Code.

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2 It is worth noting that this "single home use" referenced by the Department, R. at 416, is reminiscent of the "single family household use" that was included in the statutory definition of domestic purposes from 1970 to 1990. *See* 1970 Idaho Sess. Laws 542 (ch. 187, § 3). Since 1990, the term has been "homes." Idaho Code § 42-111(1)(a); *see also* Section III.A.1., *supra*.

Rather than confirming the ability of the Department to apply different standards to the same water use, this Court should construe the statutes all together—all of Title 42 of the Idaho Code and especially §§ 42-111 and 42-203A(5)—as a cohesive statutory scheme. Applications must generally be assessed for, among other things, their injury or impact on senior water rights. Idaho Code § 42-203A(5)(a). However, the logical conclusion that must be reached by the Department is that domestic use under the parameters of Idaho Code § 42-111 are the same no matter if such domestic water is diverted under the statute or under a licensed domestic water right. Regardless of whether it is documented in a water right, not documented because of the exception from the permitting process, or even comes from a community well—the Department must treat all qualifying domestic water rights the same. A water right for a single home to be used within the limits of the domestic exemption does not have to file an application for permit; the implication (borne out by the statutory text, legislative history, moratorium orders, and Idaho's long-standing domestic preference) is that such a qualifying domestic use of water is *de minimis* and cannot cause a legally cognizable injury or impact. The same *de minimis* impact applies to a subdivision water right where each lot is subject to the same limitations, a principle espoused in the moratorium orders and Department memoranda.

B. The *Final Order* improperly denied 25-14428, rather than simply resolving the *Motion for Summary Judgment*.

The *Final Order* went beyond resolving the *Motion for Summary Judgment*, and actually denied 25-14428. R. at 417. This was erroneous because the governing standard for the Department's consideration of the *Motion for Summary Judgment—i.e.*, Idaho Rule of Civil Procedure 56—did not provide for the entry of summary judgment on behalf of the non-moving

party. In other words, in at least this respect (independent of the errors described in Section III.A., *supra*), the *Final Order* violates Idaho law; was made upon unlawful procedure; and was made arbitrarily, capriciously, and as an abuse of discretion.

As the *Final Order* acknowledged, a motion for summary judgment is not explicitly authorized by the Rules. R. at 408 (under the Standard of Review heading). However, the Rules do provide for "the filing of pre-hearing motions, which would include motions for summary judgment." R. at 408 (citing IDAPA 37.01.01.565). In entertaining a motion for summary judgment, the hearing officer explained:

> Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (see IDAPA 37.01.01.052), the Department relies on the standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment. A motion for summary judgment may be granted if a hearing officer determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* I.R.C.P. 56.

R. at 408 (italics in original).

Idaho law provides that a moving party is entitled to "summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Idaho Rule of Civil Procedure 56(a). A prior version of this rule, no longer in effect since July 1, 2016, allowed "[s]uch judgment, when appropriate, [to] be rendered for or against any party to the action." Idaho Rule of Civil Procedure 56(c) (2015). Before July 1, 2016, this provision meant that "on consideration of a motion for summary judgment, the court is allowed to enter judgment in favor of the other, non-moving party." *Parker v. Kokot*, 117 Idaho 963, 973,

793 P.2d 195, 205 (1990) (citation omitted). However, with the 2016 revisions to Idaho Rule of Civil Procedure 56, which removed this provision, there is no longer any authority for a tribunal to enter summary judgment against a moving party even in an appropriate circumstance (which this case also did not present). *See* Idaho Rule of Civil Procedure 56.

However, the *Final Order* goes beyond just determining the *Motion for Summary Judgment*, taking on the disposition of the entire proceeding. After resolving the question posed therein, the *Final Order* states:

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

R. at 416 (italics in original). That is the reason why the *Final Order* denies 25-14428. It gives no reason why a mitigation plan was required at that time, nor did the Final Order resolve material questions of fact regarding the ultimate denial of 25-14428. *See* R. at 416. Further, beyond lacking a legal basis for denying 25-14428, there is—as described above—no legal authority for the Final Order to actually deny 25-14428.

As a result, the *Final Order*'s denial of 25-14428 is a violation of Idaho law; a decision made upon unlawful procedure; and arbitrary, capricious, and an abuse of discretion. Idaho Code § 57-5279(3). This error must be corrected by this Court.

C. The Department's actions prejudiced the Associations' substantial rights.

Generally, "directly interested parties . . . have, as a procedural matter, substantial rights in a reasonably fair decision-making process and, of course, in proper adjudication of the proceeding

by application of correct legal standards." *State Transp. Dep't v. Kalani-Keegan*, 155 Idaho 297, 302, 311 P.3d 309, 314 (Ct. App. 2013).

Here, the Associations are directly interested parties, since they made the application for 25-14428. The Department's procedure in this case was "reasonably fair," however, the Department's adjudication was not made by the "application of correct legal standards." *Id.* As discussed above, the *Final Order* erroneously construed Idaho law to ignore the aspects of the domestic exemption applicable to 25-14428. *See* Section III.A., *supra.* Further, the Final Order denied 25-14428 without an adequate basis in law and without any legal authority to do so, given the procedural posture of the Motion for Summary Judgment. *See* Section III.B., *supra.* Thus, the Associations' substantial right "in proper adjudication of the proceeding by application of correct legal standards" was violated. *Id.*

IV. CONCLUSION.

The *Final Order* should be reversed, the *Motion for Summary Judgment* granted, and 25-14428 issued. In the alternative, this Court should vacate the *Final Order*'s decision to deny 25-14428 and remand the proceeding back to the Department to be concluded by a mitigation plan or otherwise. The Department violated Article XV, § 3 of the Idaho Constitution, which affords a priority to domestic uses of water over other uses—as well as Idaho Code § 42-111, which defines the domestic exemption (and is satisfied by 25-14428). Idaho Code § 67-5279(3)(a). By ignoring Idaho law, the *Final Order* was made upon unlawful procedure. Idaho Code § 67-5279(3)(c). Because the *Final Order* ignores the policy and application of the domestic exemption to 25-14428, it is also a decision not supported by substantial record on the record. Idaho Code §

67-5279(3)(d). Finally, because the Department has chosen to treat 25-14428 like an ordinary irrigation water right instead of the domestic water right it is, the *Final Order* reflects an arbitrary and capricious decision made as an abuse of discretion. Idaho Code § 67-5279(3)(e). These errors have prejudiced the Associations' substantial right in having this matter correctly adjudicated. Idaho Code § 67-5279(4).

Dated this 16th day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 16th day of May, 2017.

DOCUMENT SERVED: PETITIONER'S BRIEF

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