IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

Docket No. CV-2017-1141

IN THE MATTER OF APPLICATION FOR PERMIT NO. 25-14428
In the name of Black Hawk HOA and Iron Rim Ranch HOA

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

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,
Respondent,

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
Intervenors.

SURFACE WATER COALITION'S RESPONSE BRIEF

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STATEMENT OF THE CASE

I. Nature of the Case.

This is an appeal of the hearing officer's *Preliminary Order Denying Motion for Summary Judgment and Denying Application* ("*Order*"), issued on January 13, 2017. R. 407. The Black Hawk Homeowners Association, Inc. and the Iron Rim Ranch Home Owners Association, Inc. (collectively "Applicants") did not file exceptions to the *Order* with the Director or request a hearing on the same pursuant to I.C. § 42-1701A(3). Instead, the Applicants requested judicial review with this Court.

II. Course of Proceedings / Statement of Facts.

The Applicants filed application for permit no. 25-14428 seeking to appropriate groundwater for in-house potable use and the irrigation of up to 38 acres in a 76-home multiple ownership subdivision located southeast of Idaho Falls, Idaho.[1] R. 1. On its face the application requested a new consumptive use of the Eastern Snake Plain Aquifer (ESPA) without an accompanying mitigation plan. *See id.* After an amendment, the Idaho Department of Water Resources ("Department" or "IDWR") published notice of the application in early November 2015. R. 10-11. The Surface Water Coalition[2] filed a timely notice of protest. R. 12-14. The Applicants eventually filed a motion for summary judgment seeking a legal ruling that their new consumptive use could not cause any injury as a matter of law and that the application qualified as an exempt domestic use under section 42-111(1)(a). R. 106.

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[1] The Applicants have provided additional factual background describing the development of the multiple ownership subdivisions and other water rights associated with the place of use. *See Petitioners' Brief* at 1-3 ("*App. Br.*").

[2] The "Surface Water Coalition" or "Coalition" is a short hand reference for A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

On January 13, 2017, the Department's hearing officer issued the *Order* denying the motion and the application for permit. R. 407. The Applicants filed their notice of appeal and petition for judicial review on February 23, 2017. R. 423.

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). A district court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). The court is charged with deferring to an agency's decision. *Mercy Medical Center v. Ada County,* 146 Idaho 220, 226 (2008). The agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence, so long as the decision is supported by substantial and competent evidence. *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 505-06 (2012).

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure," (d) "is not supported by substantial evidence in the record as a whole," or (e) is "arbitrary, capricious or an abuse of discretion." I.C. § 67-5279(3); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796 (2011). A petitioner attacking the agency decision must show both that the agency erred as specified by statute, and that the party has had a substantial right prejudiced by the agency decision. *See Pines v. Idaho State Bd. of Medicine*, 158 Idaho 745, 750 (2015).

ARGUMENT

The Applicants present an unprecedented and extreme position that IDWR must approve a new consumptive use groundwater right, including for the irrigation of 38 acres, without

performing the necessary evaluation required under Idaho Code § 42-203A. The Applicants base their argument on the definition of "domestic" purposes or use found in Idaho Code § 42-111(1)(a). The Applicants argue that as long as each home meets the 13,000 gallons per day limit and irrigates no more than ½ acre, then the subdivision water right cannot legally injure any other existing water rights.

The hearing officer rightly rejected this argument and denied application for permit no. 25-14428. R. 417. The hearing officer carefully analyzed the evidence and specifically noted that the new water right would reduce the quantity of water under existing water rights without mitigation. R. 416. The agency's decision is supported by substantial and competent evidence and is in accord with Idaho law. For the reasons set forth below, the Court should deny the Applicants' petition and affirm IDWR's decision.

I. The "Domestic" Definition in Idaho Code § 42-111(1)(a) Does Not Apply to Application for Permit No. 25-14428 Filed Pursuant to Idaho Code § 42-202.

The Applicants' entire appeal is centered upon Idaho Code § 42-111 and its interpretation. The Applicants believe that application for permit no. "25-14428 entails domestic use per lot within the meaning of Idaho Code § 42-111(a)" and therefore "this Court should conclude that the domestic exemption applies to 25-14428." *App. Br.* at 12-13. Stated another way, the Applicants ask this Court to create a new "super" domestic water right by incorporating the section 42-111(1)(1) definition, and other related domestic concepts, into their new multi-home consumptive use water right. The argument fails as a matter of law and should be wholly rejected.

Contrary to the Applicants' claim, section 42-111 is irrelevant since the underlying application for permit no. 25-14428 was filed pursuant to section 42-202. Since the Applicants seek to appropriate groundwater, Idaho law required them to file a new application for permit.

See I.C. §§ 42-229 & 202 ("any person, association or corporation hereafter intending to acquire the right to the beneficial use of . . . ground water, . . . shall, before commencing of the construction . . . make an application to the department of water resources for a permit to make such appropriation"); *see also*, IDAPA 37.03.08 et seq. Pursuant to the statutory permitting process, IDWR was required to follow the procedure outlined in section 42-203A, including evaluating the seven (7) listed criteria to determine whether or not to approve the application. *See* I.C. § 42-203A(5)(a) – (g). Nothing in sections 42-202 or 203A allows IDWR to exempt an application for permit from the required analysis just because the applicant seeks a "domestic" purpose or beneficial use.

Statutory interpretation begins with the statute's plain language. *State v. Taylor*, 160 Idaho 381, 385 (2016). A court must consider the statute as a whole, and give words their plain, usual, and ordinary meanings. *See id.* Where the literal words of a statute provide clear guidance the statute is deemed unambiguous and shall be interpreted according to its plain meaning. *Aquilar v. Coonrod*, 151 Idaho 642, 650 (2011). Further, when the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect, and a court does not need to go beyond the statute's plain language to consider other rules of statutory construction. *See Taylor*, 160 Idaho at 385. If the statute is unambiguous, a court does not construe it, but simply follows the law as written. *TracFone Wireless, Inc. v. State*, 158 Idaho 671, 677 (2015).

The plain, unambiguous language of section 42-111(1) defeats the Applicants' argument. First, the statute's domestic definitions only apply "[f]or purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243, and 42-1401A."[3] Noticeably absent from the list is

[3] Section 42-221 addresses IDWR's fees; section 42-227 exempts domestic wells from water right permitting; section 42-230 is the Ground Water Act's definition statute; section 42-235 is the drilling permit requirement;

the application for permit statutes, sections 42-202 and 203A. By the plain and literal terms of section 42-111, it is obvious the statute's domestic definition does not apply in any way to application for permit 25-14428. Although a person may apply for a water right with a "domestic" purpose of use, that doesn't mean the statutory definition in section 42-111(1)(a) then applies to exempt such permits from other provisions of Idaho law.

Just the opposite, the legislature's exclusion of sections 42-202 and 203A from the list of statutes set out in section 42-111 evidences its clear intent to exclude new groundwater applications for permit from the domestic definition statute. *See KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 528 (2010) ("'It is a universally recognized rule of the construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others,' a maxim commonly known as *expressio unius est exclusio alterius*.") (emphasis in original). In other words, the domestic purpose or use definition set forth in section 42-111(1)(a) does not apply to a new application for permit filed and evaluated under sections 42-202 and 203A. Therefore, the Applicants' appeal fails as a matter of law.

Given the plain language of section 42-111(1), the domestic definition does not apply to application for permit no. 25-14428 filed under sections 42-202 and 203A. Although this was not the stated basis, the hearing officer properly denied the Applicants' motion and application as a matter of law. *See e.g. Nicholson v. Coeur d'Alene Placer Mining Corp.*, 161 Idaho 877, 392 P.3d 1118, 1222 (2017) ("When the trial court reaches the correct result by an erroneous theory, we will affirm the result on the correct theory"). The Coalition respectfully requests the Court to affirm IDWR and deny the petition for judicial review accordingly.

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section 42-237a identifies the director's powers in administering and enforcing the Ground Water Act; section 42-242 provides definitions for the statutory claim procedure; section 42-243 defines how to file a statutory claim; and section 42-1401A provides definitions for the adjudication chapter.

II. The Applicants' Interpretation of Idaho Code § 42-111 is Erroneous and Should be Rejected.

A. A Plain Reading of Section 42-111 Demonstrates that "Multiple Ownership Subdivisions" Do Not Qualify for a Subsection (1)(a) "Domestic" Use That is Exempt from Permitting and the Section 42-203A Evaluation.

As set forth above, the Applicants' primary issue on appeal is the interpretation of section 42-111. *See App. Br.* at 8-13. If the Court determines the statute does apply, then the Coalition offers the following argument for the Court's consideration.

The Applicants argue the statute is ambiguous and that a new consumptive use water right for 76 homes qualifies for the individual domestic use set forth in I.C. § 42-111(1)(a) (i.e. 13,000 gpd and irrigation up to ½ acre). The Applicants then claim that such water use is "non-injurious" as a matter of law and must be approved by IDWR similar to an exempt domestic well under section 42-227. In short, the Applicants believe that as long as each home in the subdivision uses less than 13,000 gpd and irrigates ½ acre or less, then the subdivision water right qualifies as an exempt domestic use "for homes." *App. Br.* at 9. The Applicants' argument contradicts the plain language of the statute and should be rejected as a matter of law.

Statutory interpretation begins with the statute's plain language. *See Taylor*, 160 Idaho at 385. The Court must consider the statute as a whole, and give words their plain, usual, and ordinary meanings. *See id.* When the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect, and a court does not need to go beyond the statute's plain language to consider other rules of statutory construction. *See id.*

The plain, unambiguous language of section 42-111 defeats the Applicants' argument. The statute expressly provides that "[f]or 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." I.C. § 42-111(2) (emphasis added). In other words, the statute expressly precludes a subdivision's individual homes from using the "domestic" water rate set out in section 42-111(1)(a) (i.e. 13,000 gpd and irrigation up to ½ acre). Application for permit no. 25-14428, which seeks nearly 1 cfs for 76 new homes and the irrigation of up to 38 acres, does not qualify as an "exempt" or per se non-injurious "domestic" water use under section 42-111(1)(a). R. 1.

The phrase "multiple ownership subdivisions" clearly refers to developments and subdivisions with more than one home. *See Filer Mut. Telephone Co. v. Idaho State Tax Comm'n*, 76 Idaho 256, 261 (1955) ("In construing a statute, words and phrases are to be assumed to have been used in their popular sense, if they have not acquired a technical meaning").

Although not defined in chapter 42, Idaho law defines a "subdivision" as follows:

> 15. Subdivision: A tract of land divided into five (5) or more lots, parcels, or sites for the purpose of sale or building development, whether immediate or future . . . Cities or counties may adopt their own definition of subdivision in lieu of the above definition;

Idaho Code § 50-1301.

Further, Black's Law Dictionary provides the following definition:

> **Subdivision.** Division into small parts of the same thing or subject-matter. The division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development.

BLACK'S LAW DICTIONARY 993 (6th ed. 1991).

Under either definition the term "subdivision" simply denotes land with more than one parcel or lot. The terms "multiple ownership" simply explain this fact (i.e. "multiple" means more than one). Further, it is common knowledge that a subdivision consists of a group of homes with numerous owners. Accordingly, the term "multiple ownership subdivision," as used

in section 42-111, denotes land that has been divided into more than one lot for the purpose of sale or building development to be occupied by multiple homeowners.

Without any legal or factual support, the Applicants would have the Court believe the phrase "multiple ownership subdivisions" is limited to "common areas," a "clubhouse," "common faucets," or "other water lines" such that it would not include water provided to the individual homes for potable and irrigation use. *See App. Br.* at 10. Nothing in the statute limits the terms "multiple ownership subdivision" in such a manner. As such, the Court is precluded from adding such terms to the statute to give it the meaning sought by the Applicants. *See Matter of Adoption of Chaney*, 126 Idaho 554, 558 (1994) ("we have held that we cannot insert into statutes terms or provisions which are obviously not there"). Again, since the Applicants seek to appropriate water for 76 new homes, including for the irrigation of 38 new acres, it is expressly forbidden from using the rate and irrigation allowance for the individual "domestic" use set out in section 42-111(1)(a). *See* I.C. § 42-111(1)(b) and (2).

In sum, the Applicants' unreasonable interpretation contradicts the statute's plain language and should be rejected as a matter of law. *See James v. City of Boise*, 160 Idaho 466, 485 (2016) (statute's words must be given their plain, obvious, and rational meaning). The Coalition requests the Court deny the Applicants' appeal and affirm the Department's *Order* accordingly.

B. The Applicants' Water Right is Not an Exempt Domestic Use Since the Proposed "Total Use" Exceeds 13,000 gallons per day.

In addition to the errors outlined above, the Applicants also ignore the last sentence of section 42-111(1)(a). It is undisputed that the Applicants are seeking to appropriate and use more than 13,000 gallons per day under application for permit 25-14428. R. 1. Accordingly, even if the statute applied and the use qualified under section 42-111(1)(a), which the Coalition

does not concede, the proposed water use is prohibited by the statute. The Applicants seek the right to divert up to 0.76 cfs (roughly 485,000 gpd if continuous diversion) to deliver water to 76 homes and irrigate up to 38 acres. The statute plainly prohibits what the Applicants seek.

Specifically, the statute defines domestic purposes or uses to include water for "homes, organization camps, public campground… and for any purpose in connection therewith…. ***if the total use is not in excess of thirteen thousand (13,000) gallons per day.***" I.C. § 42-111(1)(a) (emphasis added). In other words, even if the statute applies as the Applicants' suggest, then the total use cannot exceed 13,000 gallons per day. Although the Applicants allege that application for permit 25-14428 "entails domestic use per lot within the meaning of Idaho Code § 42-111(1)(a)," they ignore the plain language of the statute. Notably, the Director has previously found that the "total use" language in section 42-111(1)(a) applies to any and all water used:

> Idaho Code § 42-111(1)(a) limits the domestic use to a "total use" of 13,000 gallons per day. The phrase "total use" in Idaho Code § 42-111 is the sum total of the water used for domestic purposes each day. "Total use" is not a synonym for total water diverted each day. Re-diversion from any storage facility for a particular purpose is additive to the "total use" sum. . . .Unless Rotarun is accountable for its total daily use, the use of water pumped from the proposed well plus the water diverted from the storage pond would likely exceed the daily use limitations of the definition of domestic purposes by Idaho Code § 42-111. Consequently, the drilling permit will only be approved upon condition that Rotarun design and construct its system so it physically cannot "use" in excess of 13,000 gpd. Alternatively, Rotarun may opt to install measuring and recording equipment to measure and record its daily use of ground water.

See Amended Final Order at 6-7 (*In the Matter of Application for Drilling Permit in the Name of Rotarun Ski Club, Inc. Numbered 849072*) (November 25, 2008).[4]

Since the Applicants' proposed total use will exceed 13,000 gpd it is clear that the "domestic" use alleged under application for permit 25-14428 is not exempt under the law. Section 42-111(1)(a) plainly prohibits what the Applicants seek in their application. The Court should deny the petition accordingly.

[4] Copy of the decision available at http://www.idwr.idaho.gov/Browse/WaterMngmt/Orders-Archive/2008/

C. Even if the Court Finds Section 42-111 to be Ambiguous, the Applicants' Unreasonable Interpretation Should be Rejected.

Desperate to avoid the statute's plain wording, the Applicants argue that section 42-111 is "ambiguous." *See App. Br.* at 10. The Applicants claim their interpretation, which differs from the Department's, is "reasonable" and therefore that difference renders the statute ambiguous. *See id.* As to the Applicants' claim that the statute is "ambiguous" the Idaho Supreme Court has explained:

> A statute is not ambiguous merely because the parties present differing interpretations. *Yzaguirre*, 144 Idaho at 476, 163 P.3d at 1188. Instead, the statute is ambiguous only if more than one of the interpretations can be reasonably construed from the language of the statute. *Id.* "The first step is to examine the literal words of the statute to determine whether they support the parties' differing interpretations." *Id.*

BHC Intermountain Hosp., Inc. v. Ada County, 150 Idaho 93, 96 (2010).

Examining the statute's literal words shows there is nothing "reasonable" about the Applicants' interpretation. No reasonable person would interpret "multiple ownership subdivisions" to only refer to water that is used solely for "common areas," "clubhouses," or "common faucets." The unreasonableness of the Applicants' position is further exposed by the remaining terms in the statute. Indeed, under the Applicants' reading then water used for "mobile home parks" would similarly only refer to common areas, faucets, water lines, and clubhouses, not individual mobile homes. Further, would a retirement home then be allowed the individual domestic use under section 42-111(1)(a) for each individual apartment or room? Finally, would the prohibition apply to "commercial or business establishments" that included residences or a "home" concept as part of their enterprise (i.e. a leased condominium or apartment complex)? These questions expose the obvious flaw in the Applicants' argument. Clearly, the plural use of "subdivisions" and "mobile home parks" refers to the fact that more than one of these type of developments exists across the State of Idaho. The terms are not

limited to certain aspects of these developments to the exclusion of the individual homes or residences.

Even if the statute is found to be ambiguous, which the Coalition does not concede, then the Court should defer to IDWR's interpretation under the four-part test set forth in *J.R. Simplot Co. v. Idaho Tax Comm'n*, 120 Idaho 849 (1991).[5] *See Canty v. Idaho State Tax Com'n*, 138 Idaho 178, 183 (2002). The Court in *Canty* confirmed the test to apply as follows:

> The first prong asks if the agency is entrusted to administer the statute at issue, so it is "impliedly clothed with power to construe" this law. . . The second prong says that the agency interpretation must be reasonable. An agency's interpretation is reasonable if it is not "so obscure and doubtful that it is entitled to no weight or consideration." [citations omitted] . . . The third prong of the *Simplot* test requires the Court to determine that the statutory language does not expressly treat the precise question at issue. If it does, no deference need be given to the agency. . . . The fourth prong requires the court to look for the rationales underlying deference. The rationales to be considered include: (1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation.

Canty, 138 Idaho at 183-84.

Applying the *Simplot* test factors to IDWR's interpretation of section 42-111, it's clear that the agency's interpretation is reasonable and should be afforded deference in this case. First, IDWR is entrusted to administer section 42-111 and the other applicable statutes in Title 42, including the application for permit statutes, sections 42-202 and 203A. Second, IDWR's interpretation is practical and reasonable. The hearing officer provided the following explanation in the preliminary order denying the application for permit:

> The term "domestic purposes" does not include water for multiple ownership subdivisions "unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b)" of Idaho Code § 42-111 (total diversion 0.04 cfs and 2,500 gallons per day). Therefore, homeowners with a multiple ownership subdivision seeking to divert water from a community well in excess

[5] The Applicants do not even acknowledge the *Simplot* test and the deference due IDWR under such an analysis.

> of the diversion rate and volume limitations set forth in subsection (1)(b) are not exempt from the permitting process and must obtain a recorded water right (either collectively or individually) prior to diverting ground water for domestic use.

R. 410-11.

The above interpretation is reasonable and follows the plain language of the statute. As such, the second prong of the *Simplot* test is satisfied. The third prong asks whether the statute's language expressly addresses the question at issue. If so, then no deference is given. Although the Coalition believes the statute expressly precludes what the Applicants are seeking, if the Court finds that section 42-111 does not address what is the difference between water used for "homes" and water used for "multiple ownership subdivisions," then the Court should analyze and defer to IDWR's interpretation. Indeed, the rationales underlying IDWR's interpretation are present since it has agency expertise and has offered a practical interpretation of section 42-111. The hearing officer aptly explained the basis for denying the application:

> Applicants would have the Department classify such domestic use as beyond the reach of legal injury. The Applicants have not identified any statutory provisions that support such a determination. Further, the constitutional provisions, administrative rules and Department orders identified by the Applicants do not insulate domestic uses from the injury review set forth in Idaho Code § 42-203A(5)(a). These sources do not make any explicit determinations on injury caused by domestic uses.

R. 414-15.

IDWR plainly acknowledged that the Applicants failed to provide any legal support for their theory and interpretation of section 42-111. As such, if the Court finds the statute to be ambiguous, then it should defer to IDWR's interpretation pursuant to the four-part *Simplot* test.

The Applicants place great weight on the 1990 amendment which changed the definition from "to include water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household" to "the use of water for homes." *See App.*

Br. at 13.[6] The Applicants go on to argue that the change signaled the legislature's intent to broaden the exemption and exempt multiple homes that divert from a community well to avoid any injury analysis under section 42-203A. *See id.* To the contrary, the 1990 amendment simply clarified and provided a single "domestic" definition for various statutes throughout Title 42. The session law itself states that it was meant "to provide uniform definitions of domestic purposes." 1990 Idaho Sess. Laws 870 (chip. 319, § 1). Referring to "homes, organization camps, and public campgrounds" in the plural tense simply describes the type of places where water use would qualify as a "domestic purpose" or use under the statute. Since there are numerous such places across the State of Idaho, including new places to be developed, the plural use is consistent and practical. Contrary to the Applicants' theory, using the plural tense did not expand the definition to 76 home subdivisions, indeed that is specifically precluded by section 42-111(2).

In sum, the Applicants' strained interpretation of section 42-111 should be rejected. The plain language of the statute shows that multiple ownership subdivisions do not qualify as individual exempt "domestic" uses. IDWR rightly denied the argument and the *Order* should be affirmed.

III. The Moratorium Orders, Constitutional Preference, and De Minimis Doctrine Do Not Support the Applicants' Argument.

Recognizing the weakness in arguing about the plain terms of the statute, the Applicants turn to various moratorium orders in an effort to sustain their argument. *See App. Br.* at 14-17. In a nutshell, the Applicants claim that the Director determined that "community wells" qualified

[6] The Applicants erroneously claim the statute used the term "single family household" at the time of the 1990 amendment. The correct language was "to include water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household." *See* 1990 Idaho Sess. Laws 870 (ch. 319, § 1). Although the term "household" was singular, it did not refer to a "single family" as the Applicants represent to this Court.

for the domestic exemption and that any injury was not "legally cognizable" to prevent such development. *See id.* at 16-17. In addition to misinterpreting the order, the Applicants apparently believe that an agency order overrides or trumps a statute enacted by the Idaho Legislature. Such an argument fails as a matter of law.

First, the language of the moratorium orders defeats the Applicants' argument. Nothing in the orders states that a new application for permit filed by a subdivision transforms into an exempt "domestic use" as defined under section 42-111. Instead, the orders simply state that new applications for permit seeking water for "multiple ownership subdivisions or mobile home parks ***will be considered*** . . ." *See App. Br.* at 15 (emphasis added). Processing or "considering" an application for permit does not mean that the new water use will be automatically approved, let alone exempt from the analysis required under section 42-203A.

Indeed, although the Director decided to allow processing of subdivision applications for permit, the Director had no authority to take an additional step and exempt such applications from the analysis required under section 42-203A. *See e.g., Curtis v. Canyon Highway Dist. No. 4*, 122 Idaho 73, 82 (1992) ("To be valid, an administrative regulation must be adopted pursuant to authority granted to the adopting body by the legislature"); *see also*, *Levin v. Idaho State Board of Medicine*, 133 Idaho 413, 418 (1999) ("A regulation that is not within the expression of the statute, however, is in excess of the authority of the agency to promulgate that regulation and must fail"). The Applicants' interpretation of the moratorium orders is flawed and should be rejected.

In this regard the Applicants misread the moratorium orders and wrongly attempt to insert a determination into those decisions that simply isn't there. Again, the Director had no authority to issue an order or develop a rule that was contrary to the statutory permitting scheme.

See e.g., Idaho County Nursing Home v. Idaho Dept. of Health & Welfare, 120 Idaho 933, 937 (1991) ("When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict"). The Director simply cannot preclude the required analysis under section 42-203A. As such, the Applicants' moratorium order argument fails.

Next, the Applicants turn to the Idaho Constitution and other references concerning adjudication and administration to further their strained reading of section 42-111. *See App. Br.* at 17-25. First, the preference provision in Article XV, § 3 of the constitution is irrelevant to the issue before the Court. The constitutional preference could apply where an established water right is competing with other beneficial uses on a source that would invoke the preference. However, just because a use may have a preference does not mean the user automatically receives water through a new appropriation at the expense of non-preferred uses (i.e. domestic v. irrigation) without compensation.[7]

The Idaho Supreme Court explained the constitutional preference basics in *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741 (1911), as follows:

> From the language thus used in this section appellant argues that it was the intention of the framers of the Constitution to make an appropriation of water for domestic uses a right superior to an appropriation made for manufacturing uses, without reference to the time or priority of such appropriations. In other words, appellant argues that the appropriation made by the respondent, being for manufacturing purposes, did not withdraw the water so appropriated from a subsequent appropriation made for domestic uses, and that the appropriation and use for manufacturing purposes conferred no right which could not be taken away and destroyed by an appropriation for domestic use. Applying this principle to the facts alleged in the complaint, it is claimed that the appropriation made by the respondent in the year 1891 for manufacturing and milling purposes, and the continuous use of such water from that date up to 1908, conferred no right upon the respondent which could not be defeated and subsequently acquired by the appellant upon an appropriation for domestic uses.

[7] The Applicants' reliance upon *AFRD #2* is similarly misplaced as the Court only addressed the "facial" constitutionality of CM Rule 20.11. The Court made absolutely no findings about a new subdivision water right and the analysis required under section 42-203A.

> We do not think that the language thus used in the Constitution was ever intended to have this effect, for it is clearly and explicitly provided in said section that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied; that priority of appropriation shall give the better right as between those using the water. This clearly declares that the appropriation of water to a beneficial use is a constitutional right, and that the first in time is the first in right, without reference to the use, but recognizes the right of appropriations for domestic purposes as superior to appropriations for other purposes, when the waters of any natural stream are not sufficient for the service of all those desiring the same. This section clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of private property for public and private use as referred to in section 14, art. 1, of the Constitution.
>
> ***It clearly was the intention of the framers of the Constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the Constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes.*** This would manifestly be unjust, and clearly in contravention of the provisions of this section, which declare that the right to divert and appropriate the unappropriated waters of any natural stream for beneficial use shall never be denied, and that priority of appropriation shall give the better right.

113 P. at 743 (emphasis added).

The Applicants make the same erroneous argument as the city in the *Montpelier Milling Co.* case. The constitutional preference does not arbitrarily "give" the Applicants a water right for their subdivision. Moreover, the preference doesn't even apply in this matter. This case concerns a new application for permit for 76 homes and IDWR's decision whether to even approve the new water use in the first place. There is nothing in the constitution that stretches a domestic preference to an outright exemption for a 76, 760, or even 7,600 home subdivision, let alone allow IDWR to forego its required analysis of a new permit under section 42-203A. As such, the Applicants' argument fails as a matter of law and should be rejected.

Next, the Applicants rely upon CM Rule 20 and its provision regarding domestic and stock water rights that meet the definition in section 42-111. *See App. Br.* at 18-19. Contrary to

the Applicants' argument, this case does not concern conjunctive administration of existing water rights and therefore the rule is irrelevant to deciding this appeal. *See e.g. Final Order* at 2 (*In the Matter of Application to Appropriate Water No. 27-12155 in the name of the City of Shelley*) ("Finally, the standard of review is different for determining injury in a delivery call compared to reduction of the quantity of water under existing rights. In the analysis for reduction of the quantity of water under existing water rights, the Department must review the impact to each individual water right to determine whether the quantity of water will be reduced by the diversion and use proposed by the new application").

Although the Idaho Supreme Court determined that CM Rule 20 was "facially" constitutional in *AFRD#2* , that ruling does not somehow allow IDWR to forego the required analysis when analyzing a new application for permit under section 42-203A. Again, this case does not concern CM Rule 20 or a delivery call pursuant to conjunctive administration.

Finally, the Applicants claim that the domestic exemption is based upon the *de minimus* common law doctrine and that its application requires IDWR to approve its new subdivision application for permit 25-14428.[8] *See App. Br.* at 21. Notably, as recognized by the hearing officer, the term *de minimus* is not found anywhere in Title 42. R. at 412. The reference to deferred *de minimus* stockwater and domestic water right claims in the Snake River Basin Adjudication (SRBA) is just as irrelevant. Regardless, the legislature has not determined that an application for permit of a multiple ownership subdivision is a "trifle" exempt from the express process in section 42-203A. The cases cited by the Applicants on this issue are inapposite.

[8] The Applicants argue that they could drill individual wells for each lot and therefore be exempt from the permitting process. *See App. Br.* at 23. However, despite this puffery, the Applicants failed to show that the local land use ordinances or other environmental regulations would allow 76 individual wells within such a high density development. As for the hearing officer's dicta concerning 76 separate applications for permit, the issue is not necessary for decision on application for permit no. 25-14428 and should be disregarded. R. 415.

Further, contrary to the Applicants' insinuations, there is nothing "de minimus" about application for permit no. 25-14428 which seeks 0.76 cfs to provide potable water to 76 homes and irrigate up to 38 acres.[9] The hearing officer properly analyzed the impacts from the new consumptive water use and found that it would deplete Snake River flows and injure existing water rights. R. 408-09 ("Irrigation is a consumptive use of water. . . . The domestic use proposed in Application 25-14428 (including ½ acre of irrigation per lot at seventy-six lots) will reduce the quantity of water in the Snake River above Milner Dam by approximately 85.9 acre-feet per year . . .").

The *Order* is supported by this substantial evidence and cannot be refuted by the Applicants. *See A&B Irr. Dist.*, 153 Idaho at 505-06. There is nothing in the common law that would warrant a different result. Since the Applicants failed to propose a mitigation plan, the hearing officer properly denied the application for permit. R. 416-17. The Court should affirm the *Order* and deny the Applicants' appeal accordingly.

IV. The Applicants are Bound by the Terms of Permit No. 25-14395.

Although the Applicants describe the history of the subdivision's development they fail to acknowledge the legal effect of the prior water right permit no. 25-14395. *See App. Br.* at 2-3. By accepting the prior water right for domestic use which required a separate water right for irrigation, the Applicants are barred from seeking a water right for the same purposes as a matter of law. Furthermore, IDWR could not approve application for permit 25-14428 because the Applicants could not put that water to beneficial use in light of the existing water right permit and its conditions.

[9] This assumes that all homes in the subdivision would irrigate the full ½ acre per lot as claimed by the Applicants.

In August 2013 the Applicants filed for a water right for the in-house potable water use at the same 76 homes. R. at 112. The application for permit did not seek water use for irrigation purposes.[10] *See id.* The application was processed and not protested. IDWR issued a permit in December 2013. The Department conditioned the permit as follows:

> 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 this date specified shall be cause to void this water right.

R. at 112.

Based on the evidence in the record, it is undisputed that the Applicants hold an existing water right permit to cover the in-house potable use at the same 76 homes, which includes an express obligation to obtain a separate water right for irrigation purposes. The Applicants are bound by the elements and conditions of this existing water right permit. *See J & J Contractors/O.T. Davis Const., A.J.V. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 536 (1990) ("The doctrine of claim preclusion, or res judicata, applies to the effect of administrative decisions"). Stated another way, the Applicants have already filed for a water right to cover the development and received a final agency determination approving that request. The Applicants knew that in order to then be able to irrigate the lots they were required to go out and obtain a separate water right for irrigation purposes.[11] The Applicants had an opportunity to contest the

[10] The Coalition can only speculate that the Applicant likely filed for "in-house" potable water use only to avoid having to submit a mitigation plan or being subject to a protest by the Coalition or others.

[11] The Applicants state they have not been able to purchase a separate irrigation water right so far. *See App. Br.* at 3. That fact does not excuse non-compliance with the permit conditions or allow the Applicants to escape the permit's binding legal effect.

agency decision and the condition requiring a separate irrigation water right. The Applicants accepted the final order and did not seek judicial review. The agency's decision is final and precludes the Applicants from re-litigating the issue through a separate application for permit. *See Hindmarsh v. Mock*, 138 Idaho 92, 94 (2002) (*Res judicata* bars the relitigation of issues that should have been raised in prior proceedings).

Further, Idaho law prevents the Applicants from obtaining a separate domestic water right permit at the subdivision. As a matter of law the Applicants cannot beneficially use "two" domestic water rights in the same 76 homes. The Idaho Supreme Court has been crystal clear that the concept of "beneficial use" is the measure and limit upon the extent of a water right. *See A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 650 (2013); *AFRD#2 v. IDWR*, 143 Idaho 862, 880 (2007). Since permit no. 25-24395 already provides potable water for 76 homes, the Applicants cannot obtain a separate water right for the same purpose of use through application 25-14428. Stated another way, the Applicants cannot legally receive "two" permits for the same in-house potable use. The new permit would result in unlawful "waste" of the state's water resources. *See AFRD#2*, 143 Idaho at 880 ("Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use").

In light of the Applicants' existing permit no. 25-14395, and its express conditions, the Applicants are precluded from obtaining a duplicate water right under application for permit no. 25-14428. Moreover, the Applicants cannot avoid the legal effect of the requirement to obtain a separate water right for irrigation purposes. The Court should reject the attempted "end-around" the existing permit and deny the Applicants' appeal accordingly.

V. The Hearing Officer Was Authorized to Deny the Application for Permit.

In their final issue the Applicants dispute the Department's denial of the motion for summary judgment and the application for permit 25-14428. *See App. Br.* at 25-27. Each argument fails and should be rejected.

First, the Applicants allege the hearing officer erroneously granted summary judgment in favor of the Coalition, a non-moving party contrary to Rule 56(c) (as revised effective July 1, 2016). *See App. Br.* at 25-26. This is untrue. Regarding the Applicants' motion, a plain review of the *Order* shows the hearing officer only denied the Applicants' motion, he did not grant summary judgment for the Coalition. R. 417. Accordingly, any alleged procedural error based upon what is or what is not allowed by Rule 56 is meritless.

As to the denial of the application, the hearing officer was authorized by law to enter such an order. The Applicants admittedly did not submit a mitigation plan with their application for permit no. 25-14428. R. 1. Without mitigation, the hearing officer found the new permit would injure existing water rights contrary to Idaho law. R. 416 ("The Applicants acknowledge that their proposed use will reduce the quantity of water under existing water rights on the Snake River. . . The Applicants have not identified any plan to mitigate for the impact to existing water rights. . . . Therefore, Application 25-14428 must be denied"). This decision is supported by substantial evidence in the record and should be upheld. *See A&B Irr. Dist.*, 153 Idaho at 505-06.

Instead of providing a mitigation plan, the Applicants took the risk of filing a summary judgment motion arguing that their water use was exempt from an injury analysis and claiming that no mitigation was required. R. 103. The hearing officer carefully analyzed and rejected this argument, both factually and as matter of law. R. 411-16. Contrary to the Applicants' theory,

Idaho law expressly authorized the Department to reject or refuse to issue the permit. *See* I.C. § 42-203A(5).

In sum, the Applicants' claim that the *Order* was made upon unlawful procedure or violates the Idaho APA is without merit and should be rejected.

CONCLUSION

The Applicants urge this Court to adopt a new policy not expressed by the Idaho Legislature. This novel and unprecedented argument seeks to exempt a new class of water rights from the required permitting process and analysis. IDWR rightly denied this attempt. This Court should do the same.

The Applicants' entire appeal contradicts the plain and ordinary language of section 42-111. The unreasonable interpretation should be rejected outright. First, the statute plainly states that the "domestic" definition used therein does not apply to sections 42-202 and 203A. Second, subsection two of the statute expressly prohibits "multiple ownership subdivisions" from qualifying for the quantities set out in section 42-111(1)(b). In sum, no reasonable person would interpret the statute as exempting a new consumptive use water right from the analysis required under section 42-203A. The Coalition respectfully requests the Court to affirm IDWR's *Order* and deny the Applicants' petition for judicial review.

DATED this 21st day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2017, I caused to be served a true and correct copy of the foregoing upon the following by the method indicated:

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