

LODGED

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

JUN 24 2016

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

By _____

Clerk

Deputy Clerk

Docket No. CV42-2015-4552

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 79380
In the name of Thomas & Dorothy Leno

RICHARD PARROTT,
Petitioner,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents,

and

CEDAR RIDGE DAIRY LLC,
Intervenor.

INTERVENOR CEDAR RIDGE DAIRY LLC'S RESPONSE BRIEF

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
163 Second Avenue West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

*Other Parties and Counsel Listed on
Certificate of Service*

*Attorneys for Intervenor Cedar Ridge
Dairy LLC*

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE..... 1

I. Nature of the Case..... 1

II. Course of Proceedings / Statement of Facts 1

ISSUES PRESENTED 2

STANDARD OF REVIEW 2

ARGUMENT 3

I. The *Final Order* is Supported by Substantial Evidence. 3

 A. The Director’s Decision Confirming the Proposed Year Round Season of Use is Supported by Substantial Evidence. 5

 B. The Director's Decision to Retain the Water Right’s Priority Date is Supported by Law and Substantial Evidence. 6

II. The Director’s *Final Order* is Not Arbitrary or Capricious. 7

 A. The Director’s Decision to Approve the Year Round Season of Use was Not Arbitrary or Capricious. 8

 B. The Director's Decision to Approve the Retention of the Original Priority Date was Not Arbitrary or Capricious. 9

III. The Petitioner Has Not Shown That His Substantial Rights Were Prejudiced by the Director’s *Final Order*...... 10

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

CASES

<i>American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.</i> , 142 Idaho 544 (2006).....	8
<i>Barron v. IDWR</i> , 135 Idaho 414 (2001)	3
<i>Chisholm v. IDWR</i> , 142 Idaho 159 (2005).....	2
<i>Cowan v. Bd. of Comm'rs of Fremont Cty.</i> , 143 Idaho 501 (2006)	5
<i>Hopper v. Swinnerton</i> , 155 Idaho 801 (2013).....	3, 5
<i>Mann v. Safeway Stores, Inc.</i> , 95 Idaho 732 (1974)	4
<i>Payette River Property Owner's Assn. v. Board of Comm'rs.</i> , 132 Idaho 552 (1999).....	3
<i>Sagewillow, Inc. v. IDWR</i> , 138 Idaho 831 (2003)	2
<i>Tappen v. Department of Health & Welfare</i> , 98 Idaho 576 (1977)	4
<i>Terrazas v. Blaine Cty. ex rel. Bd. of Comm'rs</i> , 147 Idaho 193 (2009).....	8

Constitutional & Statutory Authority

I.C. § 42-1420	9
I.C. § 42-202	4
I.C. § 42-222	4
I.C. § 67-5245	4
I.C. § 67-5246	4
I.C. § 67-5279	3, 7, 10

Rules

Idaho Appellate Rule 35	2
Idaho Rule of Civil Procedure 84(p).....	2

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the *Amended Final Order Conditionally Approving Transfer* (“*Final Order*”), issued by the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) on November 12, 2015. The Petitioner Richard Parrott appealed the order. Petitioner does not challenge the transfer approval, but argues that the Director was wrong to correct the season of use and priority date errors made by the hearing officer. Intervenor Cedar Ridge Dairy LLC (“Cedar Ridge”) supports the *Final Order* and maintains the Director properly approved the transfer pursuant to Idaho law. Consequently, the final order should be affirmed pursuant to Idaho’s Administrative Procedures Act.

II. Course of Proceedings / Statement of Facts

On May 20, 2014, Thomas and Dorothy Leno filed Application for Transfer No. 79380 with the Idaho Department of Water Resources. R. 1. The transfer proposed to move a split portion of irrigation water right 47-17589 from property near the Idaho-Nevada border to a dairy located north of Berger, Idaho for year round stockwater and commercial purposes. R. 685. Petitioner and others protested the transfer application. R. 46-87. On March 18 and 19, 2015, the Department conducted an administrative hearing in Twin Falls, Idaho. R. 177. Attorney Travis Thompson represented the Applicant and Intervenor Cedar Ridge, and Attorney David Coleman represented Protestants Margaret Winsryg and Leroy Elliot. Various other protestants, including Petitioner, participated pro se. The hearing was held in conjunction with hearings for Application for Transfer Nos. 79357, 79384 and 79466.

On June 1, 2015, the hearing officer issued an Amended Preliminary Order Approving Transfer 79380. R. 722. Although the hearing officer approved the transfer, he proposed to limit

the season of use and advance the priority date. R. 695. The Applicant and Cedar Ridge filed exceptions to this order with the Director, specifically challenging the season of use and priority date limitations. R. 728, 734-44. On October 13, 2015 the Director issued a *Final Order Approving Transfer*. R. 807. The Applicant and Cedar Ridge then requested reconsideration and clarification of this order. R. 826. On November 12, 2015 the Director issued an *Amended Final Order Conditionally Approving Transfer* (“*Final Order*”) which included formal water right transfer forms and addressed a discrepancy in the record. R. 907. The Petitioner filed a notice of appeal on December 9, 2015. R. 919.

ISSUES PRESENTED¹

1. Whether the Director’s *Final Order* is supported by substantial evidence.
2. Whether the Director’s *Final Order* is arbitrary and capricious.
3. Whether substantial rights of the Petitioner are prejudiced.

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). The Court reviews the matter “based on the record created before the agency.” *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). The Court does not substitute its judgment as to the weight of the evidence presented, but instead defers to the agency’s findings of fact unless they are clearly erroneous. *See id.* When conflicting evidence is presented, the agency’s findings must be sustained on appeal, as long as they are supported by substantial and competent evidence, regardless of whether the Court might have reached a different conclusion. *See Barron*

¹ Petitioner did not identify a specific “statement of issues” in his *Transfer Protest Parrott Brief* (“*Petitioner Br.*”). Petitioner’s filing does not conform to Idaho’s civil and appellate rules. *See* I.R.C.P. 84(p); I.A.R. 35. Regardless, Cedar Ridge presents this statement for convenience of the Court to address what Cedar Ridge interprets to be the arguments that Petitioner is offering.

v. *IDWR*, 135 Idaho 414, 417 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. See *Payette River Property Owner's Assn. v. Board of Comm'rs.*, 132 Idaho 552 (1999).

An agency's decision must not be overturned unless 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); *Barron*, 135 Idaho at 417. Even if one of the above conditions is met, an agency action shall affirmed unless substantial rights of the appellant have been prejudiced. I.C. § 67-5279(4); *Barron*, 135 Idaho at 417.

ARGUMENT

Although the Petitioner does not identify under what grounds he is challenging the Director's *Final Order* it appears he takes issue with the evidence and the legal basis supporting the decision to confirm a year round season of use and the original priority date for the water right being transferred.² See *Petitioner's Br.* at 4-5. With this understanding Cedar Ridge addresses those points under these theories below.

I. The *Final Order* is Supported by Substantial Evidence.

The Director's findings that the use of the water right for year round stockwater and commercial purposes under its original priority date would not harm existing water rights is supported by substantial evidence in the record. R. 900 ("The information in the Kimball model is sufficient to conclude that the changes proposed by Leno will not injure existing water rights.

² Petitioner also insinuates that the water right being transferred should be declared forfeit. See *Petitioner's Br.* at 4. Petitioner provides no legal argument in support of this theory and cannot identify any facts in the record to support this claim. The Court should reject this argument accordingly. See *Hopper v. Swinnerton*, 155 Idaho 801, 806, 811 (2013).

The magnitude of seasonal aquifer fluctuation is far greater than the anticipated drawdown impacts to the closest domestic wells to Dairy #3”).

Under the provisions of Idaho Code § 67-5245 an agency director may review a hearing officer’s preliminary order. Upon review, the director’s decision becomes the final agency order. See I.C. § 67-5246(3) (“If the preliminary order is reviewed, the agency head shall issue a final order”). Here, though the Director agreed with the hearing officer’s decision to approve the transfer, he corrected the preliminary suggestion for a shortened season of use and an advanced priority date as those conclusions were contrary to Idaho law and the evidence presented. R. 891-92. The Director approved the transfer with a year round season of use along with the retention of the original priority date. R. 907-12.

IDWR processed transfer application No. 79830 under the provisions of I.C. § 42-222 which provides:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202(B) of the Idaho Code.

The Director concluded that the transfer satisfied the above statutory criteria. R. 902 (“Leno has satisfied his burden of proof for all of the review criteria set forth in Idaho Code § 42-222”). The Director’s decision is supported by substantial evidence in the record. R. 888-898. Substantial and competent evidence need not be uncontradicted, nor must it lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder. See *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 736 (1974). Only if a finding of fact is without any basis in the record would it be clearly erroneous. See *Tappen v. Department of Health & Welfare*, 98 Idaho 576, 579-80 (1977).

Qualified expert testimony and analysis within the record is considered to be substantial evidence. *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 518 (2006). In *Cowan*, the record reflected that expert data and documentation had been presented to justify a board's decision that a land developer complied with wetland protection provisions. *See id.*

In this case, the Petitioner appears to contend that the agency record does not support a finding that year round usage and retention of the priority date would not injure existing water rights. *See Petitioner's Br.* at 5. However, the Petitioner does not point to any specific evidence which could support his theory nor does he point to any findings of injury to existing water rights. *See id.* Instead, the Petitioner merely presents an unsubstantiated assertion that the findings regarding the season of use and priority date should revert to those preliminary findings of the hearing officer. *See id.* Such unsupported claims are not sufficient to warrant reversal of the Director on judicial review. *See Hopper*, 155 Idaho at 806. Moreover, such conclusions are not even supported by the facts upon which the preliminary order was issued which acknowledge that no injury was shown regarding the proposed transfer. R. 738-39. Just the opposite, the record reflects ample evidence to support the Director's correction based upon the evidence presented. R. 888-98.

Since the Petitioner can point to no legal error or other evidence in the record to support his theories, his appeal should be denied. Cedar Ridge therefore urges the Court to affirm the *Final Order*.

A. The Director's Decision Confirming the Proposed Year Round Season of Use is Supported by Substantial Evidence.

The Director relied on scientific studies performed by Brockway Engineering and expert testimony of others which together comprised the majority of the evidence in the record concerning potential impacts of the transfer. That evidence conclusively demonstrated minimal

impact to the area groundwater levels and existing wells and further showed the stability of ground water levels in the area which both support the approval of year round use of the transferred water right. R. 891, 896-98.

Notably, Brockway Engineering performed two separate scientific studies to analyze potential impacts of pumping on area ground water levels based upon year round commercial and stockwater use. R. 316-17; 319. Both studies found that impacts from the transfer to be only 0.13 to .23 feet after 20 years. Such potential drawdown was minimal compared to the normal operation of a domestic well and the annual fluctuation experienced in the Salmon Tract aquifer (up to 10 feet annually). R. 318; R. 319, R. 897 (“The static water levels in the Berger area fluctuate as much as 10 feet throughout the year due to seepage from surface water canals and seepage from irrigation”).

Additionally, the record reflects that IDWR has previously found that, under similar analysis, impacts of less than two feet would not constitute injury to nearby wells. R. 732. Furthermore, evidence was shown that groundwater levels in the Salmon Tract area are stable and that there would be a reduced demand for the transferred water during the winter. R. 309; 891. The Petitioner has failed to identify any evidence in the record to show otherwise.

The above examples of the evidence resolutely support the Director’s decision that year round water use would not injure existing water rights. As such the Director’s *Final Order* approving year round usage is supported by substantial evidence in the record and should be affirmed by this Court.

B. The Director's Decision to Retain the Water Right's Priority Date is Supported by Law and Substantial Evidence.

As to the water right’s priority date, the Director properly found that the original date should be retained. R. 892. Again, the Director relied upon the scientific studies and testimony

presented to conclude that the original priority date should stand as a correction to the hearing officer's preliminary decision. *See id.* ("Because water levels in the basalt aquifer in the Berger area are stable and approval of this transfer will not destabilize water levels in the aquifer, the priority date of this transfer should not have been advanced").

The record does not reflect any evidence of a future delivery call against or a future curtailment of any ground water rights in the Berger, Idaho area. R. 693. Instead, substantial evidence in the record confirms that groundwater levels are stable if not rising. R. 744. Stable groundwater levels provides evidence against the speculation of future curtailment and refutes any argument to alter the water right's priority date. Again, this evidence supports the Director's final decision and shows the error in the hearing officer's initial order. The Petitioner has not shown any error legal or factual error in the Director's decision.

In sum, the Director's finding that the water right should retain its original priority date is supported by substantial evidence and Idaho law. The Court should affirm the *Final Order* accordingly.

II. The Director's *Final Order* is Not Arbitrary or Capricious.

The Petitioner has not alleged that the *Final Order* violates any constitutional or statutory provision, was made upon unlawful procedure, or exceeds the agency's authority. Consequently, there is only one statutory ground that the Petitioner could allege applies to his appeal, that the decision is "arbitrary or capricious." *See* I.C. § 67-5279(3); *see also generally, Petitioner's Br.*

Because the Director consulted expert studies and testimony before approving the transfer for year round use and retention of its original priority date, his decision was not arbitrary or capricious. An agency action is only "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *American Lung*

Assoc. of Idaho/Nevada v. Dept. of Ag., 142 Idaho 544, 547 (2006). It is only “capricious” if it “was done without a rational basis.” *Id.* When the administrative record clearly indicates that an agency carefully considered an application and issued a thorough and detailed discussion of why it came to the specified conclusions, the decision will be upheld, and not found to be arbitrary or capricious. *See Terrazas v. Blaine Cty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 205 (2009).

In this case, the Petitioner alludes that the Director made an arbitrary and capricious ruling regarding the season of use and the priority date. *See Petitioner's Br.* at 5. However, the Petitioner does not point to specific flaws or a lack of legal basis for the Director's conclusion. To the contrary, the record reflects that the Director carefully considered the evidence before coming to his conclusion and that his decision is supported by Idaho law.

A. The Director's Decision to Approve the Year Round Season of Use was Not Arbitrary or Capricious.

The Petitioner claims that the Director's allowance regarding the season of use was made contrary to the evidence, yet he does not offer any specific reasons to support the assertion. *See Petitioner's Br.* at 5.

Contrary to the Petitioner's claim, the Director's reasoned conclusion is supported by evidence in the record. R. 891, 980. For example, the Director noted because the nearest domestic wells are three-quarters of a mile away and because a small quantity of water is proposed to be pumped, any slight drawdowns in those that far away would not injure any domestic water right holders. R. 891. Moreover, the Petitioner's domestic well is located even farther away, nearly two miles away from the wells at Dairy #3. *See Exs. 22, 28* (Parrott's well identified as Well #5).

Additionally, evidence was presented to establish that the ground water levels are stable. R. 744. The Director reasoned that because the demand from the groundwater resource for the

proposed transfer is significantly reduced in the winter, attributable drawdowns will be minimal.

R. 891. Through his analysis of the record and finding of no injury to existing water rights, the Director properly issued a *Final Order* approving the transfer with a year round season of use. The Petitioner has failed to show that the Director acted arbitrarily or capriciously or that he otherwise abused his discretion. As such, the *Final Order* should be affirmed.

B. The Director's Decision to Approve the Retention of the Original Priority Date was Not Arbitrary or Capricious.

In addition to the season of use, the Director held that the water right would retain its original priority date. R. 892. This decision was made in accordance with Idaho law and after consideration of the facts.

Once a decree has been issued, the Department is bound by the terms of that decree. I.C. § 42-1420. The water right subject to the transfer was partially decreed with a priority date of December 25, 1970. R. 33. As such, in this case, the Director properly corrected the hearing officer since the latter had no basis or authority to change the priority date element of the water right. R. 743.

Furthermore, the Petitioner provides no legal basis or evidence in the record to support the hearing officer's suggestion of protecting existing water rights against a call by the advancement of the transfer's priority date. R. 693. The hearing officer found that ground water levels are stable. R. 691. Additionally, certain water levels in a domestic well had risen since the time of drilling. R. 744. In sum, the Director addressed the evidence in the record and corrected the hearing officer's findings which had not been based upon sufficient legal or factual bases to advance the water right's priority date. The Court should affirm the *Final Order* accordingly.

III. The Petitioner Has Not Shown That His Substantial Rights Were Prejudiced by the Director's Final Order.

To prevail on judicial review, even if it could be shown that the Director erred under one of the statutory grounds in Idaho's APA (I.C. § 67-5279(3)), the Petitioner must still show that a substantial right was prejudiced through the process. Petitioner has failed to meet this burden. The approval of this transfer will not result in any injury to Petitioner's domestic water right and, therefore, he has not been prejudiced in any way. R. 900. Stated another way, the Petitioner cannot identify any facts in the record to show that he has a "substantial right" or interest that will be prejudiced by the *Final Order*.

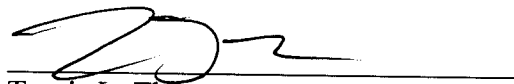
Consequently, the Court can deny the appeal on this basis as well. Cedar Ridge respectfully requests the Court to affirm the *Final Order* accordingly.

CONCLUSION

The Director's *Final Order* is supported by substantial evidence. The Director's decision is not arbitrary or capricious nor does it constitute an abuse of discretion. The record plainly shows that no domestic water right holder will be injured by the transfer and that ground water levels are stable. The Director properly evaluated the facts and issued a reasoned decision supported by Idaho law and the evidence. As such, the Court should affirm the *Final Order*.

DATED this 24th day of June, 2016.

BARKER ROSHOLT & SIMPSON LLP


Travis L. Thompson

*Attorneys for Intervenor Cedar Ridge
Dairy LLC*

CERTIFICATE OF SERVICE


I hereby certify that on this 24th day of June, 2016, I caused to be served a true and correct copy of the foregoing upon the following by the method indicated:

Garrick Baxter
Megan Carter
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720
garrick.baxter@idwr.idaho.gov
megan.carter@idwr.idaho.gov

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

Richard Parrott
1389 East 4400 North
Buhl, Idaho 83316
ofarm@lightcom.net

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



Travis L. Thompson