

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN B. KUGLER,)

Plaintiff/Appellant,)

Vs.)

THE IDAHO DEPARTMENT OF WATER)

RESOURCES and GARY SPACKMAN in)

His Official Capacity as Interim Director))

Idaho Department of Water Resources.))

Respondents.)

_____)

IN THE MATTER OF PERMIT TO)

APPROPRIATE WATER NO. 35-8359 IN)

THE NAME OF JOHN B. KUGLER AND)

DIANE KUGLER)

_____)

Case No. CV-2011-15672

APPELLANT'S REPLY BRIEF

LODGED

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho
FEB 27 2012
By _____ Clerk
_____ Deputy Clerk

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SCANNED
MAR 29 2012

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TABLE OF CASES AND AUTHORITIES

- Doe v. Boy Scouts of America 148 Idaho 427, 224 P. 3rd 494
- Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n 144 Idaho 23, 156 P. 3, 524
- Idaho Code 42-218 (a)
- Idaho Code 42-223(1)

SUPPLEMENTAL STATEMENT OF THE CASE

On October 4, 1984 a "WATER PERMIT ", No. 35-08359, to appropriate 6.00 CFS of water was issued to appellant by the Idaho Department of Water Resources without restrictions as to term or conditions other than instructions to commence the work. By virtue of getting the water permit appellant did not plant a crop that fall. In the spring of 1985 your appellant commenced the work required to drill a well and complete an irrigation system by hiring a well driller who wished to start his own well drilling business. Appellant purchased, at a cost of \$ 12,000.00, a drilling rig and also another drilling bit as requested by the driller at a cost of \$1,500.00. In the meantime, while the driller was seeking equipment, Idaho Power Co. notified appellant that the power line could not be extended to the premises until the following year. By telephone your appellant notified the IDWR of the this problem to which the department representative said ' ... that would not be a

problem ..." and that I should not be concerned. Thereafter Appellant was notified by the driller that he had to do something else and that he had found a well driller who would assume the drilling under the same terms as he had agreed with your appellant. Appellant contacted that driller and he confirmed the agreement to drill the well so again the farmland was not planted to a crop. In the fall of 1985 appellant communicated with the driller and learned that he had gotten ill and had not as yet commenced drilling. Again appellant notified the department that additional time would be required in which to complete the development to which your appellant was again advised by the department that was understandable and that it was not of concern. In the spring of 1986 appellant contacted the driller who indicated that he would be getting right to the drilling project. A couple of months later, and not having any report from the driller, appellant drove out to the farm and saw that appellant's equipment was not on the farm and that nothing had been done. On investigation appellant learned that the driller had appropriated and sold all of the equipment. After two years of idleness the farmland was deteriorating and turning into a blowing sand area eroding the top soil. With the legal problem with the well driller the best that could be done for the farm was to place the ground into the CRP program effective October 1, 1986, planting it with grasses for the nearby wildlife as well as stabilizing the soil. Your appellant notified the Idaho Department of Water Resources and advised them that I was still intending to use the permit when it became possible. At no time did the Idaho Department of Water Resources send a notice to the appellant that the "Water Permit" was being terminated.

ARGUMENT

Appellant does not disagree with the conclusion of the respondents that the Idaho Department of Water Resources directs the management of the water resources of the State of Idaho. Appellant does however believe that it has misdirected its' management duties in regards to appellants' claim of a right to appropriate a small amount of ground water for the improvement and beneficial use of farmlands. The major singular issue is whether or not the statutes permit the Interim Director of the Idaho Department of Water Resources to adversely effect appellant's "Water Permit" issued by the director in November of 1984. Secondly

there are issues as to whether or not the Interim Director's action to supply a defect to his own action and opinion as the "Hearing Officer" in the first instance is proper and permissible. Another issue that might develop is whether "mitigating circumstances" can be something other than matters affecting the delivery of waters.

As this Court is well aware the Idaho Supreme Court has issued decisions clearly reciting that if there is a question interpreting a statute the ultimate decision is one that the Court has the right to give and over which it has the right of free review. The respondents assert that appellant's water permit was issued in 1990 while the application, filed on a 1970's form, clearly reflects that it was filed and acted upon in October of 1984. At no time was any notice to appellant, as required by statute, was ever sent to appellants asserting that a lapse of Water Permit No. 35-8359 had occurred or was about to occur. As appellant asserted, denied by respondents, the depicted water permit of July in 1990 was a "fabrication". Unfortunately, thereafter the Idaho Department of Water Resources, for several years, did not recognize that Farm Credit Services assignment was part of a mortgage security situation and that it had not deprived appellants of their ownership rights. Appellant does not know when "trust waters" became a part of water law but it is the position of the undersigned that the issuance of a Trust Water permit in 1990 was a nullity as effecting appellants' water rights.

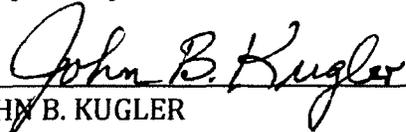
The IDWR has periodically sent notices to Farm Credit Services and, after several years, to appellant. Each time those notices came out appellant was required to pay monies to the department and make an application for an extension of time in which to complete the water appropriation project as appellant was still prohibited by a CRP contract from applying any water to the farmlands. Each time the department granted a five year extension until the application for an extension to the then known end of the farmlands participation in the CRP program in 2007. In the Order granting the extension previous to it there had been a determination by IDWR to the effect that the diversion application would have no noticeable effect on prior water rights. After the hearing on the extension request for a one year extension request beyond 2009, the end of CRP, in which to establish an irrigation

system, in which the department introduced no evidence in contradiction of it's earlier Order, the Hearing Officer entered a Finding that the granting of the right to continue with a development of the proposed application to a beneficial use would adversely effect other water rights. Obviously, that finding was contrary to the record and in the same Order the Hearing Officer determined that no further development would be permitted without the first written consent of the department, in effect totally terminating the right established by the issuance of the permit. Appellant contends that this was a "taking" and the Hearing Officer, now serving as the Acting Director affirmed his own position without discussion on this issue.

CONCLUSION

As noted above, appellant believes that an extension of time should be granted and that a well drilling permit should be authorized under the rules and law as it existed in 1984. Appellant is aware that the permit is still junior to other water rights granted and as clarified existing prior to November 1984. In the event that it is determined by this Court that " trust waters " are now what is involved by virtue of any of the statutory changes appellant would contend that it would still be a "taking". In order for the State of Idaho to honor it's water permit by reason of mitigating circumstances or minimal adverse effect IDWR should still be required to grant the extension and issue a well drilling permit.

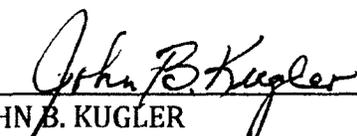
Respectfully Submitted,



JOHN B. KUGLER

CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellants Reply Brief was served on the respondents by mailing the same to GARRICK L. BAXTER, P.O. BOX 83720-0098, Boise, Id 83720-0098 this 22nd day of February, 2012.



JOHN B. KUGLER