

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 49632-2022

SOUTH VALLEY GROUND WATER
DISTRICT and GALENA GROUND
WATER DISTRICT
Petitioners-Respondents,

v.

IDAHO DEPARTMENT OF WATER RESOURCES,
Respondents-Appellants,

v.

SUN VALLEY COMPANY, CITY OF
BELLEVUE, BIG WOOD CANAL
COMPANY, BIG WOOD & LITTLE
WOOD WATER USERS ASSOCIATION, CITY OF POCA TELLO, CITY OF
KETCHUM, and CITY OF HAILEY
Intervenors-Respondents,

**IGWA's Brief in Support of Verified Petition for Leave to Intervene or,
in the Alternative, Appear as Amicus Curiae**

Appeal from Twin Falls County case no. CV07-21-00243

Honorable Eric J. Wildman, District Judge, Presiding.

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INTRODUCTION

Rule 7.1 of the Idaho Appellate Rules allows intervention by any person or entity “who is a real party in interest to an appeal or proceeding governed by these rules or whose interest would be affected by the outcome of an appeal or proceeding under these rules.” Idaho Ground Water Appropriators, Inc. (IGWA) requests intervention because IGWA and its members have interests that would be affected by the outcome of this appeal, as explained below.

If the court denies IGWA’s request to intervene, IGWA alternatively requests leave to appear as amicus curiae. Rule 8 of the Idaho Appellate Rules allows an entity to appear as amicus curiae by leave of the court upon stating “the interest of the applicant in the appeal or proceeding and the name of the party in whose support the amicus curiae would appear.” The interests that warrant IGWA’s intervention in this appeal are the same interests that warrant its appearance as amicus curiae. Therefore, this brief does not distinguish between arguments that support intervention versus appearance as amicus curiae. If IGWA is granted leave to appear as amicus curiae, IGWA will appear in support of the petitioners-respondents South Valley Ground Water District and Galena Ground Water District.

ARGUMENT

This case involves conjunctive management of surface and ground water rights. In the spring of 2021, the Idaho Department of Resources (the “Department”) issued an order curtailing ground water rights in the Wood River Valley in an effort to increase the flow of surface water in the Wood River for the benefit of downstream irrigators. Ground water districts representing the owners of curtailed water rights (South Valley Ground Water District and Galena Ground Water District) filed a petition for judicial review. Upon review, the district court reversed the curtailment order because the Department failed to establish an area of common groundwater supply and failed to make a finding of material injury to senior rights. (Memorandum Decision and Order, Feb. 10, 2022, p. 11-14).

The Department has appealed the district court decision, putting at risk the court's ruling that the Department must establish an area of common ground water supply and evaluate material injury before curtailing junior rights. (Notice of Appeal, Mar. 24, 2022, p. 4-5.)

IGWA desires to intervene in this appeal because this Court's decision will set precedent that directly affects IGWA and its members. IGWA consists of nine ground water districts and one irrigation district¹ whose members collectively irrigate nearly one million acres of farmland on the Eastern Snake River Plain using groundwater diverted from the Eastern Snake Plain Aquifer (ESPA). IGWA members have been the primary target of the Department's venture into conjunctive management, and have been, and continue to be, subject to several curtailment orders issued by the Department under the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules").²

The Department developed the CM Rules in 1994 in response to a water right delivery call filed against ground water users who are now members of IGWA. *Musser v. Higginson*, 125 Idaho 392, 393 (1994). IGWA and its members have since endured numerous delivery calls and more than a decade of litigation over the proper interpretation and application of the CM Rules, including more than a dozen contested cases before the Department, several district court actions, and five appeals to this Court. *Am. Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862 (2007); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011); *In the Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irr. Dist.*, 155 Idaho 640 (2013); *IGWA v. IDWR*, 160 Idaho 119 (2016); *Rangen, Inc. v. IDWR*, 159 Idaho 798 (2016); *Rangen, Inc. v. IDWR*, 160 Idaho 251 (2016). In fact, all of the cases that the district court relied upon in concluding that the Department must establish an area of common ground

¹ North Snake Ground Water District, Magic Valley Ground Water District, Carey Valley Ground Water District, Southwest Irrigation District, American Falls-Aberdeen Area Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, and Henry's Fork Ground Water District.

² IDAPA 37.03.11.

water supply and evaluate material injury before curtailing junior-priority groundwater rights involved IGWA.

Despite the cost, litigation was necessary to clarify the respective rights and obligations of senior and junior water users within the context of conjunctive management. Conjunctive management was a new frontier for Idaho. It required melding two very different applications of the prior appropriation doctrine—one for surface water and one for ground water. Statutes governing surface water are predicated on the ability of the Department to open and close headgates to shepherd water from one user to another through rivers, canals, and ditches. Idaho Code § 42-607. Priority administration follows measured river flows and reservoir storage which change day-to-day and reset after each irrigation season. Ground water exists in a much different hydrologic environment. Ground water cannot be shepherded from juniors to seniors through confined channels. When a ground water pump is shut off, a slight raising of the water table emanates in all directions. The Idaho legislature adapted the prior appropriation doctrine to this environment by providing for administration based on the elevation of the water table, which changes slowly over multi-year periods. Idaho Code §§ 42-226, 42-233a, 42-233b.

The CM Rules attempt to meld these schemes to enable surface water and ground water rights to be administered conjunctively. It was a complicated task to say the least, and the byproduct left many unanswered questions. Fortunately, judicial interpretations of the CM Rules eventually resolved those questions and produced enough clarity of the respective rights and obligations of senior and junior users that IGWA and senior surface users were able to resolve the various delivery calls through the development and implementation of mitigation plans approved by the Department under Rule 43 of the CM Rules. The world of conjunctive management had, it seemed, returned to order.

However, the Wood River delivery call case from which this appeal arises has thrown all of that into question. Instead of complying with CM Rules, the Department asserted independent authority under Idaho Code § 42-237a.g to curtail junior groundwater users without regard to the CM Rules, without establishing an area of common ground water supply, and without evaluating material injury. The district court's reversal of the order brought assurance to IGWA that,

whether conjunctive management occurs under Idaho Code § 42-237a.g or the CM Rules, “both methods of conjunctive administration must comply with the prior appropriation doctrine, [therefore] the processes and the results under each should be substantially similar.” (Memorandum Decision and Order, p. 10.)

The Department’s appeal from that decision indicates that the Department views Idaho Code § 42-237a.g as authorizing a substantially dissimilar process and substantially dissimilar results from what the CM Rules provide. This is an alarming prospect for IGWA. After years of litigation and finally resolving the outstanding delivery calls, IGWA and its members are now faced with the Department potentially disregarding it all and pursuing conjunctive management under Idaho Code § 42-237a.g, without regard to material injury and the other aspects of Idaho’s prior appropriation embodied in the CM Rules. IGWA has a substantial interest in preventing that from happening, and this case provides the proper forum to assert that interest.

CONCLUSION

Based on the foregoing, IGWA respectfully requests leave to intervene pursuant to Rule 7.1 of the Idaho Appellate Rules because IGWA and its members have an interest that “would be affected by the outcome of an appeal or proceeding under these rules.” If the Court denies IGWA’s request to intervene, IGWA alternatively requests leave to appear as appear as amicus curiae under Rule 8 of the Idaho Appellate Rules, with permission to submit briefs and oral argument in support of the petitioners-respondents South Valley Ground Water District and Galena Ground Water District.

RESPECTFULLY SUBMITTED this 22nd day of April, 2022.

RACINE OLSON, PLLP

By: 
Thomas J. Budge
Attorney for IGWA

CERTIFICATE OF SERVICE

I certify that on this 22nd day of April, 2022, the above document was served on the following persons through the iCourt system.


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