
In the Supreme Court of the State of Idaho

SOUTH VALLEY GROUND WATER
DISTRICT and GALENA GROUND WATER
DISTRICT,

Petitioners-Respondents-Cross Appellants,
v.

THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN in his
official capacity as Director of the Idaho
Department of Water Resources,

Respondents-Appellants-Cross Respondents,

and

SUN VALLEY COMPANY, CITY OF
BELLEVUE, BIG WOOD CANAL
COMPANY, BIG WOOD & LITTLE WOOD
WATER USERS ASSOCIATION, CITY OF
POCATELLO, CITY OF KETCHUM, and
CITY OF HAILEY,

Intervenors-Respondents.

Supreme Court Docket No. 49632-2022

**CITY OF HAILEY'S
INTERVENOR-RESPONDENT BRIEF**

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of Blaine, Case No. CV07-21-00243
Honorable Eric J. Wildman, District Judge, Presiding

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STATEMENT OF THE CASE

A. Introduction

This is the brief of Intervenor-Respondent City of Hailey (“City”), which responds to *IDWR Appellants’ Brief* filed with this Court on August 5, 2022.

The City responds in support of the district court’s determination that the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) violated Idaho’s prior appropriation doctrine by failing to define an area of common ground water supply or make a finding of “material injury” to senior surface water rights prior to curtailing junior groundwater rights in the Bellevue Triangle during the 2021 irrigation season.

The City respectfully requests that the Court affirm the district court on these points and award the City its costs and attorney’s fees on appeal.

B. Factual and Procedural Background

On May 4, 2021, the Director sent a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“*Notice*”) to water users in Basin 37 stating that he was “initiating an administrative proceeding to determine when water is available to fill the ground water rights . . . within the Wood River Valley south of Bellevue . . .” A.R. 1.¹ The stated legal basis for initiating the proceeding was stated as: “Pursuant to Idaho Code § 42-237a.g., ‘water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect . . . the present or future use of any prior surface or ground water right.’ *Id.* (ellipses in original).²

¹ “A.R.” refers to the Agency Record on appeal with citation to the specific page within the agency record.

² The original *Notice* was mailed to some water users within Basin 37, with errors in service soon discovered and a subsequent *Notice* was served on May 7, 2022. A.R. 3-42, 46-85. A notice of the proposed proceeding also was published in newspapers without any legal descriptions to provide water users with an understanding as to where the Director was contemplating curtailment. A.R. 44, 212-13, 317, 457-58.

Attached to the *Notice* was a map depicting a “Potential Area of Curtailment,” which did not include the area in which the City’s water rights are diverted or used. A.R. 43. Nevertheless, the *Notice* warned all water users: “If you do not participate, you may still be legally bound by the results of this proceeding.” A.R. 1 (emphasis in original).

On May 18, 2021, concerned that the factual and legal issues addressed in the proceeding could affect the City’s water rights and water use, the City filed a *Notice of Intent to Participate* in the proceeding. A.R. 319. The City was particularly concerned that the scope of the proceeding might “creep” beyond the “Potential Area of Curtailment,” which the Director acknowledged was a “legitimate concern” at the May 24, 2021 Prehearing Conference. Prehearing Tr. 69:11-12. Indeed, the Director acknowledged that “the proceeding itself could go on and be much larger than this particular hearing. And there could be multiple hearings that spring out of this particular matter. That’s my vision.” Prehearing Tr. 69:21-24.

The City also was concerned that, even if the evidence presented and facts and conclusions made in the proceeding did not exceed the scope of the Potential Area of Curtailment established by the Director, decisions of facts and law made within the Potential Area of Curtailment for the 2021 irrigation season could then be used in a future proceeding to bind water users who are wholly located outside the area. A.R. 1043-49. For example, it could be prejudicial to the City if facts established in the proceeding concerning the construction, application, and uncertainty of the Wood River Valley groundwater flow model (which includes the Potential Area of Curtailment and the area encompassing the diversion and use of the City’s water rights) have *res judicata* effect in future proceedings. A.R. 1045 n.1.

The Director concluded that “there is a good reason why people in category three [water users located within the Wood River Basin but outside the Potential Area of Curtailment³] should be recognized as parties.” Prehearing Tr. 69:25-70:1. Accordingly, the Director authorized the “category three” or “third group” of participants (which he dubbed the “Outside Bellevue Triangle Water Users”) to participate in discovery, call witnesses at the hearing, and participate in all briefing. A.R. 520-30.

The City participated in the proceeding by, among other things: joining in various motions filed by Sun Valley Company, City of Bellevue, and South Valley Ground Water District, A.R. 373-79; responding to a motion filed by surface water users to prevent the Outside Bellevue Triangle Water Users from presenting expert and fact witnesses, A.R. 1043-49; moving to limit the evidence presented at the hearing to avoid “creep” and to protect the interests (in the instant proceeding as well as future proceedings) of water users outside the Potential Area of Curtailment, A.R. 1037-42, 1050-59; entering evidence in the record developed at the hearing through exhibits and direct and cross examination of witnesses, *see generally* Hearing Tr. 10:17-1478:5; and submitting post-hearing briefing to the Director, A.R. 1516-39.

ADDITIONAL ISSUES PRESENTED ON APPEAL – COSTS AND ATTORNEY FEES

As an additional issue on appeal, and pursuant to I.C. § 12-117, the City asks this Court for an award of its reasonable costs and attorney fees incurred on appeal.

³ At the Prehearing Conference, the Director categorized the various participants into four groups. Prehearing Tr. 10:13-11:13. The first group consisted of senior surface water users on Silver Creek or the Little Wood River; the second group consisted of junior groundwater users in the Potential Area of Curtailment; the third group consisted of water users located within the Wood River Basin but outside of the Potential Area of Curtailment; and the fourth category consisted of “everybody else.” *Id.*

ARGUMENT

I. STANDARD OF REVIEW

In an appeal from a district court acting in its appellate capacity under the Idaho Administrative Procedure Act, this Court reviews the decision to determine whether it correctly decided the issues. *City of Blackfoot v. Spackman*, 162 Idaho 302, 305, 396 P.3d 1184, 1187 (2017). The Court reviews the matter “based on the record created before the agency.” *Chisholm v. Idaho Dept. of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005). A reviewing court “defers to the agency’s findings of fact unless they are clearly erroneous,” and “the agency’s factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.” *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012). Substantial evidence is “relevant evidence that a reasonable mind might accept to support a conclusion.” *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009). “The Court is bound by an agency’s factual determinations even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.” *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 804, 367 P.3d 193, 199 (2016) (internal citations omitted). As to questions of law and matters of statutory interpretation, they are freely reviewed. *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 243, 443 P.3d 252, 257 (2019); *Intermountain Real Props., L.L.C. v. Draw, L.L.C.*, 155 Idaho 313, 317–18, 311 P.3d 734, 738–39 (2013). This Court may affirm the district court on a different legal theory. *Edged in Stone, Inc. v. Nw. Power Sys., LLC*, 156 Idaho 176, 181, 321 P.3d 726, 731 (2014).

The decision of the Department must be “set aside if the agency’s findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency’s statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67–5279(3). In addition, this Court will affirm an agency action unless a substantial right of the appellant has been prejudiced. I.C. § 67–5279(4).” *Idaho Power Co. v. Idaho Dept. of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011). “If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. I.C. § 67–5279.” *Id.* (internal quotation marks omitted).

II. THE DISTRICT COURT PROPERLY HELD THAT IDAHO’S PRIOR APPROPRIATION DOCTRINE REQUIRES DEFINING AN AREA OF COMMON GROUND WATER SUPPLY AND DETERMINING MATERIAL INJURY BEFORE JUNIOR GROUND WATER RIGHTS CAN BE CURTAILED.

For purposes of conjunctive administration of ground and surface water rights, an area of common ground water supply (“ACGWS”) has been defined as “[a] ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source” IDAPA 37.03.11.010.01. The district court correctly held:

Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court’s estimation, determining the applicable area of common ground water supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive [administration] of surface and ground water.

R. at 688.⁴

⁴ “R.” refers to the District Court Clerk’s Record on Appeal with citation to the specific page within the record.

Here, however, the Director did not determine an ACGWS but, instead, provided notice of a “Potential Area of Curtailment.” A.R. 1, 43. His failure to establish an ACGWS created ambiguity in the proceeding as to what the district court called the “world of water users whose rights may be affected by the call.” R. at 688. As a result, the City (and other Outside Bellevue Triangle Water Users) were left to wonder whether their rights may be affected. The new, novel, undefined, and untested “Potential Area of Curtailment” did not provide any of the parties with clarity or certainty about the scope of the proceeding and did not allow for the “proper and orderly” conjunctive administration of ground and surface water rights. *Id.*

The establishment of an ACGWS is not simply convenient, it is required by Idaho’s prior appropriation doctrine. The district court correctly observed that “the prior appropriation doctrine provides the parameters through which conjunctive administration must occur.” R. at 687 (citing Idaho Const., Art XV, § 3; I.C. § 42-106). In particular, conjunctive administration requires evaluation of two “classic” elements of water rights and the prior appropriation doctrine: source and priority. *A&B v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). As the district court explained:

The necessity of establishing an area of common ground water supply is two-fold. First, it establishes the borders for due process. Its boundary establishes the world of ground water right holders who are potentially subject to curtailment. It is those water users who must be given proper notice and an opportunity to be heard. Second, with respect to priority administration, its boundary establishes the proper order of curtailment of junior rights. In times of shortage, junior water rights are administered in inverse priority to satisfy materially injured senior rights under the prior appropriation doctrine. Establishing an area of common ground water supply assures that those junior rights that are causing the material injury are those that are curtailed. . . . Determining the area of common ground water supply is necessary to bring in *all* ground water rights which affect the flow of the subject surface water source. That is required to assure that proper priority administration is accomplished consistent with the prior appropriation doctrine.

R. at 689 (emphasis in original).

In other words, the ACGWS defines the area in which a ground water source and a surface water source are deemed hydraulically connected for the purposes of conjunctive administration. Determining the ACGWS is necessary for evaluating which, if any, junior ground water rights might be causing material injury to senior surface water rights and should be curtailed in priority. Without one, no one—not IDWR, junior ground water users, senior surface water users, or any reviewing court—can know whether any particular ground water pumping might cause material injury to senior surface water rights.

As for “material injury,” that term has been defined as “[h]indrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law” IDAPA 37.03.11.010.14. Notably, that definition from IDWR’s Conjunctive Management Rules, IDAPA 37.03.11, provides that the parameters of material injury “in accordance with Idaho law” are “set forth in Rule 42.” *Id.* Rule 42 lists a number of factors to be considered “in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste.” IDAPA 37.03.11.042.

As noted by the district court, the Idaho Supreme Court has held that Idaho Code Section 42-237a.g. (the provisions under which initiated the proceeding at issue in this case) “merely provides that well water cannot be used to fill a groundwater right if doing so would . . . cause material injury to any prior surface or groundwater right.” R. at 690 (citing *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 804, 252 P.3d 71, 85 (2011)). But in this case the Director did not evaluate or determine that any senior surface water right was materially injured by ground water pumping. Rather, he based his curtailment on “depletions to the source.” R. at 691.

In sum, the Director curtailed ground water rights to increase surface flows based on the assumption—but not proof—that doing so was necessary and capable of providing additional water to senior surface water users who were entitled to it under the prior appropriation doctrine. He did not evaluate whether the seniors he sought to benefit were actually suffering material injury or using their water efficiently and without waste. For example, the Director did not evaluate whether senior surface water irrigators required their full “paper rights” in the 2021 irrigation season, or whether they were irrigating reduced acreage (hence requiring less water).

By failing to evaluate whether any senior surface water user suffered material injury and used their water efficiently and without waste, the Director deprived the curtailed ground water users of their real property rights, I.C. § 55-101(1), which are entitled to protection under the law. *Clear Springs* at 814, 252 P.3d at 95 (“the owner of a water right must be afforded due process of law”).

The district court’s holding that, prior to curtailing junior ground water rights, Idaho’s prior appropriation doctrine requires the Department to establish an area of common ground water supply and find that senior surface water users are materially injured by ground water pumping should be affirmed.

III. THE CITY REQUESTS AN AWARD OF ITS REASONABLE COSTS AND ATTORNEY FEES ON APPEAL

Idaho Code § 12-117(1) provides:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency . . . and a person . . . the court hearing the proceeding, including an appeal, shall award the prevailing party reasonable attorney’s fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

The Idaho Supreme Court has explained that “Section 12-117(1) permits an award of fees only if the nonprevailing party ‘acted without a reasonable basis in fact or law.’ Determining

whether the nonprevailing party had a ‘reasonable’ argument in law requires, at a minimum, examining the legal arguments made, i.e., the substance of the nonprevailing party’s arguments.” *3G AG LLC v. Idaho Dept. of Water Res.*, 170 Idaho 251, 266, 509 P.3d 1180, 1195 (2022). “The reasonableness of a challenge to an agency’s conclusions of law, when considering fees under section 12-117(1), turns on the substance of the nonprevailing party’s legal arguments – not on whether the arguments were merely repeated or repackaged from below.” *Id.*

Here, the Department seeks to avoid the standards set forth in its own Conjunctive Management Rules whose parameters have been refined through decades of litigation (including many trips to this Supreme Court). There is no reasonable basis in law for the Director’s use of a “Potential Area of Curtailment” instead of designating an ACGWS. And there is no reasonable basis in law for the Director’s use of an unknown injury standard instead of the “material injury” standard that has been evaluated and interpreted by the Department and this Court for decades.

The City was compelled to participate in the proceeding below to protect its interests because of the lack of clarity and standards inherent in the novel proceeding initiated by the Director. By bringing this appeal, the Department has further forced the City to expend resources in defending against its unlawful actions. The steps taken by the Department in this proceeding are unreasonable, thus warranting an award of the City’s reasonable costs and attorney fees on appeal.

CONCLUSION

The district court’s determination that the Director must determine an area of common ground water supply and find material injury to senior surface water rights before curtailing junior ground water rights should be affirmed. The City respectfully requests an award of its attorney fees incurred defending this appeal.

DATED this 23rd day of September, 2022.

Respectfully submitted,

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Michael P. Lawrence

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that on the 23rd day of September, 2022, this electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, was served on each party at the following email addresses via ECF/iCourt electronic filing:

A handwritten signature in blue ink, appearing to read "MPL", is positioned above a horizontal line.

Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September 2022, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

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