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 & DIANE**) **KUGLER**))	**Case No. CV-2011-15672** **APPELLANT'S BRIEF**

JOHN B. KUGLER
2913 GALLEON CT. NE
TACOMA, WA
PRO SE FOR APPELLANT

GARRICK L. BAXTER
Deputy Attorney General
P. O. BOX 83720-0098
BOISE, IDAHO 83720-0098
ATTORNEY FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Bennett v. Twin Falls North Side Land & Water Co., 27 Idaho 643, 150 P. 336
Casitas Municipal Water Dept. v. United States, 543 F.3rd 1276
Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 307, 109 P. 3rd 161
Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 P. 81
Idaho Code 42-204
Fifth Amendment to U.S. Constitution
Fourteenth Amendment to U. S. Constitution
Constitution of Idaho, Article XV

ISSUES PRESENTED ON APPEAL

I

Did the Idaho Department of Water Resources have the power and authority to alter appellant's water right application filed and approved in 1984?

II

Do the Idaho statutes in effect in 1984 control the requirements for appropriation of water under appellant's permit ?

III

Did the Interim Director of the IDWR have the authority to order a special report on the effect of appellant's water right on the flow of the Snake River and to delay a proposed review hearing on appellant's request for director review of the hearing officer's decision and order?

IV

Did the Interim Director violate the procedural rules in the offering of testimony on the effect of appellant's water right on the Snake River over the objection of appellant/petitioner and if not, did the Interim Director abuse his discretion by doing so?

V

May the Idaho Department of Water Resources refuse to issue a well drilling permit to appellant or his designated well driller?

VI

Has the Idaho Department of Water Resources, by it's Order precluding development of appellant's farm lands by the drilling of a well, taken a property right of appellant without just or fair compensation?

VI

Does the District Court have authority to direct the Interim Director and/or the Department of Water Resources to grant appellant a well drilling permit?

STATEMENT OF THE CASE

In 1984 appellant filed an application to appropriate ground water for the irrigation of his farm lands located in the North Pleasant Valley area north and west of American Falls, Idaho. That application was accepted by the Department of Water Resources and under date of October 4, 1984 a 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 other conditions as is set forth on the document dated July 27, 1990 which was microfilmed on July 30, 1990. Your appellant, in the spring of 1985 contacted Idaho Power Co concerning an extension of the power line that they could not complete at that time but would be scheduled

later. Appellant also hired a well driller for the construction of a well. A well rig was brought in after a few months with no drilling occurring a disagreement with the driller occurred and litigation was commenced. Appellant notified the IDWR of the dispute and advised the department that additional time would be required in which to complete the development. In 1986, with the legal problem with the well driller continuing and the land being exceptionally sandy with constant blowing, placed the ground into the CRP program planting it with grasses for the nearby wildlife as well as stabilizing the soil.

In 1990 appellant needed monies and borrowed funds granting the lender a mortgage together with an assignment of the water permit which the lender required. Subsequently the water department sent notices to the lender and each time that a notice of potential lapse was sent a request for an extension of time in which to complete the works was filed and granted by the IDWR. Appellant's farm-land continued in the CRP program at all times when each request for additional time was required.

In 2008 appellant notified the IDWR that the CRP program on the farm was to be terminated and that appellant would like to get a well drilling permit in order to complete the irrigation project and the appropriation of water as had been granted in 1984. Appellant filed his application for some additional time in which to complete the drilling project and to put sprinklers on the farm. That application resulted in a hearing on that request. The only evidence presented was the testimony of the applicant as applicant relied on the previous order granting an extension which determined that applicants water useage would have little or no effect on the aquifer. Mr. Spackman, as hearing officer, entered his findings of fact and conclusions that was appealed to the director. The appeal was not presented to the director as required by rule. Thereafter Mr. Spackman became acting director and appellant was able to schedule an appointment with him at which he advised appellant that appellant's appeal " had slipped through the cracks " and that he would determine whether to proceed with appellant's appeal or await the appointment of the new director. Finally, in September of 2010 appellant received a notice that a hearing on the appeal would be scheduled in either October or

November of 2010. Nothing occurred until February of 2011 when appellant received a notice that Mr. Spackman ordered a study concerning appellant's permit to appropriate ground water. A copy of that study was then received as well as a scheduled hearing date. At the hearing appellant presented no evidence concerning the effect of the permit and spoke only as to a taking and mitigating circumstances. Mr. Spackman called his staff people, over appellant's objection to put on evidence with respect to the study. From the actions of Mr. Spackman and the conclusions in his order this appeal has been taken.

ARGUMENT

At the outset appellant must apologize to the Court and counsel for appellant's lack of computer knowledge and an inability, for lack of available resources, to be more thorough and direct in respect to appellant's argument. It is appellant's contention that the granting of appellant the right to appropriate 6.00 CFS of ground water by the Idaho Department of Water Resources was something similar and perhaps more than a simple contract. Idaho waters are available to the public and Idahoans have always been urged to improve and utilize Idaho waters in a beneficial manner. Appellant filed a proper application and claim for waters beneath his farm. That claim and request was accepted by the regulatory agency and a permit was issued. Appellant contends that that permit was a contract subject to the law as it existed in 1984. This agreement was entered into prior to the Snake River adjudication. Under basic Idaho law on contracts one party cannot unilaterally change any of the terms or conditions of the contract without the consent of the other party. The Permit To Appropriate Water that is contained in the record was obviously fabricated in 1990. In 1984 and still in 1990, the statute (as best appellant can tell) sec. 42-204, I.C. dealing with the appropriation remained the same. Appellant had the right to proceed with his appropriation at that time and no authority can be found to exist which would give the IDWR the right to make the change that now appears.

At each of the occasions on which appellant's request or the lender's request on appellant's behalf were granted the IDWR continued to acknowledge appellant's

priority date. In order to fully have the benefit of that priority date it is necessary for this Court to determine that the waters claimed by appellant are general ground waters found beneath appellant's farm and are not trust waters for which a fee must be paid to the IDWR. It is appellant's vague recollection that all permits issued before 1985 were declared to be valid and not subject to the changes that were occurring as a result of the Swan Falls agreement.

As this Court is well aware a moratorium on the drilling of wells was enacted by the legislature. It is appellant's contention that this moratorium should not apply to appellant as the right to drill a well and appropriate waters was granted in 1984. The right to prove up on appropriation has been extended until the issuance of the current order of Mr. Spackman that is now before the Court. Appellant finds no legal basis to support the conclusion of Mr. Spackman that appellant now has no tight to prove up on the permit issued in 1984.

At the hearing on which Mr. Spackman relies for his conclusion that the granting of a well permit to appellant will adversely affect the Milner Dam flow it was objected to as there was no basis for rebuttal testimony of that nature. The issue raised by appellant to the Director in this area was that there was no evidence in the record to support such a conclusion. If the Director has such authority to supplement a record in the course of the appeal then it must be determined that such is a discretionary right of the director and appellant would suggest that Mr. Spackman abused that discretion. The IDWR conclusion of record prior to Mr. Spackman's decision to the contrary was that appellant's well would have negligible effect on anything or anywhere. Mr. Spackman' abuse of discretion was and is prejudicial to appellant and has obviously caused appellant much grieve and trouble as well as an additional financial burden.

If it is determined by this Court that the introduction of the department report was proper it still does not give rise to support a determination that appellant is not permitted to drill a well and appropriate water as he had been granted the right to do. Appellant is aware that wells are being drilled in the water basin in which the farm is situate. Mostly likely these are called trust waters for which there may be a fee as suggested in the changed permit in this record. The

other provision of the twenty year review should seem to be a non applicable requirement as twenty years have elapsed since the fabricated permit was prepared. Appellant still has the duty and the right to appropriate waters whether they be ordinary ground waters or trust waters. The Court can and should direct the IDWR to issue a well driller's permit so that appellant can improve the farm to a better beneficial use.

CONCLUSION

As reflected in argument and in appellant's statement of the cause, appellant is much aggrieved by the IDWR and Mr. Spackman. Appellant foresees the respondents asserting that they are only enforcing the regulations. Appellant can not comprehend how it can be held that an enforcement is not *ultra virus* as the IDWR also has an obligation to permit appellant to prove up on the claim and now, of course, additional time is required since the permit was not issued when requested. Regulatory action can qualify as a " *per se* " taking when the regulation completely deprives an owner of any economically beneficial use of property. Mr. Spackman and the IDWR should be directed to immediately issue a well drilling permit to appellant and grant a reasonable extension of time in which to complete the irrigation system so that proof of application to a beneficial use can be provided to the IDWR.

Respectfully Submitted,

John B. Kugler

JOHN B. KUGLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING APPELLANT'S BRIEF WAS SERVED ON THE RESPONDENTS BY MAILING TWO COPIES OF THE SAME , postage prepaid, TO GARRICK L. BAXTER, P.O. BOX 83720-0098, BOISE, IDAHO 83720-0098 THIS 5TH DAY OF JANUARY, 2012.

John B. Kugler

JOHN B. KUGLER