

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

SOUTH VALLEY GROUND WATER DISTRICT and GALENA GROUND WATER DISTRICT,
Petitioners,
vs.
THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Director of the Idaho Department of Water Resources,
Respondents.
and
SUN VALLEY COMPANY, CITY OF BELLEVUE, BIG WOOD CANAL COMPANY, BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION, and CITY OF POCA TELLO,
Intervenors.
Case No. CV07-21-243
ORDER DENYING SECOND APPLICATION FOR TEMPORARY RESTRAINING ORDER
ORDER DENYING SECOND MOTION FOR PRELIMINARY INJUNCTION

I.

BACKGROUND

On May 4, 2021, the Director of the Idaho Department of Water Resources issued a Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing in Docket No. AA-WRA-2021-001. The Notice provided the following background:

A drought is predicted for the 2021 irrigation season and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface

water users. Curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 (“Model”) show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season. 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.” Based on the information from the Model, the Director of the Idaho Department of Water Resources (“Department”) believes that the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. Therefore, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-140 1A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.

Thompson Dec., Ex. I, p.1. Based on that background, the Director determined to initiate an administrative proceeding under Idaho Code § 42-237a.g. The purpose of the proceeding was for the Director to decide whether the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue will affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season. The *Notice* set an administrative hearing before the Department on the matter for June 7-11, 2021.

This judicial review proceeding was initiated on May 24, 2021, when the South Valley Ground Water District and Galena Ground Water District (“Districts”) filed a *Petition for Judicial Review, Complaint for Declaratory Relief, Temporary Restraining Order and Preliminary Junction, or Alternatively, Writ of Prohibition* (“*Petition*”).¹ The *Petition* sought the entry of a temporary restraining order restraining the Director from proceeding with the administrative proceeding. On May 27, 2021, the Court entered an *Order* denying the Districts’ request for a temporary restraining order and the administrative proceeding proceeded as scheduled. Meanwhile, the parties filed a stipulation before this Court to stay all proceeding in this matter pending the Director’s issuance of his final order in the administrative proceeding. The Court entered a *Stay Order* consistent with the parties’ stipulation on June 10, 2021.

¹ Although the *Petition* was filed in Blaine County, the case was reassigned by the clerk of the court to this Court.

The Director issued his *Final Order* in the administrative proceeding on June 28, 2021. The *Final Order* directs that certain junior priority ground water rights within the Bellevue Triangle will be curtailed for the 2021 irrigation season starting July 1, 2021. The junior priority ground water rights to be curtailed are identified in Exhibit A to the *Final Order*. By operation of its terms, the Court's *Stay Order* lifted when the Director issued his *Final Order*.

On June 30, 2021, the Districts filed the following documents with the Court: (1) *Motion to Amend Petition*; (2) *Motion to Stay During Consideration of Petition for Judicial Review*; (3) *Second Application for Order to Show Cause*; (4) *Second Application for Temporary Restraining Order*; (5) *Second Motion for Preliminary Injunction*; and (6) *Motion to Shorten Time*. On that same date, the Court entered an *Order* permitting the following entities to appear as intervenors in this proceeding: Sun Valley Company, City of Bellevue, Big Wood Canal Company, Big Wood & Little Wood Water Users Association, and City of Pocatello. A hearing on the Districts' *Second Application for Temporary Restraining Order* and *Second Motion for Preliminary Injunction* was held before the Court on July 1, 2021.²

II.

ANALYSIS

The Districts request a preliminary injunction restraining the Director from carrying out curtailment of junior ground water rights under his *Final Order*. A preliminary injunction may be granted in the following cases:

- (1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually;
- (2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff;
- (3) when it appears during the litigation that the defendant is doing, threatening, procuring or allowing to be done, or is about to do, some act in violation of the

² The Court notes the Districts filed a *Motion to Shorten Time* under Rule 7(b)(3)(H), requesting that these matters be heard on an expedited basis. The Court in an exercise of its discretion granted the *Motion to Shorten Time* with respect to the *Second Application for Temporary Restraining Order* and the *Second Motion for Preliminary Injunction* given the exigencies of the circumstances.

plaintiff's rights, respecting the subject of the action, and the action may make the requested judgment ineffectual;

....

I.R.C.P. 65(e). A preliminary injunction "is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997). The decision to grant or deny a preliminary injunction is left to the trial court's discretion. *Id.*

The evidence shows this is an exceptionally dry year in the Wood River Basin. The evidence also shows there is going to be a water supply shortfall in that Basin for the 2021 irrigation season. Simply stated, there is not enough water to satisfy all existing water rights. As a result, this is not a typical preliminary injunction case where the Court can enter an order enjoining an action that is going to cause injury, maintain the status quo, and then wait for the issue to work its way through the process without harm to the parties. Without curtailment, senior surface water rights will suffer material injury this irrigation season. With curtailment, certain junior ground water rights will be required to turn off in whole or in part this irrigation season. Maintaining the status quo via the entry of a preliminary injunction in this case cannot create more water supply so as to satisfy all water rights. There are going to be water rights that are unsatisfied during the 2021 irrigation season one way or another and entering a preliminary injunction to maintain the status quo cannot avoid that result.

Therefore, the question before the Court is whether the Districts have carried their burden of establishing that their members have a clear right to divert ground water this irrigation season to the detriment of senior surface water rights. *See e.g., Gordon v. U.S. Bank National Association*, 166 Idaho 105, 115, 455 P.3d 374, 384 (2019) (as the parties seeking injunctive relief, it is the Districts that have the burden of proving a right thereto). In reviewing the file, the *Final Order*, and the evidence presented, the Court finds the Districts have not carried their burden as to any of the grounds set forth in Rule 65(e).

The Idaho Supreme Court has directed that the substantial likelihood of success necessary to demonstrate the Districts are entitled to the relief they demand "cannot exist where complex issues of law or fact exist which are not free from doubt." *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984). This case involves complex issues of law that are not free from doubt. The relief requested by the Districts focuses in large part on the interplay between the Idaho Ground Water Act and the CM Rules as they relate to water right administration in

times of shortage.³ For instance, the Districts assert the Idaho Ground Water Act does not give the Director the authority to initiate a contested case for conjunction administration outside of the CM Rules. They also assert the CM Rules are required for the administration of surface and ground waters. These are complex legal issues of first impression. Whether the Director can unilaterally act under the Idaho Ground Water Act to administer surface and ground water rights in times of shortage, and if so how, are issues that have not previously been addressed by Idaho courts.

That said, the Court recently ruled on the interplay of the Idaho Ground Water Act and the CM Rules as they relate to water administration, albeit in a different context (i.e., in the context of whether the Director may designate a ground water management area under the Act in light of the CM Rules). *Memorandum Decision and Order*, Case No. CV01-20-8069 (Nov. 6, 2020). Under the facts of that case, the Court held the promulgation of the CM Rules did not subsume the Director's duty to manage ground water resources under the Ground Water Act. *Id.* at 10-13. Many of the principles and rationales set forth by the Court in its decision in that case are applicable here. The Court's decision in Case No. CV01-20-8069 was never appealed, so the Court relies on that similar reasoning in finding no clear right to injunctive relief has been established by the Districts here.

The legislature has directed that the Director administer the waters of the state consistent with the prior appropriation doctrine. *See e.g.*, I.C. § 42-602. The Idaho Constitution requires priority administration. Idaho Const., Art XV, § 3. Therefore, even if a question exists regarding which set of rules the Director should be operating under, there is no question that the Constitution requires that water be administered in priority and that the Director has an obligation to carry out that function. The Idaho Supreme Court made that clear in *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994), when it provided that the Director's duty to deliver water under Idaho Code § 42-602 "is clear and executive." While the Director has a clear and executive duty, the details of how the Director chooses to distribute water are largely left to his discretion. *Musser*, 125 Idaho at 395, 871 P.2d at 812. Therefore, because the relief demanded by the Districts involves complex issues of law, there can be no clear right to

³ The term "CM Rules" refers to Idaho's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

injunctive relief. It follows the Districts' *Second Application for Temporary Restraining Order* and *Second Motion for Preliminary Injunction* must be denied.

Additionally, the Director found that hydraulic connectivity exists between ground water in the Bellevue Triangle and surface water on Silver Creek and the Little Wood River. He applied the Wood River Valley Ground Water Flow Model ("WRV 1.1 Model"), a ground water model developed for the area, to find that ground water pumping in the Bellevue Triangle is impacting senior surface water rights with sources on Silver Creek and the Little Wood River.⁴ As a result, he determined senior surface rights are or will suffer injury within this irrigation season. Further, that the seniors are using water efficiently and without waste under their water rights and will not receive sufficient water under their rights to accomplish the use for which they are authorized. The relief demanded by the Districts in this proceeding challenges several of the Director's factual findings. For instance, the Districts challenge the adequacy of the WVR 1.1. Model utilized by the Director. They also challenge whether injury to senior surface water rights has been properly established. These factual challenges by the Districts involve complex issues of fact that are not free from doubt. Because the relief demanded by the Districts involves complex issues of fact, there can be no clear right to injunctive relief. It follows the Districts' *Second Application for Temporary Restraining Order* and *Second Motion for Preliminary Injunction* must be denied.

Next, the due process issues raised are twofold. First, concerning the short timeframes for notice, discovery, experts, hearings etc. Second, the procedures employed by the Director differing from those established under the CM Rules. In regards to the short time frames, the Court notes that due to the nature of water right administration and the exigencies of the situation time is of the essence. The Idaho Supreme Court and this Court have recognized that due process needs to balance the opportunity to be heard against the exigencies of the situation. *See e.g., American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) ("Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water"). The parties were given notice, a hearing was conducted before the Director, and the parties were afforded the opportunity to be heard. The Court understands the frustration caused by the shorter timeframes associated with

⁴ The Director found the WRV 1.1. Model is the best available tool for evaluating the interaction between ground water and surface water in the Wood River Valley.

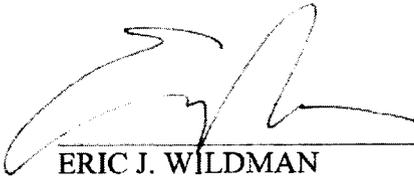
the administrative proceeding, but that is the nature of the situation. In regards to the procedures used by the Director, this relates back to the issue of the Director's authority to take action under the Ground Water Act. As previously discussed, this is a complex legal issue of first impression and as such there can be no clear right to injunctive relief.

Finally, and important to this Court's determination is that this is not a situation involving a geographic area of the magnitude of the Eastern Snake Plain Aquifer where the Director is faced with determining the impacts on a surface source from groundwater withdrawals located 150 miles or more away, or where model runs predict relief occurring gradually over the span of several years. This is a significantly smaller geographic area with wells in close proximity to the impacted surface sources and where the Director found that curtailment would result in surface water level increases and relief to injured seniors in as little as a few days.

**III.
ORDER**

Therefore, for the foregoing reasons, IT IS HEREBY ORDERED that the Districts' *Second Application for Temporary Restraining Order* and *Second Motion for Preliminary Injunction* are denied.

Dated July 2, 2021



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

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Dated: 7/2/21

Clerk of the Court

By  _____
Deputy Clerk