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District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho
FEB 21 2014
By _____ Clerk
_____ Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

IDAHO GROUND WATER APPROPRIATORS, INC., Petitioner, vs. CITY OF POCATELLO, Petitioner, vs. TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, A&B IRRIGATION DISTRICT, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, and MINIDOKA IRRIGATION DISTRICT, Petitioners, vs.	**Case No. CV-2010-382** (consolidated Gooding County Cases CV-2010-382, CV-2010-383, CV-2010-384, CV-2010-387, CV-2010-388, Twin Falls County Cases CV-2010-3403, CV-2010-5520, CV-2010-5946, CV-2012-2096, CV-2013-2305, CV-2013-4417, and Lincoln County Case CV-2013-155) **IDWR REPLY TO SWC AND POCATELLO RESPONSES TO IDWR'S MOTION TO REMAND METHODOLOGY ORDER**

> determine whether or not an agency's action is supported by substantial competent evidence, a remand to the agency for further development of the record may be required.");

Mercy Medical at 232.

Mercy Medical stands for the proposition that a district court should remand a matter back to an administrative agency if the agency fails to make a factual determination on a necessary issue. But *Mercy Medical* does not stand for the proposition that a district court can *only* remand a matter back for factual record development.

The situation in this proceeding is distinguishable from both *Home Builders* and *Mercy Medical*. This Court has authority and discretion to order such a remand under Idaho court rules. Rule 84(r) of the Idaho Rules of Civil Procedure provides, in part, that "[a]ny procedure for judicial review not specified or covered by these rules shall be in accordance with the appropriate rule of the Idaho Appellate Rules." I.R.C.P. 84(r). Rule 13.3 of the Idaho Appellate Rules, in turn, provides for a "[t]emporary remand" to an administrative agency "to take further action as designated in the order of remand" upon the Court's motion, or upon a party's motion "showing good cause." I.A.R. 13.3(a).

Since the Director issued the Methodology Order more than three years ago, the Idaho Supreme Court has issued three decisions addressing the application of the CM Rules, including two decisions regarding application of the CM Rules to the SWC's delivery call. *In Matter of Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.*, 155 Idaho 640, 315 P.3d 831 (2013); *A & B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho 500, 284 P.3d 225 (2012); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011). The Idaho Supreme Court's decisions have clarified the legal principles that apply to the methodology for resolving the SWC's delivery call in this proceeding. The decisions are binding precedent and must be applied in this proceeding. A remand is inevitable because the Idaho

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

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

The Idaho Department of Water Resources ("IDWR" or "Department") and Gary Spackman, Director of IDWR ("Director"), by and through the undersigned counsel, hereby file this reply to the Surface Water Coalition's ("SWC") and the City of Pocatello's ("Pocatello") responses to IDWR's *Motion to Remand Methodology Order* in the above-captioned matter.

BACKGROUND

IDWR moved this Court for an order remanding this proceeding back to IDWR pursuant to Idaho Rule of Civil Procedure 84(r) and Idaho Appellate Rule 13.3. The motion seeks a limited remand for the purpose of allowing the Director to revise the "Methodology Order"[1] to conform to the Idaho Supreme Court's decisions and to correct certain clerical errors.

The SWC responded to IDWR's motion by filing *Surface Water Coalition's Response in Opposition to Idaho Department of Water Resources' Motion to Remand Methodology Order* ("SWC Response"). Pocatello also responded by filing *City of Pocatello's Response to Motion to Remand Methodology Order to Idaho Department of Water Resources* ("Pocatello Response")

[1] The Methodology Order is the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover*, issued on June 23, 2010.

ARGUMENT

The SWC opposes IDWR's request to remand the Methodology Order. First, the SWC suggests that "Idaho law forbids" IDWR's request. *SWC Response* at 3. In support of this argument, the SWC primarily relies not on an Idaho court case, but a California federal district court case titled *Home Builders Ass'n of N. Cal. v. United States Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197 (2003). The SWC cites this case for the proposition that a district court cannot remand a matter back to an agency in order to comply with later-issued Idaho Supreme Court decisions. A review of *Home Builders* shows that it does not stand for this proposition.

In *Home Builders*, an action was brought against the U.S. Fish and Wildlife Service ("Service") related to a rule designating critical habitat for a threatened snake. The Service sought an order from the court vacating the final rule and asking to have the matter remanded back to the Service. *Home Builders*, 268 F.Supp. 2d at 1204. The basis for the request was a decision by a 10th Circuit Court related to the same issue. *Id.* The district court denied the Service's request for remand, but only because the Service failed to cite to any authority allowing the court to vacate the rule. As the court stated:

> [T]he court finds that the Service has been unable to provide sufficient legal authority to support the method by which it is attempting to change a duly promulgated rule. Instead of utilizing the clearly established administrative procedures for amending or revising a rule, the Service, finding itself in a litigation posture, has conceded that the rule was not promulgated in compliance with ESA and asks the court to vacate the rule and remand the matter to it so that it can create a new rule. ... In summary, the Service has failed to demonstrate that this court can properly remand an ESA rule to the Service without making a determination on the merits and without the Service complying with the statutory procedures for revising a rule.

Id. at 1205.

Contrary to the SWC's argument, the district court did not reject the Service's remand request on the grounds that a court may not remand an administrative case to

comply with a later-issued decision, but because the court lacked the authority to vacate the rule as requested by the Service. The court also discussed the 10th Circuit case the Service had used as the legal justification for reconsidering the rule, but the court refused to rely upon it because it was not binding precedent:

> [T]he Service's only stated reason for seeking this remand is the Service's own conclusion that its decision does not comply with a later-issued decision by the Tenth Circuit. Implicit throughout the Service's papers is the assumption that the existence of this decision makes the Alameda whipsnake critical habitat determination per se invalid or illegal. The Service even refers to its "duty to abide by recent judicial interpretations of the ESA." *As stated above, the court finds that this assumption is faulty, for the obvious reason that this court is not within the Tenth Circuit.* Further, the court finds that the existence of the Tenth Circuit opinion is insufficient to overcome the Service's duty to comply with the statutorily mandated procedures for revising or amending a critical habitat rule.

Id. (emphasis added). The Idaho Supreme Court decisions applicable to this proceeding are binding precedent.

Citing *Mercy Medical Center v. Ada County*, 146 Idaho 226, 232 (2008), the SWC also argues that a district court can only remand a matter back to an administrative agency where "the record is inadequate to permit the reviewing court to determine whether or not an agency's action is supported by substantial competent evidence." *SWC Response* at 7. *Mercy Medical* does not stand for such a limited proposition.

In *Mercy Medical*, the issue before the Court was whether the district court abused its discretion by remanding a matter back to the Board of County Commissioners ("Board") to make further findings on essential elements of an application. The Court focused on the fact that the Board failed to make necessary factual determinations:

> [W]hen a board fails to make a factual determination on a necessary issue, the district court must not make its own factual determination but must rather remand the case to the board to make that determination. *Univ. of Utah Hosp. v. Clerk of Minidoka County,* 114 Idaho 662, 665, 760 P.2d 1, 4 (1988); *accord, In re Application of Hayden Pines Water Co.,* 111 Idaho 331, 336, 723 P.2d 875, 880 (1986) ("[W]here the record is inadequate to permit the reviewing court to

Administrative Procedure Act requires a judicial review proceeding to be "remanded for further proceedings" before the agency when the agency's decision does not conform to the controlling law. Idaho Code § 67-5279(3). Allowing the Director to revise the Methodology Order to address legal issues pertaining to the Idaho Supreme Court's decisions would promote judicial economy and efficiency. By addressing the legal issues now, instead of moving forward with an order that does not conform to the recent Idaho Supreme Court decisions, the parties and the Court avoid the costs and delay that will occur. This satisfies the good cause standard of I.A.R. 13.3.

The SWC also argues that IDWR asks for a "blank check" to revise the Methodology Order. This is not correct. The IDWR is asking for a limited remand to address certain specific issues. For instance, the Methodology Order should be revised to conform to the Idaho Supreme Court's holding that Idaho Code § 42-226, the Ground Water Act, and cases surrounding the Ground Water Act have no application in a delivery call by a surface water appropriator against a ground water appropriator, *Clear Springs Foods, Inc.*, 150 Idaho at 801-804, 252 P.3d at 82-85, the Court's holding regarding Idaho Constitution Art. XV § 7, *Clear Springs Foods, Inc.*, 150 Idaho at 807, 252 P. 3d 88, and its holdings regarding application of the "clear and convincing" evidence standard. *A&B Irr. Dist.*, 153 Idaho at 524, 284 P.3d at 249. The Methodology Order should also be revised to confirm to the Idaho Supreme Court's recent SWC decision related authorities involving beneficial use, the legal presumptions, burdens, evidentiary standards and the authority of the Director. *In Matter of Distribution of Water to Various Water Rights Held By or For Benefit of A & B Irrigation Dist.*, 155 Idaho at ___, 315 P.3d at 838. A remand would also allow the Director to correct clerical errors in the Methodology Order. *See Order Revising April 2013 Forecast Supply (Methodology Steps 6 – 8),* IDWR Docket No. CM-DC-2010-001

(Aug. 27, 2013), at 2 n.1 ("The Director has determined the reference in Methodology Order Step 8 to 'RISD' is incorrect and should instead reference 'DS.'").

IDWR did offer in its motion to allow other parties to file briefing on remand if they believe that the Director's identified issues were too narrow. This was in response to specific statements by the SWC that the Idaho Supreme Court's recent decision in the SWC case requires the Director to "reconsider" and "set aside" the Methodology Order and the as-applied orders. *See Surface Water Coalition's Petition for Reconsideration And Request for Hearing on Final Order Establishing 2013 Reasonable Carryover (Step 10); Motion to Authorize Discovery*, IDWR Docket No. CM-DC-2010-001 (Dec. 30, 2013). The Director wanted to provide the other parties the opportunity to raise other issues the parties believe the Director should be considering based upon the Idaho Supreme Court's decisions. It would serve to make this judicial review proceeding more efficient if IDWR would have the opportunity to consider and address potentially legitimate interpretations of the recent Idaho Supreme Court decisions at this stage in the proceeding. This is consistent with Idaho court's strong public policy of providing administrative agencies the opportunity to cure potential errors without judicial intervention. *See Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004).

The Director viewed this as an opportunity to resolve potential issues without further judicial proceedings and as an opportunity to narrow the remaining issues for purposes of judicial review. To state it plainly, the other parties to this proceeding may also have identified revisions to the Methodology Order they believe are necessary under the Idaho Supreme Court's decisions and the Director wants to provide the parties the opportunity to raise the issues before the Director for efficiency purposes. As discussed above, if the District Court finds that the

Director's interpretation is incorrect, it will just result in further delay as it will be remanded back to IDWR.

However, if this Court is not inclined to provide the parties the opportunity to brief the issues to the Director, the Department can simply address the issues identified above. The Department can complete revisions within two weeks of any order granting the motion to remand if no additional briefing is allowed by the parties. This should not result in a delay in the judicial proceeding as the record in the consolidated proceeding has yet to be finalized and the Department can complete the revisions while preparing the record for lodging with the agency.

Pocatello does not oppose the request but asks whether the Director also anticipates revising the other orders that are also on appeal with the Methodology Order consolidated cases. *Pocatello Response* at 2. Pocatello suggests that IDWR should outline its proposed procedure for how to deal with the interaction between the appeal of the other orders and the Methodology Order. *Id.* at 3.

In IDWR's motion, the Department stated that it did not anticipate modifying any other orders. Based upon Pocatello's response, the Department has reevaluated this issue and believes that especially the evidentiary standard used by the Director in the as-applied orders should be addressed (i.e. whether the Director applied the clear and convincing evidence standard). Other references to the issues identified above (for example, reference to the Ground Water Act) may also be addressed. The Department believes this can also be addressed in the two week time period.

CONCLUSION

There is good cause for a limited temporary remand of these proceedings to allow the Director to revise the Methodology Order to address legal issues clarified by the Idaho Supreme

Court's decisions and to address known clerical errors. This will provide for an efficient and economical resolution of the remaining matters. The limited remand would not unduly delay the proceedings, as it would address only the legal and clerical issues discussed above. Further, the Director is prepared to issue revised orders within two weeks after the entry of an order granting the motion.

DATED this 21st day of Feberuary, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of February, 2014, I caused a true and correct copy of the foregoing document to be filed with the Court by facsimile and served by U.S. mail and electronic mail on the following parties:

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