1998 Opinion No. 42
IN THE SUPREME COURT
OF THE STATE OF IDAHO
Docket Nos. 23223, 23224, 23225 and 23226
Cite as: 98.9 ISCR 363

IN RE: SRBA I CASE NOS. 39576, 91-00005 EX REL. GENERAL PROVISIONS RE: BASIN-WIDE ISSUE 5, ENTERED 4-26-96.

A & B IRRIGATION DISTRICT, FALLS IRRIGATION DISTRICT and BURLEY IRRIGATION DISTRICT; FREMONT-MADISON IRRIGATION DISTRICT AND MITIGATION GROUP; PAYETTE RIVER WATER USERS ASSOCIATION, INC.; STATE OF IDAHO,

Appellants,

v.

IDAHO CONSERVATION LEAGUE, IDAHO RIVERS UNITED and IDAHO WILDLIFE FEDERATION; AMALGAMATED SUGAR COMPANY, CITY OF ASHTON, CITY OF BLISS, CITY OF BUHL, CITY OF BURLEY, CITY OF CASCADE, CITY OF CHUBBUCK, CITY OF COUNCIL, CITY OF DECLO, CITY OF DONNELLY, CITY OF EDEN, CITY OF EMMETT, CITY OF FAIRFIELD, CITY OF FRUITLAND, CITY OF GARDEN CITY, CITY OF GLENNS FERRY, CITY OF GRAND VIEW, CITY OF HAILEY, CITY OF HEYBURN, CITY OF INKOM, CITY OF KUNA, CITY OF MACKAY, TY OF MOUNTAIN HOME, CITY OF MUD LAKE, CITY OF NAMPA, CITY OF NEW PLYMOUTH, CITY OF MERIDIAN, CITY OF MIDDLETON, CITY OF MINIDOKA, CITY OF OAKLEY, CITY OF PARMA, CITY OF PAUL, CITY OF PAYETTE, CITY OF RIGBY, CITY OF RIRIE, CITY OF ROBERTS, CITY OF RUPERT, CITY OF ST. ANTHONY, CITY OF SUGAR CITY, CITY OF WEISER, CITY OF UCON, BASIC AMERICAN FOODS, INC., THE CITY OF POCATELLO, LAMB-WESTON, INC., NORTH SNAKE GROUND WATER DISTRICT, SAND SPRINGS RANCH PARTNERSHIP, ORE-IDA FOODS, INC. and J.R. SIMPLOT COMPANY; DON MC FARLAND, CAROL MC FARLAND and SUNDANCE, INC.; IDAHO GROUND WATER APPROPRIATORS, INC.; NAMPA & MERIDIAN IRRIGATION DISTRICT, ALLEN NOBLE FARMS, INC., CLEAR LAKES TROUT, INC., COTTONWOOD CANAL COMPANY, FARM DEVELOPMENT CORPORATION, GRINDSTONE BUTTE MUTUAL CANAL COMPANY, G. PATRICK MORRIS, CARL NICHOLSON, THOMAS NICHOLSON, ALLEN T. NOBLE, RAINBOW TROUT FARMS, INC., RIM VIEW TROUT COMPANY AND SAILOR CREEK WATER COMPANY; TWIN FALLS CANAL COMPANY and NORTH SIDE CANAL COMPANY; IDAHO POWER COMPANY; BOISE-KUNA IRRIGATION DISTRICT, NEW YORK IRRIGATION DISTRICT, WILDER IRRIGATION DISTRICT and BIG BEND IRRIGATION DISTRICT; HAGERMAN WATER RIGHT OWNERS, INC.; G. DAVID ELSON AND SAN FELIPE RANCHES; THE UNITED STATES OF AMERICA,

Respondents.

Appeal from the District Court of the Fifth Judicial District, State of Idaho. Hon. Daniel C. Hurlbutt, District Judge.

Appeal from decision excluding General Provisions from the partial decree, *remanded*.

ATTORNEYS

Ling, Nielsen & Robinson, Rupert, for appellants A & B Irrigation District, Falls Irrigation District and Burley Irrigation District. Roger D. Ling argued.

Rigby, Thatcher, Andrus, Rigby, Kam & Moeller, Chtd., Rexburg, for appellant Fremont-Madison Irrigation District and Mitigation Group. Did not participate.

Elam & Burke, P.A., Boise, for appellant Payette River Water Users Association, Inc. Scott L. Campbell argued.

Hon. Alan G. Lance, Attorney General; Clive Strong, Deputy Attorney General, Boise, for appellant State of Idaho. Clive Strong, Deputy Attorney General argued.

Betty Richardson, United States Attorney, Boise; William B. Lazarus, Department of Justice, Washington, D.C., for respondent United States of America. Did not participate.

Beeman & Hofstetter, P.C., Boise, for respondents Amalgamated Sugar Co., all cities, Lamb-Weston, North Snake Ground Water Dist., Sand Springs Ranch Partnership, Ore-Ida Foods, Inc., and J.R. Simplot Co. Dana L. Hofstetter argued.

Benoit, Alexander, Sinclair, Harwood & High, Twin Falls, for respondents Don McFarland, Carol McFarland and Sundance, Inc. John K. Butler argued.

Givens, Pursley & Huntley, Boise, for respondent Idaho Ground Water Appropriators. Did not participate.

Lawrence J. Lucas, Boise, argued for respondent Idaho Conservation Groups.

Ringert, Clark Chtd., Boise, for respondent Nampa-Meridian Irrigation District, et al. Did not participate.

Rosholt, Robertson & Tucker, Twin Falls, for respondents Twin Falls Canal Company and North Side Canal Company. Did not participate.

Hawley, Troxell, Ennis & Hawley, Boise, for respondents Boise-Kuna, New York, Wilder and Big Bend Irrigation Districts. Did not participate.

Patrick D. Brown, Twin Falls, for respondent Hagerman Water Right Users, Inc. Did not participate.

Boise, January 1998 Term
Filed: April 22, 1998
Frederick C. Lyon, Clerk

OPINION ON REARGUMENT OF CONJUNCTIVE MANAGEMENT ISSUE AND ON REHEARING OF IRRIGATION SEASON ISSUE

WALTERS, Justice

This portion of the opinion follows resubmission of two of the questions raised originally in the appeal in Basin-wide Issue no. 5. The first question, ordered *sua sponte* by the Court for reargument,[1] is whether the adjudications in Basins 34, 36, and 57 should include general provisions proposed by the Director regarding conjunctive management. The second question concerns the Court's determination in Part IV that all decrees for irrigation in the SRBA shall set the period of use as the "irrigation season" and that general provisions regarding early and late season irrigation need not be included in the decrees. This latter question was submitted for reconsideration upon grant of a petition for rehearing filed by the State. The respective general provisions are found in Appendix A attached to the opinion filed on October 3, 1997. 97.20 ISCR 941, 974.

We conclude that the district court's decision not to include the general provisions in question in its decrees must be vacated, and we remand the case for further proceedings.

ISSUES

The issues thus presented are:

1. Whether general provisions regarding interconnection and conjunctive management of surface and ground water in Basins 34, 36 and 57 are necessary to define or to efficiently administer the water rights decreed by the SRBA district court.
2. Whether water rights for irrigation shall set the period of use as the "irrigation season" or whether such rights must be for a specific date subject to general provisions regarding early and late season irrigation.

STANDARD OF REVIEW

Whether a general provision from the Director's report should be included in the SRBA decree presents a mixed question of law and fact over which this Court conducts free review. *State v. Nelson*, 98.1 ISCR 21, 23 (Jan. 6, 1998). This Court previously has held that, "A general provision is a provision that is included in a water right decree regarding the administration of water rights that applies generally to water rights, is not an element of the water right, or is necessary for the efficient administration of the water rights decreed." Slip op. at p. 5, 97.20 ISCR at 972. A general provision is an administrative provision that generally applies to water rights but it need not apply to every water right. Slip op. at p. 6, 97.20 ISCR at 972. Further,

> Idaho Code § 42-1412(6) instructs that a general provision should be included in a water right decree if such general provision is "necessary" to define or efficiently administer water rights. Whether a general provision is "necessary" depends upon the specific general provision at issue and involves a question of fact, (defining the proposed general provision and the circumstances of its application), and a question of law, (determining whether the general provision facilitates the definition or efficient administration of water rights in a decree). A general provision is "necessary" if it is required to define the water right being decreed or to efficiently administer water rights in a water right decree.

Id.

DISCUSSION

I.

Whether General Provisions Regarding Interconnection and Conjunctive Management are Necessary to Define or to Efficiently Administer the Water Rights Decreed by the SRBA District Court.

The issue submitted to the district court was whether the conjunctive management general provisions found in general provision 3 in Basin 34, general provision 1 in Basin 36, and general provision 4 in Basin 57 should be included in the adjudication decree. The district court determined not to adopt the proposed general provisions, expressing the reason that the proposals were not "general" because they did not apply to all rights recommended in the Director's respective reports and also for the reason that general provisions on interconnection were unnecessary to the administration of water rights by the Director because they would overlap the rules for conjunctive administration adopted by the IDWR pursuant to the Idaho Administrative Procedures Act. IDAPA 37.03.11 (Oct.7, 1994).

When the district court reached its decision, it was without the benefit of this Court's opinion which defined a general provision and held that general provisions need not apply to every water right. Accordingly, we conclude at the outset that the district court should be given another opportunity to consider the question of including the proposed general provisions in the decrees issued in each of the subject Basins without regard to the fact that the provisions may not apply to all of the rights recommended in the Director's respective reports.

Furthermore, and as recognized by the district court, it is not in contest in the SRBA proceedings that most, if not all, water in the Snake River system is interconnected. The court observed that general interconnection of all water in the Snake River system is well settled, and that "all water under the jurisdiction of the SRBA Court is interconnected, unless the party claiming otherwise proves by a preponderance of the evidence that the water is from a separate source." The dispositive issue, therefore, is whether inclusion of general provisions on conjunctive management of the interconnected waters in Basins 34, 36 and 57 is necessary for the definition or for the efficient administration of the water rights to be decreed in any of those reporting areas. As demonstrated by Appendix A, each of those areas has differing conjunctive management provisions.

Conjunctive management combines legal and hydrologic aspects of the diversion and use of water under water rights arising both from surface and from ground water sources. Proper management in this system requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources. In 1994, an interim legislative committee charged with reviewing the progress of the SRBA noted the pendency of studies on conjunctive management investigating the effect of ground

[1] *See* footnote 1, *supra*, slip op. at p. 4, 97.20 ISCR 972.

water pumping on natural springs that flowed directly into the Snake River. The committee reported:

> Conjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication. In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of the ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam. *Idaho Power Co. v. State*, 104 Idaho 575, 588[, 661 P.2d 741, 754] (1983); *In re Snake River Basin Water System*, 115 Idaho 1, 2-3[, 764 P.2d 78, 79-80] (1988).
>
> Historically, conjunctive management has not occurred in Idaho, especially between the Snake River Plain Aquifer and the Snake River. To conjunctively manage these water sources a good understanding of both the hydrological relationship and legal relationship between ground and surface water rights is necessary.
>
> Although these issues may need to be resolved by general administrative provisions in the adjudication decrees, they generally relate to two classic elements of a water right -- its source and priority. The SRBA should determine the ultimate source of the ground and surface water rights being adjudicated. This legal determination must be made in the SRBA. The IDWR should provide recommendations to the SRBA District Court on how it should do so. Further, the SRBA District Court must determine the relative priority between surface and ground water rights.
>
> If the SRBA proceeds and these issues are not addressed, a major objective for the adjudication will not have been served. Conjunctive administration will be set back, and another generation of ground and surface water users will be uncertain regarding their relationship to each other.

1994 INTERIM LEGISLATIVE COMMITTEE REPORT ON THE SNAKE RIVER BASIN ADJUDICATION, p. 36-37.

While the district court noted the adoption by the IDWR of IDAPA 37.03.11 setting forth the department's "Rules for Conjunctive Management of Surface and Ground Water Resources," these rules do not necessarily overlap the SRBA proceedings. They do not provide for administration of interconnected surface and ground water rights in the SRBA, nor do they deal with the interrelationship of water rights within the various Basins defined by the Director and the SRBA district court, and they do not deal with the interrelationship of those Basins to each other and to the Snake River in the SRBA proceeding. The Rules adopted by the IDWR are primarily directed toward an instance when a "call" is made by a senior water right holder, and do not appear to deal with the rights on the basis of "prior appropriation" in the event of a call as required. *See, e.g., Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). Here, of course, the Director's proposed conjunctive management provisions were designed to address within the SRBA the ground water and surface water interconnections and impacts relating to three specific Basins. The general provisions proposed for each of the Basins were not identical, but were distinctively crafted evidently due to the unique characteristics of each of the individual reporting areas.

We conclude that the order of the district court denying the inclusion of general provisions dealing with interconnection and conjunctive management of surface and ground water rights in Basins 34, 36 and 57 must be vacated and the matter remanded to the district court for the purpose of holding an evidentiary hearing to determine factually whether the proposed general provisions for each of those areas is necessary either to define or to efficiently administer the water rights decreed by the court in the adjudication process. Because each of the proposed general provisions regarding interconnection and conjunctive management in Basins 34, 36 and 57 is separate and distinct, each Basin's conjunctive management provision must be discretely considered in reaching the factual determination whether the respective general provision is necessary either to define or to more efficiently administer water rights in that particular Basin. I.C. § 42-1412(6); *In re SRBA Case No. 39576*, 128 Idaho 246, 262, 912 P.2d 614, 630 (1995).

II.

A. Whether the Term "Irrigation Season" Should Be Specified as the Period of Use for Irrigation Water Rights.

The general provisions relating to irrigation use were also proposed by the Director in reporting the test areas known as Basin 34, Basin 36 and Basin 57. *See* Appendix A. With a slight exception applicable only to tributaries to the Big Lost River in Basin 34, the general provision concerning the irrigation topic in issue in this case otherwise is identical for each Basin.

The district court ruled that general provisions pertaining to early and late season irrigation use need not be included in the SRBA's partial decree. As with its determination on the conjunctive management issue, the district court held that the irrigation provisions were not "general" because they failed to apply to all water rights. Instead, the court held that all decrees for irrigation in the SRBA shall set the period of use as the "irrigation season," and that "it is an administrative function vested in the sound discretion of the Director to ensure that irrigators do not waste water by putting it to use before or after the irrigation season." The court decided that because the period of use for irrigation varies from year to year and region to region in the state, "a fixed period of time for the season of use does not reflect reality nor can it be proved with the certainty required for a decree which will have application in perpetuity." Accordingly, the district court concluded that "The proper solution and the one required as a matter of law, is that in the SRBA all irrigation rights shall be decreed with one and the same period of use: the irrigation season." Consequently, said the court, "There is no necessity for the court to enter general provisions for early and late season irrigation use."

On the initial appeal, in Part IV (slip op. p. 7-8, 97.20 ISCR at 973) this Court agreed with the district court's decision that all decrees for irrigation in the SRBA shall set the period of use as the "irrigation season." However, on rehearing, we have concluded that this Court's holding that simply specifying the period of use of water for irrigation as the "irrigation season," conflicts with the plain meaning of I.C. §§ 42-201(1)(c), 42-1409(1)(g), 42-1411(2)(g), 42-1411A(13),

and 42-1412(6), and the long-standing interpretations of these sections by IDWR. The district court's approach is fundamentally at odds with over 32,000 irrigation water rights claimed in the SRBA which contain specifically fixed periods of use.

Idaho Code § 42-202(1), which sets forth the elements required in an application for a water right license, requires the "period of year during which the water is to be used" for each purpose for which the water is sought. Prior to the enactment of I. C. § 42-202(1) in 1967, this Court established that it was within the power of the IDWR to impose a specific period of use on water rights. *Dunn v. Boyd*, 46 Idaho 717, 271 P. 2 (1928); *Uhrig v. Coffin*, 72 Idaho 271, 240 P.2d 480 (1952); *Devil Creek Ranch v. Cedar Mesa Reserv.*, 126 Idaho 202, 879 P.2d 1135 (1994). However, in 1967, I.C. § 42-202(1)(c) was amended to require an applicant for permission to appropriate water to declare "[t]he nature of the proposed use or uses *and the period of year during which water is to be used for such use or uses*." 1967 Idaho Sess. Laws, ch. 374, at p.1081 (emphasis supplied). Since its enactment in 1967, the IDWR has interpreted this section as requiring the "period of use" to be described by a specific beginning and ending date, not merely by reference to a "season" for the use. As a result, each of the 18,175 irrigation water right licenses issued since May, 1967, has included a period of use in terms of a specific beginning and ending date.

Thereafter, in 1969, conforming amendments were made to the adjudication statutes.[2] For instance, I.C. § 42-1409(1)(g) requires each water right claim to set forth the period of the year when water is used or necessary for each purpose claimed. Idaho Code § 42-1411(2)(g) requires the Director to report the period of the year when water is used for the purposes claimed. These elements described in the Director's report must be included in the SRBA court's decree pursuant to I.C. § 42-1412(6). In addition, I.C. § 42-1411A(13) contains a parallel provision with regard to federal reserved water rights, requiring the SRBA court to incorporate in its decree of federal reserved water rights each element of a water right listed in § 42-1409(1), which includes the period of the year in which the right is used.

Prior to the enactment of these sections, which require the period of the year when a water right is to be used, the period of use was the "irrigation season." However, to now determine that the period of use is the "irrigation season" would render meaningless the 1967 and 1969 amendments. The courts have a duty not to deprive any statutory provisions of their meaning. *See George W. Watkins Family v. Messenger*, 118 Idaho 537, 797 P.2d 1385 (1990). Applying the statutes as written, this Court holds that I.C. §§ 42-201(1)(c), 42-1409(1)(g), 42-1411(2)(g), 42-1411A(13), and 42-1412(6) require that the period of use for each irrigation water right be identified by specific dates, as the Director has previously done for more than thirty years, and not merely by reference to an "irrigation season."

Accordingly, we withdraw our previous holding in Part IV, slip op. p. 7-8, 97.20 ISCR at 973, that the period of use shall be the "irrigation season." Instead, we hold that each irrigator's water right shall be decreed with a specific period of use setting forth a beginning date and an ending date, as previously adhered to by the IDWR. The determination of the appropriate period of use for each irrigation water right is a factual question to be resolved by the district court on remand.

B. Whether General Provisions Regarding Early and Late Season of Use are Necessary to Define or Efficiently Administer the Water Rights Decreed by the SRBA District Court.

Inasmuch as we are withdrawing our previous decision on the question of the period time for use of irrigation water rights and thus vacate the district court's order holding that the period of use is the "irrigation season," we must now revisit the issue of whether an early and late season general provision is necessary for the definition or efficient administration of the water rights decreed.

The period of use for irrigation water rights varies from right to right as a result of the issuance of permits and decrees over the many years. Some prior decrees set the period of use as the "irrigation season," some set a fixed period of use by date, while others set a different fixed period of use. Given this multiplicity in variety of decreed, licensed and permitted periods of use for irrigation rights, the Director maintains that it is not possible to absolutely administer the period of use for irrigation rights fairly and consistently. Furthermore, the varying periods of use do not allow the flexibility necessitated by the changes from year to year in climatic conditions and the variability of regional area's soil types. To resolve this on-going dilemma, the Director proposed general provisions for early and late season use for irrigation in order to administer the multiple periods of use for irrigation rights.

The district court agreed with the Director that "given the inability of the Director to fairly and reasonable administer the multiple periods of use for irrigation rights, the decrees entered by the SRBA cannot be administered as the situation presently exists." However, the district court held that the Director's proposal for general provisions governing early and late season irrigation use was not needed because such general provisions were unnecessary to define and administer *all* water rights. Instead, to resolve the Director's perplexity regarding the multiple periods of use for irrigation rights, the district court concluded that the period of use for irrigation should be designated simply as the "irrigation season."

We have concluded that the period of use for irrigation must be identified by reference to specific dates, setting forth fixed periods of use for irrigation water rights, as already administered by the IDWR and the Director. This conclusion, however, does not perforce resolve the Director's quandary regarding early and late season periods of use for irrigation caused by climatic and regional variations. Accordingly, we remand the case to the SRBA district court for factual findings to determine whether early and late season general provisions are necessary to define or to efficiently administer irrigation water rights.

CONCLUSION

We reiterate that general provisions proposed by the Director do not have to apply to all water rights within the

[2] In 1969, Chapter 14, Title 42 of the Idaho Code (the adjudication statute) was amended to require, pursuant to I.C. § 42-1409, claimants to include in their claims "the period of year when water is used for each purpose," and pursuant to I.C. § 42-1410, to require the court's decree in every case to "declare as to the water rights adjudged to each party, the . . . season of use." 1969 Idaho Sess. Laws, ch. 279, at pp. 830-32.

Basin to which they may relate. We remand this proceeding to the SRBA district court for the purpose of holding an evidentiary hearing to determine whether the conjunctive management general provisions proposed for Basins 34, 36 and 57 are necessary to define or to administer water rights efficiently in any of those particular Basins. We vacate our earlier decision that the period of use for irrigation water rights is the irrigation season, conclude that irrigation water rights shall be decreed with a specific period of use for each water right, and remand to the SRBA district court the factual question of the appropriate period of use for each irrigation water right. We also remand for a factual determination as to whether general provisions regarding early and late season use are necessary for the efficient administration of a water right or are necessary to define a water right.

No costs are awarded on appeal.

Justices, SILAK, SCHROEDER and Justice Pro Tem DRESCHER, CONCUR.

Justice JOHNSON, DISSENTING.

I respectfully dissent. In my view, the district court correctly resolved the issues discussed in the Court's opinion issued following reargument of the conjunctive management issue and rehearing of the irrigation season issue.

In the portion of its order that resolved the conjunctive management issue, the district court said:

> Findings on the nature and extent of the interconnection in order to determine the impact of one right on another, is a determination reserved for the time when a call is made on a source or where the Director determines, as a part of his statutory duties, to administer conjunctively. The varying degrees of interconnection may be determined by resolving such issues as the timing and amount of impacts, distances, local hydrology, aquifer characteristics, spatial variation, groundwater levels, hydraulic gradients, aquifer boundaries, confining layers, stream bed hydraulic conductivity and the timing and amount of return flows. Then the issue of how to respond to a call or the necessity and manner of IDWR conjunctive administration may be resolved by the Department. These are not issues necessary to determine the statutory elements of a water right; or if they may be, cannot be decreed as a general provision.

In the portion of its order that resolved the irrigation season issue, the district court said:

> [T]he period of use for irrigation is the irrigation season, unless a specific time period for irrigation is proved. The irrigation season is determined, in the first instance, by the honest determination of the irrigator as to when water is needed and can be beneficially used for that purpose. Nevertheless, no irrigator has the right to waste water by irrigating prior to or after the irrigation season and the law places the duty and authority to circumscribe wasteful uses with the Director of the Department of Water Resources. Unless proved otherwise, the period of use for irrigation is the irrigation season, and it is an administrative function vested in the sound discretion of the Director to ensure that irrigators do not waste water by putting it to use before or after the irrigation season.

In the SRBA, the proposed general provisions for early and late season irrigation recognize the reality that the period of use for irrigation varies from year to year and region to region in the State of Idaho. The need for this general provision exists because a fixed time period for the season of use does not reflect reality nor can it be proved with the certainty required for a decree which will have application in perpetuity. The Director clearly recognizes this problem.

> The solution to the problem is not to exacerbate it by continuing to adhere to the fiction that the irrigation season can be decreed as a fixed period. The proper solution and the one required as a matter of law, is that in the SRBA all irrigation rights shall be decreed with one and the same period of use: the irrigation season. There is no necessity for the court to enter general provisions for early and late season use. The water users may determine, in the first instance, the beginning and ending dates of the irrigation season. However, under his duty and authority, the Director of IDWR, may, by adopting rules and regulations based on all the facts required, set the irrigation season on an annual basis.

I would affirm the district court's decision on each of these issues.