

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 POCATELLO,
 Interveners.

Case No. CV07-21-00243

Court Minutes

JUDGE: Wildman (SRBA), Eric J.
 CLERK: Heidi Schiers
 HEARING TYPE: Motion for Preliminary Injunction
 and Application for Temporary Restraining Order

DATE: July 01, 2021
 LOCATION: Magistrate Courtroom 3
 COURT REPORTER: Sabrina Vasquez

INTERPRETER:

Parties Present:

Galena Ground Water District	Attorney:	<u>Heather Elizabeth O'Leary; James R. Laski</u>
South Valley Ground Water District	Attorney:	<u>Albert Penick Barker; Michael Alan Short; Travis Lee Thompson</u>
Idaho Department of Water Resources	Attorney:	<u>Garrick L. Baxter; Michael C. Orr; Meghan M. Carter</u>
Gary Spackman	Attorney:	<u>Garrick L. Baxter; Michael C. Orr; Meghan M. Carter</u>
Big Wood & Little Wood Water Users Association	Attorney:	<u>Jerry Ray Rigby; Chase T. Hendricks; Joseph F. James</u>
Big Wood Canal Company	Attorney:	<u>William Kent Fletcher</u>
City of Bellevue, a Chartered City	Attorney:	<u>Candice Michel McHugh</u>
City of Pocatello	Attorney:	<u>Sarah Ann Klahn</u>
Coalition of Cities	Attorney:	<u>Candice Michel McHugh</u>
Sun Valley Company	Attorney:	<u>Christopher Michael Bromley</u>

Hearing Start Time: 1:30 PM

1:30	Court calls case. Parties present by Zoom: South Valley Ground Water and Galena Ground Water Districts – Mr. Al Barker and Ms. Heather O'Leary. Mr. Barker will make argument. IDWR and Gary Spackman – Mr. Michael Orr and Mr. Garrick Baxter. Mr. Orr make
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	<p>argument for Dept. Sun Valley Company – Mr. Chris Bromley, will not make argument today. City of Bellevue – Ms. Candice McHugh, will not make argument. Big Wood canal company – Mr. Jerry Rigby and Mr. Chase Hendricks. Mr. Kent Fletcher will not be present. Mr. Rigby and Mr. Hendricks will make argument for BWCC and BWLWWUA. City of Pocatello – Sarah Klahn, will not be present today.</p>
1:34	<p>Court reviews the case. Final order directs that certain groundwater rights in Bellevue Triangle will be curtailed starting today. On June 30, Petitioners filed an application for temporary restraining order. Petitioners have also filed a motion to amend the petition for judicial review. Michael Orr for IDWR opposes the motion to amend, for the same reasons described in the motion to dismiss (previously filed). The Court lacks subject matter jurisdiction in the non-administrative procedure action. He had intended to file a formal response in opposition, but he did not yet have opportunity.</p>
1:37	<p>Court set this hearing on an expedited basis. Court received the motions and supporting documentation, as well as the Director’s final order yesterday. Court grants the motion to shorten time re. temporary restraining order and preliminary injunction. Court notes that it is the middle of a heat wave, and time is of the essence. There could be injury to seniors. While political subdivisions are not required to post a bond, if this Court was later incorrect, there is no pot of money to compensate senior water holders.</p>
1:39	<p><u>Mr. Barker makes argument.</u> He comments re. the security. This is a wholly new proceeding which the Dept. has never engaged in before. The Director said he was not going to follow the conjunctive management rules. He essentially predetermined the people who would be affected, and curtailed without going through process to identify common groundwater supply or correct procedures. He made decision without notice. The Director predetermined the area of curtailment and the people who would be benefitted. He comments on flows in Hailey and in Silver Creek. The Big Wood surface users above Stanton’s Crossing are always cut sooner than equivalent rights in the Little Wood, but the Director did not consider this. The model is truncated, does not include info gathered since 2014.</p>
1:45	<p>The evidence in the case is that there have been changes in water consumption since then. The model boundaries have not been changed either. The Director artificially drew lines. It is important for due process rights of those affected by the curtailment. The whole proceeding was based on a predetermination of an area without process. It is a proceeding untethered to rules or procedures. Mr. Barker comments on earlier delivery calls. The advisory committee was established last fall. The downstream users didn’t care for some of the provisions of a groundwater management plan. In the 2nd meeting of the groundwater advisory committee, there was never a mention of this new procedure which the Dept. used.</p>
1:50	<p>He comments re. quasi-injury of groundwater pumping. In March, the Director directed his staff to investigate injury, but he didn’t tell the committee. In April, the Director announced he had info on injury, and he was prepared to act. May 4, the Director sent notice of a hearing in one month. Mr. Barker continues reviewing the timeline. May 18</p>

	<p>was the first time anyone saw basis for the Director’s decision. At the time of closing to new parties, nobody had information about potential injury.</p> <p>Mr. Barker comments that their experts didn’t have time to analyze if the model projections were accurate or not. At the hearing, they were allowed to raise questions but not provide other information. The Dept. had 2 months before disclosing the info in its staff report. Other parties only had 2 weeks 2 respond.</p>
1:55	<p>They have lack of info from people claiming to be injured. Mr. Barker contends this violates due process rights. The Director is saying this is not a delivery call. There were about 10 people who wanted to show injury, but the Director determined there was not just injury to people who raised their hands, but to every user in the Little Wood who is senior to the wells in the Triangle. They had no opportunity to know that the Director would expand it. Surface water rights have already been curtailed; there is no water at all to be had.</p>
1:59	<p>Mr. Barker comments re. statutory authority. The statute was not repealed. The effective date was not until today. Conjunctive management rules were ignored. He refers to Stevenson v. Steele case. The Dept. wants to pick out pieces of the groundwater act. If the conjunctive management rules are not followed, then the local groundwater rules should have been followed. Conjunctive management rules set forth how those who have been injured should provide info. It is not just a question of senior/junior priority. Surface/groundwater rights are not as straightforward. People need opportunity to demonstrate material injury. Mr. Barker refers to Clear Springs case.</p>
2:06	<p>The Dept. only wants to look at Rule 1 of the conjunctive management rules. Mr. Barker comments on definition of a delivery call. He comments on definition of conjunctive management, refers to Rule 20.1.</p>
2:12	<p>When Water District 37 was formed, the Dept. said it would manage the tensions between surface and groundwater users. This is a combination of a proceeding that was ran through without adequate opportunity. They decided to be responsible for injuries to people who did not even show up and express an injury. It is a violation of due process. The model isn’t necessarily the right tool. The tool is crude and not up to date.</p>
2:15	<p>Mr. Barker comments re. irreparable harm. It is a sliding scale when doing a preliminary injunction. The harm is curtailment of water to 23,000 acres in the middle of an irrigation season, where there is no available water to make up for it. That injury could be as much as \$12 million. They provided a mitigation plan which was rejected by the Director, because they didn’t mitigate for all of the people who didn’t show up at the hearing.</p>
2:20	<p><u>Mr. Orr makes argument.</u></p> <p>He incorporates arguments today from his motion to dismiss. Surface water users are also going without water, and it is documented. In times of shortage, someone is going to go without water. Mr. Orr comments on the prior appropriations doctrine, refers to case law and first in time and first in right. Curtailing of junior water rights is not an injury, but an inherent element of the prior appropriations doctrine. Petitioners’ argument puts the risk on senior water users.</p> <p>Mr. Orr comments on the standard for due process. He responds to argument that the</p>

	<p>schedule did not allow sufficient time. There was already a shortage, when notice was issued, and some surface use had discontinued, while junior users continued usage. Mr. Orr comments on the need for timely administration to protect senior water rights. The impacts of down-water pumping are more delayed. This case involves a smaller aquifer. Pumping in the Triangle significantly affected elsewhere. The earlier case cited by opposing counsel is like apples and oranges.</p>
2:28	<p>Judicial review is in the nature of an appeal. Petitioners have not shown that they are likely to prevail. He comments on lack of subject matter jurisdiction for non-APA claims. The claims are not in the nature of an appeal, but for a trial de novo. That is contrary to statute and Supreme Court precedent.</p>
2:30	<p>Mr. Orr comments on the powers of the Director of Water Resources, refers to subsection g, includes prohibiting withdrawal of water from wells. Water in a well shall not be deemed available. The standard is not material injury under conjunctive management rules. The statute provides the Director with authority to initiate a proceeding. Mr. Orr comments on adverse claims (delivery calls). 2-37a does not address delivery calls. The fact that the Director did not operate on b-g is irrelevant. Mr. Orr refers to decision attached to his original declaration. Conjunctive management rules have a limited and defined scope, responding to delivery calls.</p>
2:35	<p>Nothing in it limits the Director from taking additional actions to manage groundwater. Clarifying position does not constitute delivery calls. Not all of the surface water users are aligned or in agreement. Counsel took issue with the model. That was the subject of considerable evidence and testimony at the hearing. The idea that stakeholders had no input as to the boundaries is incorrect. All parties agreed that is the best scientifically based tool available. Counsel is misrepresenting the record.</p>
2:40	<p>The evidentiary record was created in the agency, and that is where the Court needs to look for judicial review. Opposing counsel is misrepresenting the record. The boundary models were developed with stakeholder input. The northern boundary was fully explained. 99% of the benefits of the entire aquifer can be achieved by curtailing 70% of groundwater use (?). Re. argument that Petitioners didn't know who the seniors were, there was a list of users potentially affected by groundwater use in the Bellevue Triangle. The notion that this proceeding should only address rights of seniors who decided to participate, it's not material response to delivery call. It's the Director's determination of senior water rights will be adversely affected. The proceeding was not conducted into a delivery call, it was a way to provide for an evidentiary basis. They are not disputing that curtailment will cause crop loss. Seniors are already experiencing that. Petitioners are trying to relitigate the Clear Springs Case. The Supreme Court addressed this and groundwater appropriators. The Supreme Court rejected the notion of full economic development. It applied to appropriators of groundwater.</p>
2:46:55	<p><u>Court comments.</u> It issued the decision re. Basin 33 and addressed the interplay between the groundwater act and conjunctive management rules, but that was under different context. The</p>

	<p>decision did not specifically address a delivery call. Court questions how it is distinguished from a delivery call under conjunctive water management rules.</p> <p>Mr. Orr responds re. who initiated the proceeding. The preceding delivery calls had been resolved. The Director has discretion in the performance of his duty. In this year with drought and severe water shortage, the Director exercised his discretion. Conjunctive management delivery calls are a different issue.</p> <p><u>Court questions</u> if a senior user calls up and complains, then the Director can initiate an admin proceeding 42-237a or can request them to file a delivery call subject to rules of conjunctive management.</p> <p>Mr. Orr comments what the Director has done in the past upon receiving letters. The Director could do that in the future. He suspects it would be the Director's decision.</p>
2:52	<p>Court wants to make sure that under this process, they are not starting over again. Mr. Orr comments that this is not the intent at all.</p>
2:53	<p><u>Mr. Rigby makes argument.</u></p> <p>He is joined in briefing with Mr. Kent Fletcher. They fully support the arguments of Mr. Orr and the AG. Mr. Barker's argument that there was insufficiency of notice is wrong. This Basin has been in contest since before 2015. All parties have known this is a basin different from ESPA, and much more affected by groundwater pumping. The argument by counsel that they didn't have time because they had planted their crops is incorrect; this Basin is in groundwater management area, and both sides have been involved in discussions. The Director warned everyone in March, and that there needed to be specific remedial action in the next few weeks. This is what prior appropriation is all about. Because of this drought, there are problems with surface water.</p>
2:57	<p>Mr. Rigby comments re. material injury. That shouldn't be the test. Everyone knew from years earlier that they were being shut off far earlier than other rights would have been, if there was water in the river. There would be additional water in the river if the pumps were turned off. There was clear evidence that groundwater was impacting it. They can do something about junior water right users diverting and affecting senior water users. It is irrelevant if the junior users' injuries are greater in dollars; it is not the law that they should be given deference. Once it is established that there is impact to the seniors, the Director has the right to make that determination.</p> <p>The Court ruled that conjunctive management rules pursuant to CM3 allows for other rules to be applicable. Mr. Rigby argues that this is another rule, and it is a safety guide to avoid irreparable harm which could come. All that the senior users recognize is the prior appropriation. Under the level, the runs which were made were appropriate. The model is still not the best, but the model was done with everyone's input, and it will be made better, but it cannot destroy the senior users' rights and crops for years on end.</p>
3:03	<p>Mr. Rigby comments that there were substantial injuries testified to by the farmers and senior surface users. He attached that today, and it was admitted in the case below. The Director used this info to make a determination. Priority is harsh, and parties understand this. These seniors are being injured, when the juniors are not. Mr. Rigby requests Court not grant the petition of the junior water pumpers.</p>
3:05	<p><u>Mr. Barker responds.</u></p> <p>He comments on the record. They did not see it until 2 weeks before the end. It is</p>

	<p>different from the Dept. running the scenario and coming up with area of potential curtailment. It was never any part of the model run. Mr. Barker refers to declaration that expert needed to do analysis of background info which the Dept. provided only on May 21. Re. due process, the Dept. gathered a huge level of stuff which it decided was important, and then it gave other parties only 2 weeks to figure it out.</p> <p>The ESPA are the cases which exist, and if the State cites to them, then Petitioner should also be able to.</p> <p>Mr. Barker comments that the Director said that as far as he knows, there was no difference between injury and material injury. Mr. Orr is saying that it is about adverse effect. Mr. Barker argues that they are the same thing.</p> <p>He refers to 237a of the groundwater act. There was no evidence offered about recharge. Mr. Barker refers to staff report listing people who might be affected.</p>
3:11	<p>Mr. Luke said it was not a determination of injury or adverse effect. Mr. Barker comments it is a violation of due process, even outside the conjunctive management rules. The boundary does not establish an area of common groundwater supply. He believes he heard people misunderstanding what he said about injury. When one weighs the irreparable harm that will undoubtedly occur from this curtailment, the 23,000 acres and \$12-15 million of injury, compared to a smaller injury. Mr. Barker provided a proposed mitigation plan for curtailment, and the Director said it wasn't good enough.</p>
3:15	<p>Court takes matter under advisement.</p> <p>Mr. Orr comments when the hearing next re. the mitigation plan will occur.</p> <p>Mr. Barker clarifies that he did not ask for hearing on order denying the mitigation plan. The Director denied the plan, and then decided to set a hearing.</p>
3:16	<p>Adjourn.</p>

Hearing End Time: 03:16 PM