

9-1-2011

Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71 (Idaho 2011)

Richard Neiley

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Richard Neiley, Court Report, Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71 (Idaho 2011), 15 U. Denv. Water L. Rev. 213 (2011).

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on substantiated projections of future growth.” Accordingly, the Court held that there is no immunity for municipalities and other government agencies from speculation challenges under a governmental planning “exception.”

Finally, the Court held that the District’s assignment of error by the water court could be rejected as a matter of law. The court determined that not only did the District fail to assert any over-commitment (other than the 7,000 acre feet already under contract for some future delivery with no plan for beneficial use), it also failed to show that *any* of the 13,000 acre feet it had under contract was committed to a specific beneficial use or was necessary for the municipality’s reasonably anticipated population growth. The Court rejected the District’s argument that its planned water uses, or those of its contractees for water, were irrelevant. The Court concluded that the evidence was insufficient as a matter of law to prove a need for additional rights or any recognizable legal demands and, thus, it was unnecessary to make any decision regarding joint appropriation of direct and storage flow rights.

Accordingly, the Court affirmed the water court’s ruling granting the Opposers’ motion to dismiss.

Michael Lerch

IDAHO

Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71 (Idaho 2011) (holding that the Director’s curtailment of junior groundwater users pumping volume, in favor of protecting the rights of senior surface water users, was a proper decision under Idaho law and within the Director’s discretion).

This appeal dealt with seven issues arising from a Final Order issued by the Director of the Idaho Department of Water Resources (“IDWR”), curtailing withdrawals from the Eastern Snake River Plain Aquifer (“Aquifer”) by individual appropriators and groundwater districts (collectively known as “junior groundwater users”). The Final Order was the result of delivery calls made to the IDWR by Clear Springs Food, Inc. and Blue Lakes Trout Farm, Inc. (collectively known as “senior surface water users”) and was the culmination of IDWR administrative proceedings. The junior groundwater users filed an appeal to the Idaho Supreme Court after the District Court of the Fifth Judicial District affirmed the Final Order.

Initially, the court rejected the junior groundwater users’ first issue on appeal that the Swan Falls Agreement, made in 1984, precluded the senior users’ ability to make delivery calls so long as minimum flows were maintained in the Snake River below the Murphy Gauge. The Swan Valley Agreement was a settlement between the Idaho Power Company and the State of Idaho, which reduced minimum flows for hydroelectric power generation on the Snake, thus leaving more water available for future

appropriation upstream. The court reasoned that only the resolution of Idaho Power's water rights were at issue in the agreement, and the Comprehensive Plan referenced in the Agreement had nothing to do with allocating water or determining priorities among the various appropriators upstream from the Swan Falls Dam.

The next issue on appeal was the meaning of a "full economic development" clause contained in Idaho Code § 42-226 ("the code"). The groundwater users argued the IDWR should have denied the senior surface users' calls, because the code required that reasonable exercise of prior ground water rights not interfere with the full economic development of the underground resource, and curtailment of their water rights will result in substantial, disproportionate economic harm to the underground junior users. The court rejected this contention. The statute only applied to the prior appropriation doctrine by setting a limit on reasonable pumping levels between groundwater user, not by eliminating the concept of first in time, first in right in favor of evaluation of highest economic value or greatest economic harm of use absent a sufficient water supply.

The court, likewise, rejected the next issue on appeal. The junior groundwater users further contended that the meaning of "full economic development" permitted utilization of the aquifer as long as water was not overdrawn. The court, after reaffirming Idaho's Constitutional approval of the prior appropriation system and its dependency on the doctrine of first in time, first in right, explained that the groundwater users' argument would essentially preclude conjunctive management of the hydraulically connected surface and ground water that constituted the aquifer. The court took notice of Idaho's longstanding tradition of managing surface water and groundwater conjunctively in order to further Idaho's policy of securing the maximum use and benefit of an aquifer. Interestingly, the court mentioned that, although not brought up on appeal, perhaps the underground user could have challenged the surface users' means of diversion as unreasonable if a reasonable alternative existed.

The junior users' next contended that because there was no evidence on the record that the additional water would increase fish production the department hearing officer erred in making a finding of material injury to the senior users. The court emphasized that water put to a beneficial use is a vested right and an appropriator who holds a vested water right is entitled to the full amount of that right absent any interference with that right. Therefore, evidence of the surface users' springs was sufficient to show material injury.

The juniors then proposed that because curtailment of their pumping capacity had not resulted in a measured increase in the flow at the surface users' spring, the Final Order was nothing but a futile call. The "futile call rule" is difficult to apply in cases of underground water, where, unlike surface water flows, a person cannot physically observe water flowing from point A to point B. As noted by the hearing officer, curtailing pumping often does not provide an immediate result because of the complex nature of underground water flow. The court provided that a

reasonable time to see a measurable effect may extend for days, months, or even years; therefore, the lack of evidence of an increase after curtailment was not dispositive.

The junior users next asserted that the Director abused his discretion when he relied on the Ground Water Model utilized to study the viability and necessity of curtailing withdrawals from the Aquifer. The hearing officer testified that he relied on the model because it was the best available science and it contained an acceptable level of reliability. The record showed that the margin of error was about ten percent and the court found that no other evidence existed to contravene this finding. After applying the Idaho abuse of discretion standard, the court held the director did not err in relying on the Ground Water Model.

The court further held that the junior users were denied due process of law when they were denied a hearing prior to the initial determination by the hearing order; however, because the parties did receive a hearing before the issuance of the Final Order this was a harmless error.

Finally, the court addressed the surface users' sole issue on appeal, whether the District court erred in failing to order the Director to curtail more water from the groundwater users. Essentially, the court upheld the finding of the Director to not curtail the flows of those within the ten percent margin of error by applying the same abuse of discretion standard used earlier to justify curtailment at all.

Accordingly, the Idaho Supreme Court affirmed the finding of the District Court, and all parties prevailed in part on appeal.

Richard Neiley

KANSAS

Cochran v. State Dept. of Agric., Div. of Water Res., 249 P.3d 434 (Kan. 2011) (holding that the Cochrans had sufficient standing, under both statutory and traditional standing analyses, to seek administrative review of the Chief Engineer's decision to grant water appropriation permits to the City of Wichita when the City's permits would potentially impair the Cochrans' senior water rights).

Pursuant to an "Integrated Local Water Supply Plan," the City of Wichita ("City") sought to divert groundwater from both the Equus Beds Aquifer and Arkansas River bank storage water, from an area known as the Bently Well Field. The City therefore applied to the Chief Engineer of the Division of Water Resources for the requisite permits. The Chief Engineer approved the City's permit applications and issued an order granting the permits. The Cochrans ("appellants"), who owned water rights with points of diversion close to the points of diversion the Chief Engineer approved for the City, expressed concern that the City's diversion would negatively impact their water rights.

Appellants sent a letter to the Kansas Department of Agriculture requesting a hearing on the Chief Engineer's issuance of the permits. The Department of Agriculture entered an initial order denying appellants'