

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 47-7680 IN THE NAME OF
ROYAL CREST, INC., COLLINS BROS.
CORP., Assignee.

Docket No. 16844

COLLINS BROS. CORP., An Idaho
Corporation,

Respondent,

vs.

A. KENNETH DUNN, Director, Idaho
Department of Water Resources,

Appellant.

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District
for Twin Falls County.

Honorable Daniel C. Hurlbutt, Jr., District Judge presiding.

Phillip J. Rassier
Deputy Attorney General
Department of Water Resources
Statehouse
Boise, Idaho 83720
Attorney for Appellant

Robert C. Weaver
WEAVER and MELANSON
130 North Broadway
Buhl, Idaho 83316
Attorney for Respondent.

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130 North Broadway
Buhl, Idaho 83316
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STATEMENT OF THE CASE

A. Nature of the Case

This is a water rights case arising out of an appeal from a decision of the Idaho Department of Water Resources (Department). The case raises an issue of first impression concerning application of the public interest criterion of I.C. § 42-203A to the use of geothermal water solely for irrigation purposes. The district court acting as an appellate court reversed the decision of the Department on procedural grounds and ordered the permit granted without the public interest conditions instead of remanding the case to the Department for further factual determinations and the correction of any procedural errors.

B. Course of the Proceedings

The Respondent, Collins Bros. Corp., is the successor in interest of Royal Crest, Inc., Las Vegas, Nevada. Royal Crest, Inc. filed application for permit no. 47-7680 to appropriate 14.60 c.f.s. of artesian geothermal ground water on November 20, 1980, in the Banbury Hot Springs area of Twin Falls County. The applicant proposed to use the water to supply space heating for a large housing development, commercial and recreation use, and irrigation of 430 acres of land. (Agency R. p. 1.)¹ An amendment to the application on December 10, 1981 changed the use of the geothermal use from power to the heating of homes.

1. References to the administrative record before the Idaho Department of Water Resources are shown as "Agency R." References to the record before the district court are shown "R."

(Agency R. pp. 1, 57.) Royal Crest Inc. assigned all interest in the application for permit to the respondent, Collins Brothers Corp., Las Vegas, Nevada, on December 15, 1981. (Agency R. p. 15.)

The amended application for permit was protested by four parties. (Agency R. pp. 19-21). The Department set the matter for conference and hearing. (Agency R. p. 27.) At the conference held on March 31, 1982, Collins Bros. Corp. and the protestants all agreed to allow the Department to reach a decision in the matter based upon the conference and upon the records of the Department. (Agency R. p. 39.)

On June 28, 1983, counsel for the Idaho Power Company provided the Department with a letter stating that in the opinion of the Company's geologists, the water to be appropriated is not tributary to the Snake River system, and consequently did not fall within the blanket protest of the Company or within the Department's moratorium on issuing new permits which resulted from the Idaho Power Company v. State of Idaho lawsuit. (Agency R. p. 50.)

The Department issued a Proposed Memorandum Decision and Order on August 4, 1983, approving the application for permit subject to the following condition among others:

(2) The use of water solely for irrigation from this geothermal aquifer is not in the public interest and, therefore, only the water used for another purpose, that requires the heat from the water, can be disposed of by using it for irrigation.

(Agency R. pp. 54, 60.) No exceptions were filed to the proposed decision within the 15 day period provided. On August 31, 1983, the Department issued an order adopting the proposed decision as its final decision. (Agency R. p. 140.) The Department mailed copies of this final order to all parties on September 7, 1983. (Agency R. pp. 5, 53.)

On October 6, 1983, more than 20 days after service of the final order, Collins Bros. Corp. filed with the Department a motion to modify in part the memorandum decision. (Agency R. p. 141.) The motion asked for a reconsideration of the decision based upon the fact the applicant had previously expended approximately \$95,000 in developing and installing an irrigation system for use in conjunction with the permit.

On December 5, 1983, the director of the Department issued an order denying the motion to modify the decision. (Agency R. p. 142.) The order states the director was aware at the time of his decision that the applicant had developed the irrigation system, but he felt that the protection of the artesian hot water source was of utmost importance and that the applicant should not deplete that source for irrigation when a cold water source would suffice. The order did not address the untimeliness of the motion for reconsideration.

On January 4, 1984, Collins Bros. Corp. filed a petition of appeal with the district court appealing the Department's final decision. (R. pp. 4-18.) The Department filed the agency record on appeal with the district court on February 16, 1984. (R. p. 59.)

On August 31, 1984, the Department filed a motion for involuntary dismissal of the appeal upon the grounds that it was not timely filed. (R. pp. 23-24.) The district court orally denied the motion on September 17, 1984, after hearing argument by counsel. (R. p. 25.)

The district court heard appellate argument in the case on May 24, 1985. (R. p. 26.) On June 21, 1985, the district court ordered additional briefing from the parties and invited amicus briefs from the parties in another case pending before the district court involving the use of geothermal resources. (R. pp. 27-29.) The additional issues to be briefed were (1) the affect of the Idaho Geothermal Resources Act, I.C. §§ 42-4001 et seq. on the case, and (2) the potential conflict between Idaho Const., Art. 15, § 3, and the public interest criterion of I.C. § 42-203. (R. p. 28.)

On April 2, 1986, the district court issued its decision reversing the decision of the Department on procedural grounds and ordering the water right permit granted to Collins Bros. Corp. without conditions. (R. pp. 30-44.)

The Department filed a petition for rehearing with the district court on April 14, 1986. The district court heard argument on the petition for rehearing on August 25, 1986, and agreed to replace some of the conditions on the permit which were not objectionable to Collins Bros. Corp. The district court denied the Department's request to remand the case to the Department for further proceedings. (R. p. 45.) The district court directed counsel for Collins Bros. Corp. to prepare an

order for its signature. (R. p. 45.) On October 20, 1986, the district court entered the order prepared by counsel for Collins Bros. Corp. (R. pp. 46-48.)

The Department first received notice of entry of the October 20, 1986 order on January 19, 1987, from the district court in a letter from the presiding judge dated January 15, 1987. The Department filed its notice of appeal on February 23, 1987. (R. pp. 51-53.)

C. Statement of Facts

Royal Crest Inc. of Las Vegas, Nevada, filed application for permit no. 47-7680 to appropriate the public ground water of the state of Idaho on November 20, 1980. (Agency R. pp. 1-4.) The ground water is artesian geothermal water in the Banbury Hot Springs area located immediately south of the Snake River between Salmon Falls Creek and Deep Creek in Twin Falls County. (Agency R. p. 67.) The application sought 14.60 cfs of ground water from three artesian wells to be utilized as follows:

<u>Amount (cfs)</u>	<u>Use</u>	<u>Period of Use</u>
0.40	domestic	1/1 - 12/31
6.60	irrigation	4/1 - 10/31
2.70	commercial	1/1 - 12/31
4.90	geothermal	1/1 - 12/31

The Department published notice of the original application showing the geothermal use to be for power purposes on December 18 and 25, 1980. (Agency R. p. 11.) No protests were received in response to this publication.

On December 10, 1981, the application was amended to show the geothermal use to be for the heating of 110 homes (later modified to 99 homes). (Agency R. pp. 1, 57.) The commercial use is described as being for use in greenhouses. (Agency R. p. 1.) The location of the proposed irrigation use is 430 acres of land at Kanaka Rapids Ranch, in Twin Falls County. (Agency R. pp. 2, 56.) Other surface water rights were claimed on the application form for 195 of the 430 acres proposed to be irrigated with geothermal ground water under permit 47-7680. (Agency R. p. 2.) On December 15, 1981, Royal Crest, Inc. assigned all interest in the application for permit to Collins Brothers Corp. (Agency R. p. 15.) The Department published notice of the amended application on December 24 and 31, 1981. (Agency R. p. 18.) Four parties responded by filing protests. (Agency R. pp. 19-21.) The Department set the protested application for conference and hearing on March 31, 1982. At the close of the conference, the parties agreed to allow the Department to reach a decision based upon the conference and upon the records of the Department. (Agency R. p. 39.)

Included in the agency record after the conference was a letter from protestant Robert S. Luntley received by the Department on April 7, 1982. (Agency R. p. 40.) The Luntley letter states as follows with respect to the use of geothermal water for irrigation purposes:

I cannot believe it is in the public's or State's interest to allow anyone to use highly valuable warm geothermal water to irrigate large acreages when cold water will suffice. All of the heat in the warm water is wasted in the air and on the ground when

that heat could instead be used for heating houses, greenhouses, raising warm water fish, etc. In my opinion Idaho should severely limit or prohibit use of geothermal water for uses that can be accommodated with cold water.

(Agency R. p. 40.) The Department sent a copy of the Luntley letter to counsel for Collins Bros. Corp. on April 7, 1983.

(Agency R. p. 43.) On April 20, 1983, the Department received a response from counsel for Collins Bros. Corp. The response letter does not respond to Mr. Luntley's assertion that the use of geothermal water for irrigation purposes is contrary to the public interest. The response does question whether the Luntley well draws water from the same aquifer as wells proposed to be used by Collins Bros. Corp. (Agency R. pp. 44-45.)

Water right permit no. 47-7261 with a priority date of March 21, 1974 authorizes a surface water right from Mud Creek for the irrigation of 144 acres of the 430 acres sought to be irrigated by Collins Bros. Corp. with geothermal water under permit 47-7680. (Agency R. pp. 120-123.) Permit no. 47-7261 was assigned to Collins Bros. Corp. on December 15, 1981. (Agency R. p. 16.)

In addition, water right permit no. 47-7551 with a priority date of May 18, 1979 authorizes a surface water right from Silver Creek which is a tributary of Mud Creek to provide 200 acre feet of storage for the purpose of supplementing permit no. 47-7261. (Agency R. pp. 130-133.) Permit no. 47-7551 was assigned to Collins Bros. Corp. on December 15, 1981. (Agency R. p. 16.)

The three artesian geothermal wells authorized as points of diversion under permit no. 47-7680 are located within the area's extent of the geothermal reservoir in the Banbury Hot Springs area. (Agency R. pp. 2-3, 47, 67-75.) The reported temperature of the water from Collins Bros. Corp. wells nos. 2 and 3 are 82 degrees and 93 degrees Fahrenheit respectively. (Agency R. pp. 108, 110.) The temperature of Collins Bros. Corp. well no. 1 was not reported by the well driller. (Agency R. p. 107.)

Water Resources Investigations Open File Report 80-563, entitled "Geothermal Resources in the Banbury Hot Springs Area, Twin Falls County, Idaho," U.S. Geological Survey, August, 1980, reported as of 1979 there were 26 wells and 2 springs in the Banbury Hot Springs area producing thermal water in the temperature range from 30.0 to 72.0 degrees Celsius or 86.0 to 161.6 degrees Fahrenheit. (Agency R. pp. 67-68.)

The authors of Open File Report 80-563 state that the report was prepared for the following reason:

Due to the increasing number of wells being completed, many residents are concerned that continued development may decrease the amount of geothermal water available to present users. If continued development reduces flow or causes heads to drop below land surface, the economic advantage of using the resource would be greatly impaired. Therefore, to aid in future decisions regarding development and use of the resource, the U.S. Geological Survey, in cooperation with the U.S. Department of Energy, undertook this study of the nature and occurrence of geothermal water in the Banbury Hot Springs area.

(Agency R. p. 68.) The Open File Report states that water from the 26 observed wells producing thermal water in 1979 were used for residence heating, catfish and tropical fish production and greenhouse operation. (Agency R. p. 67.)

Wells owned by persons who protested the Collins Bros. Corp. amended application for permit are located within the Banbury Hot Springs area and produce thermal water with temperatures ranging from 86 to 104 degrees Fahrenheit. (Agency R. pp. 104-106.) This compares with the 82 and 93 degree Fahrenheit thermal water reported from Collins Bros. Corp. wells nos. 2 and 3.

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in not holding that materials properly included in the administrative record of the Department of Water Resources were adequate to affirm the Department's decision?

2. Whether the district court erred in granting the permit to appropriate geothermal ground water for irrigation purposes, after striking the contested public interest conditions requiring beneficial use of the heat resource, rather than remand the case to the Department for further proceedings?

3. Whether the district court erred in not dismissing the appeal because a motion to modify the agency decision filed nine days after the 20-day period allowed by agency rule did not toll the 30-day period for filing an appeal?

POINTS AND AUTHORITIES

I.

The standard of review by the district court of the Department's decision was the substantial evidence rule. I.C. § 67-5215(g) (Supp. 1987).

II.

An appellate court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5215(g) (Supp. 1987).

III

Harmless error does not provide grounds for reversal of an administrative decision. 5 Am Jur 2d, Appeal and Error § 776; Rogers v. Trim House, 99 Idaho 746 (1979).

IV.

The director of the Department of Water Resources has an affirmative duty to assess and protect the public interest. I.C. § 42-203A(5)(e) (Supp. 1987); Shokal v. Dunn, 109 Idaho 330.

V.

The use of geothermal water solely for irrigation purposes normally does not constitute a beneficial use of the water. I.C. § 42-233.

VI.

Upon reversal of the Department decision the appropriate appellate practice was for the district court to remand the case for further proceedings. I.C. § 67-5215(g).

VII.

It is the function of the agency upon remand to reweigh the evidence to determine if the appropriate statutory standard is met by the evidence. Workman Family Partnership v. City of Twin Falls, 104 Idaho 32 (1982).

VIII.

It is error for the district court sitting as an appellate court to substitute its own findings for that of the agency. Tappen v. State, Dept. of Health & Welfare, 98 Idaho 576 (1977); Van Orden v. State, Dept. of Health & Welfare, (102 Idaho 663 (1981); Mason v. State, Dept of Law Enforcement, 103 Idaho 748 (Ct. App. 1982).

IX.

Petitions for review of water permit decisions of the Department of Water Resources must be filed with the district court within 30 days after service of the final decision. I.C. §§ 42-203A(6), 42-1701A(4) and 67-5215(b).

X.

Petitions for rehearing of the administrative decisions of the Department of Water Resources must be filed with the agency within 20 days of the service of the order. Rule 11, Practice and Procedure Rules and Regulations, Idaho Department of Water Resources.

XI.

The Department should be bound by its own rules regarding the time allowed for filing a timely petition for rehearing. Wheeler v. McIntyre, 100 Idaho 286 (1979).

XII.

Rules prescribing the methods of procedure within an agency have the effect of law, and are binding on both the agency and on the parties. Cooper, 1 State Administrative Law 266 (1965); Williams v. Joyce, 479 P.2d 513 (OR. App. 1971); George v. Arizona Corporation Commission, 322 P.2d 369 (Ariz. 1958). Higginson v. Westergard, 100 Idaho 687 (1979).

XIII.

Judicial notice shall be taken of agency rules filed and published pursuant to statute. I.C. § 67-5205(d).

XIV.

An untimely motion to modify a final decision does not toll the running of the time in which to file an appeal. Puphal v. Puphal, 105 Idaho 302 (1983); Johnston v. Pascoe, 100 Idaho 414 (1979); Wheeler v. McIntyre, 100 Idaho 286 (1979); Williamsen Idaho Equipment v. Western Casualty & Surety Company, 95 Idaho 652 (1973); Department of Employment v. St. Alphonsus Hospital, 96 Idaho 470 (1975).

XV.

Failure to file a timely notice of appeal is a jurisdictional defect requiring dismissal of the appeal. I.R.C.P. 83(s); Briggs v. Golden Valley Land & Cattle Co., 97 Idaho 427 (1976).

ARGUMENT

I.

THE AGENCY RECORD IS ADEQUATE FOR THE DISTRICT COURT TO HAVE AFFIRMED THE DECISION OF THE DEPARTMENT ON APPEAL.

The decision of the district court in this case reversed the administrative decision of the Department for the procedural reason that the Department had considered material outside the record. The district court ordered the water right permit granted without certain public interest conditions which had been contested by the permittee.

The Department believes that the Department's decision should be affirmed because there is adequate evidence in the record to support the decision. The Department further believes that if reversal of the Department's decision is necessary, the matter should be remanded to the Department for further proceedings.

The holding of the district court and the disposition of the permit are summarized on the last page of the court's decision as follows:

Given that the department considered material which was outside of the record in this matter, and that the substantial rights of the petitioners have been prejudiced, this court concludes that the final decision rendered by the department was made in excess of its statutory authority, made upon unlawful procedure, and constituted an unwarranted exercise of the department's discretion. I.C. Sec. 67-5215(g)(2), (3) and (6).

It is hereby ordered that the final decision of the Department of Water Resources be reversed, and that the petitioners be granted their permit without conditions thereon.

(R. p. 50.)

The Department's decision contained nine conditions which were attached to the approved permit. The nine conditions are as follows:

(1) The permit holder shall either install a measuring device or provide a certified measurement by a professional engineer or install an access port or other device as specified by the Department.

(2) The use of water solely for irrigation from this geothermal aquifer is not in the public interest and, therefore, only the water used for another purpose, that requires the heat from the water, can be disposed of by using it for irrigation.

(3) The use of water for irrigation under this permit is supplemental to all existing water rights with the same purpose and place of use and the other rights must be developed and used to the fullest extent possible for irrigation before this permit is used for irrigation purposes.

(4) The Director of the Department of Water Resources retains jurisdiction over this permit to assure that the water diverted is beneficially used and for the approval of the casing and sealing of the wells.

(5) The amount of water diverted shall not exceed that necessary for domestic, commercial, and geothermal heating for 99 homes.

(6) The rate of diversion of water for irrigation under this permit and all other water rights on the same land shall not exceed 0.02 cubic feet per second for each acre of land.

(7) Water used under this permit if discharged into a natural channel shall meet Idaho Water Quality Standards.

(8) Permit holder shall commence the excavation or construction of diverting works within one year of the date this permit is issued and shall proceed diligently until the project is complete.

(9) Proof of construction of works and application of water to beneficial use shall be submitted on or before the date indicated on the Final Decision and Order.

(Agency R. pp. 59-60.)

In its October 20, 1986 order, the district court reinstated conditions 1, 7 and 8 in their original form and reinstated conditions 2, 6 and 9 in a slightly modified form. (R. pp. 46-48.) The effect of the October 20, 1986 order was, thus, to grant the permit without conditions 2, 3 and 4 imposed by the Department's decision.

A. The Standard of Review by the District Court of the Department's Findings of Fact is the Substantial Evidence Rule.

I.C. § 67-5215(f) and (g) (Supp. 1987) sets forth the standard of review to be followed by the district court when sitting as an appellate court in review of an administrative decision. I.C. § 67-5215(f) provides:

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

I.C. § 67-5215(g) provides:

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (Emphasis added.)

The district court relied upon subdivisions (2), (3) and (6) of I.C. § 67-5215(g) in reversing the decision of the Department in this case. The district court determined, "that the department considered material which was outside of the record in this matter, and that the substantial rights of the petitioners have been prejudiced. . . ." (R. p. 44.) The district court concluded that, "the final decision rendered by the department was made in excess of its statutory authority, made upon unlawful procedure, and constituted an unwarranted exercise of the department's discretion." Id. The district court's decision focuses on Department findings of fact nos. 4, 5 and 6 in reaching this conclusion. These findings are as follows:

- (4) Protestants have, since their wells were drilled, been able to obtain water under their rights by allowing it to flow from the

wells under artesian pressure without the necessity of pumping.

(5) The wells of the parties to this matter are within the Banbury Hot Springs Groundwater Management Area created by the Director on April 12, 1983.

(6) The applicant holds water right permit No. 47-7261 for irrigation of some of the lands described in this application for permit, but from surface water sources. The Department has made a field examination and has found that 131 acres of land being irrigated are within the place of use proposed under permit No. 47-7680.

(R. p. 17.)

The district court determined that findings of fact nos. 5 and 6 must be struck because they were based upon matters outside the record; and that finding of fact no. 4 was irrelevant given conclusion of law no. 1 which states:

(1) Reductions in artesian pressure in wells within the Banbury Hot Springs Groundwater Management Area is not considered as an injury to existing water rights since there remains to be sufficient water available in the source to satisfy the prior existing water rights.

(R. p. 17.) The district court further determined that Collins Bros. Corp. was prejudiced by the Department's consideration of findings of fact nos. 4, 5 and 6.

1. Finding of Fact No. 4 is supported by substantial, competent evidence and is not made irrelevant by Conclusion of Law No. 1.

The Department maintains that finding of fact no. 4 is not made irrelevant by conclusion of law no. 1. While each concerns a common factual element, i.e., artesian pressure, they address different legal issues. Finding of fact no. 4 states a fact

which is well documented in the record. The following evidence in the agency record supports finding of fact no. 4:

(1) Well Driller's Report for a well completed for protestant Robert Luntney by Boley and Henry Drilling, April 4, 1974, which shows the well flowed at an artesian closed in pressure of 85 p.s.i. (Agency R. p. 104.)

(2) Well Driller's Report for a well completed for Edward Kerpa by Boley, Henry and Weech Drilling, March 15, 1971, which shows the well flowed at an artesian closed in pressure of 145 p.s.i. (Agency R. p. 105.)

(3) Protest statement of Robert S. Luntney that "it is not in the public interest for the State to permit the aquifer to drop to a level where energy is required for pumping, when such energy use could be avoided by appropriate management of the aquifer. (Agency R. p. 38.)

(4) Well Driller's Report for a well completed for Dick Kaster by Elsing Drilling, October 9, 1975, which shows the well flowed at an artesian closed in pressure of 58 p.s.i. (Agency R. p. 106.)

(5) Protest statement of Fred and Frances Kambrich and Mr. and Mrs. Dale Durrant stating: "The practice of indiscriminately issuing permits for large artesian wells should be halted until a thorough study has been made of the Banbury area aquifer.

The pressure of our well has dropped significantly since so many large wells have been drilled." (Agency R. p. 19.)

(6) Protest statement of Mr. and Mrs. G. W. Anderson stating: "Kanaka Rapids Ranch [predecessor in interest of Collins Bros.] has lowered the pressure in our domestic artesian well until we had no water for household use.

We propose a moratorium on large well drilling until a survey is made on water levels in this area." (Agency R. p. 20.)

(7) Open File Report 80-563, Table 1. Record of Wells for Well nos. 9S-14E, 4BDC1, 9ADC1, and 23ABD1 showing water levels above land surface at the distance of 145, 167, and 25 feet respectively. (Agency R. pp. 46, 74.)

Adequate evidence clearly exists in the record to support finding of fact 4 of the Department's decision that protestants' wells flow by artesian pressure.

Finding of fact 4 is relevant to conclusion of law no. 3 which states that, "It is not in the local public interest to deplete an artesian hot water aquifer for a purpose that could be served using a cold water source." (R. p. 17.)

Conclusion of law no. 1, on the other hand, stating that reduction in artesian pressure is not considered an injury relates to the determination of whether there is water available for appropriation within the aquifer. This conclusion of law is necessary in order for the Department to approve the requested permit with or without the public interest conditions objected to. Conclusion of law no. 1 relates to criteria (a) and (b) under I.C. § 42-203A(5) concerning the adequacy of the water supply, while finding of fact no. 4 and conclusion of law no. 3 relate to criterion (e) under I.C. § 42-203A(5) addressing the local public interest. Neither makes the other irrelevant.

The district court erred in striking finding of fact no. 4 of the Department's decision.

2. Finding of Fact No. 5 is supported by substantial, competent evidence.

Finding of fact no. 5 states that, "The wells of the parties to this matter are within the Banbury Hot Springs Groundwater

Management Area created by the Director on April 12, 1983." The following evidence in the record supports finding of fact no. 5:

(1) Orders of the Department supplementing conditions of approval for permits to appropriate groundwater nos. 47-7205, 47-7312, and 47-7580, owned by the protestants which contain a recital stating that on April 12, 1982, the Director of the Department created the Banbury Hot Springs Groundwater Management Area. (R. pp. 112, 124, 134.)

(2) Open File Report 80-563 containing maps depicting the township, range and section location of the Banbury Hot Springs Area which may be matched with the points of diversion under the various ground water rights of the parties. (R. pp. 97, 103.)

The order of the Department creating the Banbury Hot Springs Groundwater Management Area, referred to in finding of fact no. 5, was not made a part of the record in this proceeding. However, evidence in the record describing the location of the wells of the parties, the location of the Banbury Hot Springs Area, and the fact that the management area was created by the Department provides substantial, competent evidence to support finding of fact 5.

The district court erred in holding that the Department's decision was fatally flawed because of the failure to include in the record a copy of the order creating the Banbury Hot Springs Groundwater Management Area. It may be true that the most appropriate course was to have included a copy of the order in the record. It is equally true, however, that materials included in the record refer to the existence and extent of the Management Area. These materials constitute substantial, competent evidence adequate to support finding of fact no. 5.

3. Finding of Fact No. 6 is either supported by substantial, competent evidence or is duplicative of matters supported by substantial, competent evidence.

Finding of fact no. 6 states that Collins Bros. Corp. holds permit no. 47-7261 from surface water sources for irrigation of some of the lands described in the application for permit no. 47-7680. Finding of fact no. 6 further states that the Department conducted a field examination which found 131 acres of land being irrigated are within the place of use proposed under permit no. 47-7680. The district court is correct that there is no evidence in the record regarding the Department field exam of surface water permit no. 47-7261.

The first part of finding of fact 6 that Collins Bros. Corp. holds permit 47-7261 for irrigation of a substantial portion of the lands described in application for permit 47-7680 is clearly supported by substantial, competent evidence. (Agency R. pp. 2, 120-123.)

A comparison of the authorized place of use under surface water permit no. 47-7261 with the proposed place of irrigation use for the geothermal ground water under application for permit no. 47-7680 (Agency R. p. 2) shows that 144 acres of the 430 acres sought to be irrigated with thermal ground water are already authorized to be irrigated with surface water from Mud Creek. (Agency R. pp. 2, 121.) The reference in finding of fact no. 6 to the Department field exam, although improper, is clearly duplicative of other evidence included in the record which is

not as favorable to Collins Bros. as that resulting from the field exam.

B. Any Procedural Irregularities Regarding Findings of Fact 5 and 6 Constitute Harmless Error.

The Department believes that the reference in findings of fact 5 and 6 to matters not formally included in the record should be determined to be harmless error.

Collins Bros. Corp. never indicated that it was unaware of the creation of the Banbury Hot Springs Groundwater Management Area referred to in finding of fact no. 5. The creation and existence of the management area is a matter of public record. As discussed above, other evidence in the record refers to the existence of the management area and clearly establishes that the wells of the parties are in fact within the boundaries of the management area. Collins Bros. did not demonstrate how it was prejudiced by the reference to the management area or the failure of the Department to properly include a copy of the order creating the management area in the record. The Department does not believe that Collins Bros. Corp. was prejudiced by the reference to the creation of the management area in finding of fact no. 5.

The first sentence of finding of fact no. 6 refers to water right permit No. 47-7261 which is a part of the record. The permit was clearly in existence prior to the March 31, 1982 conference since it carries a permit approval date of May 6, 1974. (Agency R. pp. 120-123.)

Collins Bros. Corp. was not prejudiced by reference in the second sentence of finding of fact no. 6 to the Department's field exam of permit no. 47-7261. The exam reportedly found 131 acres of the land irrigated under that permit to be covered by the place of use sought to be irrigated with geothermal water under application for permit no. 47-7680. No prejudice occurred to Collins Bros. Corp. due to this error because substantially the same conclusion can be drawn from an analysis of permit no. 47-7261 which is a part of the record. The only difference is that the analysis of permit no. 47-7261 shows that 144 acres are authorized to be irrigated within the place of use under permit no. 47-7680 whereas the field exam found 131 acres actually being irrigated. Any difference here appears to work an advantage to Collins Bros. Corp. rather than being prejudicial.

The district court should have determined that any procedural irregularities regarding findings of fact 5 and 6 of the Department's decision worked no prejudice upon Collins Bros. Corp. and are considered harmless error which does not provide grounds for reversal of an administrative decision. 5 Am Jur 2d, Appeal and Error § 776; Rogers v. Trim House, 99 Idaho 746, 588 P.2d 945 (1979).

The Department does not agree with the conclusion in the district court decision that Collins Bros. Corp. met its burden of showing prejudicial error due to the inclusion of findings of fact 5 and 6 in the Department's decision. (R. p. 43.) This Court should determine that any procedural error which occurred

before the Department in this case was harmless error which worked no prejudice upon Collins Bros. Corp.

C. The Department's Decision Requiring Use of the Thermal Resource in the Water Sought for Irrigation Use is Consistent with the Local Public Interest.

This Court recently addressed in detail the meaning of the local public interest provision contained in I.C. § 42-203A(5)(e) (Supp. 1987). Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985). The decision states that I.C. § 42-203A places upon the director of the Department an affirmative duty to assess and protect the public interest; and that the director has considerable flexibility and authority in carrying out this duty. Id. at 337.

Among the elements, particularly pertinent to the present case, which the Court said should be considered part of the local public interest are:

- 1) the effect of loss of alternative uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
- 2) harm to others;
- 3) discouraging waste; and
- 4) encouraging conservation.

Id. at 338-39.

The Shokal decision emphasizes that the list of public interest elements is not intended to be comprehensive and that the public interest should be read broadly in order to secure the greatest possible benefit from the public waters for the public. Id. The decision further states that by using the general term

"the local public interest," the legislature intended to include any locally important factor impacted by proposed appropriations. Id.

Application of the Court's analysis of the local public interest standard to the facts of the present case makes it clear that the Department acted properly and well within its authority in conditioning the Collins Bros. Corp. permit to prohibit the use of geothermal water solely for irrigation purposes.

Strong affirmation that the conditions imposed by the Department are consistent with the public interest is provided by recent amendments to the Idaho ground water law. 1987 Idaho Sess. Laws, Ch. 347, § 3, P. 741. The legislature through passage of Senate Bill 1133 enacted a new section 42-233 to the Idaho Code which reads in part as follows:

42-233. Low temperature geothermal resource. -- (1) The right to the use of low temperature geothermal resources of this state shall be acquired by appropriation. The appropriation may be perfected by means of the application, permit and license procedure as provided in this chapter for ground water, provided that low temperature geothermal resources shall be utilized primarily for heat value and secondarily for the value as water. Usage of a low temperature geothermal resource primarily for reasons other than heat value is not a beneficial use of the resource, unless the director of the department of water resources exempts the proposed use. The director may exempt a proposed use if the director finds that the proposed use satisfies the following criteria: (i) there is no feasible alternative use of the resource; (ii) there is no economically viable source of water having a bottom hole temperature of eighty-five (85) degrees or less in a well available; and (iii) the exemption is in the public interest. (Emphasis added.)

This statute removes any future doubt that the use of geothermal water solely for irrigation use would normally not constitute a beneficial use of the water. The Department also considers the enactment of the statute to be a strong indication that its conditioning of the Collins Bros. Corp. permit in this case was proper and was in accord with the local public interest.

D. I.C. § 67-5215(f) and (g) Require that the District Court Have Remanded the Case to the Department for Further Proceedings.

If the district court was correct in holding that the procedural error before the Department did cause a significant degree of prejudice to Collins Bros. Corp., then the appropriate appellate practice was for the district court to have remanded the case to the Department for further proceedings consistent with the decision. I.C. § 67-5215(g) states that the reviewing court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 42-203A(5) requires as follows with respect to the approval of an application for permit to appropriate the public waters of the state of Idaho:

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the department that such application is not made in good

faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant. (Emphasis added.)

The factual determinations necessary for the issuance of a water right permit under I.C. § 42-203A are to be made by the director of the Department and not by the appellate court. If the Department has improperly considered evidence outside the agency record to the prejudice of a water right applicant, as has been determined by the district court in this case, then the matter should be remanded to the Department to conduct further proceedings in accordance with the appellate court's decision. It is not the function of the appellate court to reweigh the evidence, minus the matters struck, to determine if the statutory legal standard is met by the remaining evidence. That is a function properly left by I.C. § 67-5215(g) to the agency upon remand. Workman Family Partnership v. City of Twin Falls, 104 Idaho 32, 38-39, 655 P.2d 926 (1982).

It was error for the district court sitting as an appellate court to substitute its own findings for that of the agency.

Tappen v. State, Dept. of Health & Welfare, 98 Idaho 576, 578, 570 P.2d 28 (1977). See also Van Orden v. State, Dept. of Health & Welfare, 102 Idaho 663, 667, 637 P.2d 1159 (1981); Mason v. State, Dept. of Law Enforcement, 103 Idaho 748, 751, 653 P.2d 803 (Ct. App. 1982).

In the present case, the action of the district court in striking portions of the evidence considered by the agency and thereafter ordering the permit issued without the relevant conditions required a reweighing of the remaining evidence to determine whether the local public interest and other criteria of I.C. § 42-203A(5) were satisfied by the remaining evidence in the record. This function of reweighing the evidence is properly the function of the administrative agency upon remand.

II.

THE APPEAL OF THE DEPARTMENT'S DECISION TO THE DISTRICT COURT WAS NOT TIMELY FILED.

A. The Appeal Was Not Filed Within Thirty Days of Service of the Department's Decision as Required by I.C. § 67-5215(b).

I.C. §§ 42-203A and 42-1701A (Supp. 1987) specify the administrative procedure available for processing an application for permit to appropriate water. I.C. § 67-5215 (Supp. 1987) specifies the procedure for judicial review of final administrative action.

I.C. § 42-203A(6) states in pertinent part:

Any person or corporation who has formally appeared at hearing, aggrieved by the judgment of the director of the

department of water resources, may seek judicial review thereof in accordance with section 42-1701A(4), Idaho Code.

I.C. § 42-1701A(4) states:

(4) Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in sections 67-5215 and 67-5216, Idaho Code.

I.C. 67-5215(b) states:

Except when otherwise provided by law, proceedings for review are instituted by filing a petition in the district court of either the county in which the hearing was had or the county in which the final decision of the agency was made, within 30 days after the service of the final decision of the agency, or, if a rehearing is requested within 30 days after the decision thereon. (Emphasis added.)

Accordingly, I.C. §§ 42-203A, 42-1701A, and 67-5215 provide that review of determinations of the Department regarding applications for water rights are governed by the provisions of the Administrative Procedure Act and a petition of appeal must be filed in district court within thirty days of the service of the decision.

Here, the Department issued its Order Adopting Proposed Memorandum Decision and Order on August 31, 1983. Interested parties were served by mail with a copy of the order on September 7, 1983. Thirty days from that date is October 7, 1983. I.R.C.P. 6(a). Unless extended by the timely filing of a petition for rehearing, the last day for filing the petition of appeal was October 7, 1983. The appeal petition was filed January 5, 1984.

Rule 11 of the Practice and Procedure Rules and Regulations for the Department of Water Resources then in effect provided as follows with respect to the timely filing of petitions for rehearing from Department decisions:²

11. Rehearings

11.1 Time for Filing. Any party to a proceeding and affected by the order of the Director or Board may apply for a rehearing within twenty (20) days after service of the order. Petitions for rehearing shall, as to form and content, conform to the requirements of Rule 3.5 and filing and service thereof shall conform to the requirements set forth in Rule 7.

. . . .

11.3 Effect of filing. The filing of a petition for rehearing shall not excuse compliance with the order nor suspend the effectiveness of such order unless otherwise ordered, but it shall toll the running of any statutory time for appeal and such appeal time shall commence upon entry of an order denying the motion or upon entry of an amended ruling.

The Department's letter of September 7, 1983 to Collins Bros. Corp. transmitting the approved application for permit no. 47-7680 along with a copy of the Proposed Memorandum Decision and Order and Order Adopting Proposed Memorandum Decision and Order contained the following instruction to the permittee concerning further available administrative and judicial remedies:

Any person who does not agree with the decision of the department may request a rehearing before the director within 20 days or may appeal directly to the district court within 30 days of the date the decision is mailed.

2. Minor amendments to Rule 11 occurred effective October 31, 1983, but the twenty-day time period for filing a petition for rehearing remained unchanged.

(Agency R. p. 53.)

This instruction correctly reflected the legal requirement of Rule 11 of the Department's Practice and Procedure Rules and Regulations regarding the timely filing of a request for rehearing. It also correctly reflected the time allowed for appeal to district court under I.C. § 67-5215(b). Just as the district court was held in Wheeler v. McIntyre, 100 Idaho 286, 289 (1979) (discussed infra), to lack the authority to enlarge the time for filing a motion to alter or amend a judgment under I.R.C.P. 59(e), so too is the Department bound by its own rules regarding the time allowed for filing a timely petition for rehearing.

It is a general principle that rules prescribing the methods of procedure within an agency have the effect of law, and are binding on both the agency and on the parties. See, Cooper, 1 State Administrative Law 266 (1965). See also, e.g., Williams v. Joyce, 479 P.2d 513, 524 (Or. App. 1971) (commissioner of labor bound by own procedural rule not allowing hearsay evidence over an objection); and George v. Arizona Corporation Commission, 322 P.2d 369, 371 (Ariz. 1958) (commission held to lack authority to waive its rule that aggrieved party must file for rehearing within twenty days).

I.C. § 67-5205(d) provides that judicial notice shall be taken of agency rules filed and published pursuant to that section. This Court has held that a rule or regulation of a public administrative body has the force and effect of law. See, Higginson v. Westergard, 100 Idaho 687, 690, 604 P.2d 51 (1979).

Collins Bros. Corp. was served with a copy of the Department's order adopting proposed memorandum decision and order on September 7, 1983. A timely petition for rehearing under the Department's rules would have had to have been filed within 20 days or by September 27, 1983. Since the Collins Bros. motion to modify the decision was not filed with the Department until October 6, 1983, it was not timely and it did not serve to toll the running of the 30 day statutory time for filing an appeal to district court.

Thus, the last day when the petition of appeal could have been filed with the district court was October 7, 1983. Since the petition of appeal was not filed until January 5, 1984, it was untimely and the district court should have dismissed the appeal.

B. Idaho Case Law Supports a Determination that an Untimely Motion to Modify an Agency Decision does not Toll the Running of the 30 Day Appeal Time Under I.C. § 67-5215(b).

The conclusion that the appeal is untimely and should be dismissed is supported by Idaho case law interpreting I.R.C.P. 59(e). Rule 59(e) is analogous to the Department's Rule 11 on petitions for rehearing except that only 10 days are allowed for filing a motion to alter or amend a judgment under Rule 59(e) whereas 20 days are allowed to file a petition for rehearing under the Department's Rule 11.

This Court has decided several cases holding that an untimely motion under Rule 59(e) does not toll the running of the time in which to file an appeal. In Puphal v. Puphal, 105 Idaho

302, 669 P.2d 191 (1983), the Court considered the effect of a motion for modification or clarification of judgment in a divorce and property settlement case which was filed approximately three months after entry of judgment. In concluding that the motion was not timely filed the Court stated:

Appellant also alleges that the trial court erred in denying his motion for relief from, modification or clarification of the judgment and order dated August 26, 1981, citing I.R.C.P. 59 and 60(b). Appellant's motion for "modification or clarification of [the] judgment and [the court's] order dated August 26, 1981," is essentially a motion to alter or amend the judgment under I.R.C.P. 59(e), which must be served "not later than ten (10) days after entry of the judgment." The appellant, however, did not file his motion for modification until November 25, 1981, far in excess of the ten days permitted by I.R.C.P. 59(e) for a motion to modify either the memorandum decision or the decree of property distribution.

105 Idaho at 305-06.

This Court reached a similar result in Johnston v. Pascoe, 100 Idaho 414, 599 P.2d 985 (1979), in which a motion under I.R.C.P. 59(e) had been filed 28 days after entry of summary judgment.

As pointed out by Justice Bistline in dissent, the trial court in the Pascoe case had not stated that it was denying the motion for untimeliness and that the record was clear that the motions were heard and determined on the court's view of their merit or lack thereof. 100 Idaho at 422. In the present case, the Department's denial of the motion to modify the decision likewise does not state that it is being denied because of its untimeliness. (Agency R. p. 142.)

In Wheeler v. McIntyre, 100 Idaho 286, 596 P.2d 798 (1979), involving a judgment of unreasonable forfeiture under an installment real estate contract the Court determined a motion to alter judgment filed 12 days after entry of judgment to be untimely. More importantly, however, the Court held that since the motion was not filed within the 10 day period authorized under I.R.C.P. 59(e) the trial court had no power to grant the requested relief. The Court stated:

The "Motion to Alter Judgment" was a motion brought under Rule 59(e), and was likewise subject to the strict 10 day requirement of Rule 59. Since the motion was not filed within 10 days of entry of judgment, the court had no power to grant the requested relief. [citing 6A Moore's Federal Practice § 59.12[2] (2d ed. 1974)]. The motion was properly denied.

100 Idaho at 289.

Finally, in the case of Williamsen Idaho Equipment v. Western Casualty & Surety Company, 95 Idaho 652, 516 P.2d 1166 (1973), the Court held that a motion for reconsideration filed 13 days after entry of judgment in a case involving recovery of costs of repairs to a truck was not timely under I.R.C.P. 59(e).

It may be readily concluded from a review of the above cases that the 10 day period to file a motion to alter or amend a judgment under I.R.C.P. 59(e) has been very strictly enforced by the Idaho Supreme Court. Rule 11 of the Department's Practice and Procedure Rules and Regulations allowing 20 days to file a petition for rehearing serves the same purpose as I.R.C.P. 59(e). The Department's Rule 11 should be enforced in a similar manner. See Department of Employment v. St. Alphonsus Hospital, 96 Idaho

470, 531 P.2d 232 (1975). Since Collins Bros. Corp. filed its motion to modify the decision 29 days after service of the Order Adopting Proposed Memorandum Decision and Order rather than within the 20 day period allowed it was untimely and did not toll the running of the 30 day appeal time provided by I.C. § 67-5215(b).

C. Failure to File a Timely Notice of Appeal is a Jurisdictional Defect Requiring Dismissal of the Appeal.

I.R.C.P. 83(s) states the consequences of a party's failure to comply with the time limits provided for appeals to the district court from decisions of administrative agencies. I.R.C.P. 83(s) states in part:

The failure to physically file a notice of appeal or notice of cross-appeal with the district court within the time limits prescribed by these rules shall be jurisdictional and shall cause automatic dismissal of such appeal upon motion of any party, or upon initiative of the district court. (Emphasis added.)

This rule of appellate practice is of long standing and of uniform practice. See, e.g., Briggs v. Golden Valley Land & Cattle Co., 97 Idaho 427, 434, 546 P.2d 382 (1976). I.A.R. 21, which governs appeals from the Industrial Commission or from the Public Utilities Commission to the Idaho Supreme Court, similarly provides that failure to file a timely notice of appeal is a jurisdictional defect.

The district court, in conformance with the rule of appellate practice contained in I.R.C.P. 83(s), should have granted the Department's motion to dismiss the appeal.

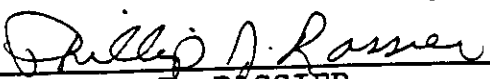
CONCLUSION

The Idaho Department of Water Resources respectfully requests this Court to reverse the decision of the district court and affirm the decision of the director approving application for permit no. 47-7680 upon conditions. The district court decision should be reversed because the stricken findings of fact are either supported by substantial evidence properly included in the record or are not essential to the Department's decision and therefore caused no prejudice to the respondent. Further, the conditions to the permit requiring that the permit holder beneficially use the heat resource of the geothermal ground water before using the water for irrigation are in accord with the local public interest requirements of I.C. § 42-203A.

If this Court does not affirm the decision of the director, the Department requests that the case be ordered remanded to the Department for further proceedings in accordance with the Court's decision.

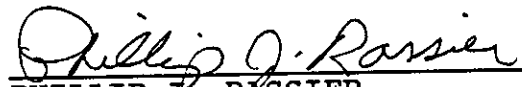
DATED this 23rd day of September, 1987.

JIM JONES
Attorney General


PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 1987, two true and correct copies of the foregoing APPELLANT'S BRIEF were mailed, postage prepaid, addressed to: Mr. Robert C. Weaver, WEAVER and MELANSON, 130 North Broadway, Buhl, Idaho 83316.


PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources