

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

COLLINS BROS. CORP., An Idaho
Corporation,

Appellant-Respondent
on Appeal.

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

Respondent-Appellant
on Appeal.

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

UNRAILED

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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,

Appellant-Respondent
on Appeal.

VS.

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

Respondent-Appellant
on Appeal.

APPELLANT'S REPLY BRIEF

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

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

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
ARGUMENT	1
I. THE DEPARTMENT'S FINDING OF FACT NO. 4 IS SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE	1
II. CONCLUSION OF LAW NO. 1 OF THE DEPARTMENT'S DECISION IS VALID	2
III. CONCLUSIONS OF LAW NOS. 3 AND 5 OF THE DEPARTMENT'S DECISION ARE VALID	3
A. The Record Contains Substantial, Competent Evidence that a Hot Water Aquifer Would be "Depleted" by the Collins Bros. Corp. Proposed Irrigation Use	3
B. Conclusion of Law No. 5 is Valid	4
IV. COLLINS BROS. CORP. IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL	5
A. Collins Bros. Corp. has not Cross-appealed the Denial of Attorney Fees by the District Court	5
B. Collins Bros. Corp. should not be Awarded Attorney Fees on Appeal to the Supreme Court	6
CONCLUSION	6
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
<u>Minich v. Gem State Developers, Inc.,</u> 99 Idaho 911 (1979)	5, 6
<u>Pichon v. L.J. Broekemeier, Inc.,</u> 108 Idaho 846 (Ct.App. 1985)	6
<u>Shokal v. Dunn, 109 Idaho 330 (1985)</u>	4
<u>Wing v. Amalgamated Sugar Co.,</u> 106 Idaho 905 (Ct.App. 1984)	6
<u>Statutes</u>	
Idaho Code § 42-203	5
Idaho Code § 42-203A	4
Idaho Code § 42-233	4
<u>Miscellaneous</u>	
I.A.R. 15	5
Black's Law Dictionary 525 (4th ed. 1968)	3

ARGUMENT

The appellant's brief of the Idaho Department of Water Resources (Department) acknowledges that procedural errors occurred before the Department. After a careful review of the record and the applicable law the appellant's brief concludes that the Department's decision should either be affirmed or remanded to the Department for further proceedings.

The response of Collins Bros. Corp. contained in the respondent's brief argues for upholding the reversal of the Department's decision by the district court without remanding the case to the Department. The Department provides the following rebuttal argument to the statements and arguments in the respondent's brief:

I.

THE DEPARTMENT'S FINDING OF FACT NO. 4 IS SUPPORTED
BY SUBSTANTIAL, COMPETENT EVIDENCE.

Collins Bros. Corp. argues at respondent's brief pages 13-14 that the evidence in the agency record listed at pages 19-20 of appellant's brief is insufficient to support finding of fact no. 4 which states:

4. Protestants have, since their wells were drilled, been able to obtain water under their rights by allowing it to flow from wells under artesian pressure without the necessity of pumping.

Collins Bros. Corp. argues that the evidence is inadequate, in part, because it does not indicate that a specific well drilled by Collins Bros. Corp. has affected the wells of the

protestants. The Department emphasizes that it is not the purpose of finding of fact no. 4 to establish the specific impact of the proposed Collins Bros. appropriation upon the existing wells of the protestants. The purpose of the finding is to state that the aquifer is artesian in nature. The evidence in the record supports this finding.

II.

CONCLUSION OF LAW NO. 1 OF THE DEPARTMENT'S DECISION IS VALID.

The Collins Bros. Corp. argues at page 16 of respondent's brief that no findings of fact exist to support conclusion of law no. 1 which states:

(1) Reductions in artesian pressure in wells within the Banbury Hot Springs Ground-water 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.

Collins Bros. argument misreads the purpose of conclusion of law no. 1. The conclusion represents the Department's interpretation of applicable law that potential reduction in artesian pressure which could occur as a result of pumping under the Collins Bros. approved permit does not constitute reason to deny the permit. It must be kept in mind that the Department did not deny the Collins Bros. application for permit. The Department approved the permit subject to the condition that the heat resource in the water not be wasted by using it only for irrigation purposes.

III.

CONCLUSIONS OF LAW NOS. 3 AND 5 OF THE DEPARTMENT'S DECISION ARE VALID.

The validity of conclusion of law nos. 3 and 5 were not addressed in the Department's initial brief because the district court decision did not hold them invalid. Collins Bros. argues in its respondent's brief at pages 16-18 that these two conclusions of law are invalid.

Conclusions of law nos. 3 and 5 are as follows:

(3) 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.

(5) It is proper that the effect of the use of the water for irrigation purpose on other water rights be considered.

(R. p. 17.)

A. The Record Contains Substantial, Competent Evidence that a Hot Water Aquifer would be "Depleted" by the Collins Bros. Corp. Proposed Irrigation Use.

Collins Bros. argues that the Department's conclusion of law no. 3 is invalid because there is no evidence that a hot water aquifer would be depleted by its proposed irrigation of 430 acres with thermal ground water. This argument centers on the interpretation of the word "deplete." The word deplete is defined by Black's Law Dictionary 525 (4th ed. 1968) as follows: "to reduce or lessen, as by use, exhaustion, or waste."

A reasonable meaning of the word "deplete" as used in conclusion of law no. 3 is to "reduce or lessen" or "waste" the artesian hot water "as by use" for a purpose that could be served

using a cold water source. The record certainly supports a conclusion that Collins Bros. intends to use the thermal water from the artesian aquifer and thereby reduce or lessen it to some extent. The use of the word deplete in conclusion of law no. 3 is not intended to imply that the proposed use of the thermal water for irrigation would necessarily exhaust the resource. It should again be noted that the approved permit does not prevent Collins Bros. from diverting water under the permit as long as it is first used for a purpose that benefits from the heat resource in the water.

Statutory authority for making conclusion of law no. 3 exists under the local public interest provision of I.C. § 42-203A(5). See Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985). The director of the Department determined that it is not in the local public interest to deplete an artesian hot water aquifer for irrigation use which could be served using cold water. The condition that the thermal water could be used for irrigation purposes only if first used for a purpose that requires the heat from the water is consistent with conclusion of law no. 3.

The wisdom of the director's decision was confirmed by the 1987 Idaho legislature which enacted a new statute providing that under most circumstances the "[u]sage of a low temperature geothermal resource primarily for reasons other than heat value is not a beneficial use of the resource." I.C. § 42-233 (Supp. 1987).

B. Conclusion of Law No. 5 is Valid.

Collins Bros. argues at pages 17-18 of respondent's brief that conclusion of law no. 5, which states it is proper that the effect of the use of the water for irrigation purposes on other water rights be considered, may be a correct statement of law but that there is no evidence of such effect. Since the Department's decision was not based upon the anticipated effect of the Collins Bros. diversion upon senior rights but rather upon the use of the hot water resource in the public interest, there does not appear to be a significant dispute over conclusion of law no. 5.

It is noted, however, that conclusion of law no. 5 is supported by finding of fact no. 8 which finds that I.C. § 42-203 requires the Department to consider the impact of a proposed appropriation upon other water rights.

IV.

COLLINS BROS. CORP. IS NOT ENTITLED
TO ATTORNEY FEES ON APPEAL.

Collins Bros. argues at page 28 of respondent's brief that it should be awarded attorney fees in this matter pursuant to I.A.R. 41 and I.C. § 12-117. It is unclear from the argument presented whether Collins Bros. is requesting attorney fees for the appeal before the district court, this Court, or both.

A. Collins Bros. Corp. has not Cross-appealed the Denial of Attorney Fees by the District Court.

Collins Bros. filed a memorandum of costs and attorney fees before the district court which was denied by an order entered

November 4, 1986. (R. p. 49.) The district court denied the request for costs and attorney fees because of the failure to raise attorney fees as an issue on appeal as required by I.A.R. 35(a)(5). The district court further ruled, citing Minich v. Gem State Developers, Inc., 99 Idaho 911, 591 P.2d 1078 (1979), that attorney fees on appeal were not justified because the Department's defense of the appeal was not unreasonable or frivolous. Collins Bros. Corp. has not cross-appealed pursuant to I.A.R. 15 from the district court's order denying attorney fees. Collins Bros. is, therefore, not in a position to present argument on this appeal in support of an award of attorney fees before the district court. See Pichon v. L.J. Broekemeier, Inc., 108 Idaho 846, 702 P.2d 884 (Ct App. 1985).

B. Collins Bros. Corp. should not be Awarded Attorney Fees on Appeal to the Supreme Court.

This is not the type of case in which the awarding of attorney fees on appeal is appropriate. Under Idaho appellate practice, attorney fees should only be awarded when the court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation. See Minich v. Gem State Developers, Inc. 99 Idaho 911, 591 P.2d 1078 (1979). The present appeal presents important legal issues of first impression in Idaho. The Department's pursuance of this appeal is not such that the Court could properly conclude that the Department's position is not only incorrect but so plainly fallacious that it could be deemed frivolous, unreasonable or without foundation. See Wing v. Amalgamated Sugar Co., 106 Idaho

905, 684 P.2d 307 (Ct.App. 1984).

Technically, Collins Bros. has not properly identified its claim for attorney fees as an issue in this appeal. I.A.R. 41 requires that a request for attorney fees be identified as an issue presented on appeal. The issues presented on appeal at page 8 of respondent's brief do not include a claim for attorney fees.

CONCLUSION

The Idaho Department of Water Resources respectfully requests that this Court 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.

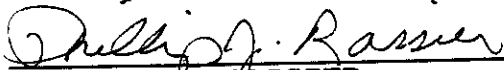
If this Court does not affirm the decision of the director, the Department requests that the case be ordered remanded to the Department for further proceedings in accordance with the Court's decision.

The Department respectfully requests that the Court not

award attorney fees to Collins Bros. Corp. in this appeal.

DATED this 17th day of November, 1987.

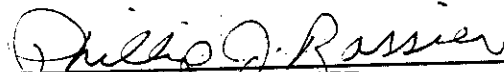
JIM JONES
Attorney General



PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 1987, two true and correct copies of the foregoing APPELLANT'S REPLY 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