

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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)

vs.)

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

Case No. 36030

RESPONDENT'S SUPPLEMENTAL BRIEF

Appeal from the Idaho Department of Water Resources

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Bobby Fleenor, Hearing Officer, Presiding

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STATEMENT OF PURPOSE

The purpose of this supplemental brief is to comply with the request of the District Court dated June 20, 1985, requesting additional briefing from the parties on two issues which the court finds to be of critical importance. In addition to the argument contained in this brief, Respondent continues to rely upon the statement of the case and argument contained in its Respondent's Brief dated October 9, 1984.

ISSUES FOR WHICH SUPPLEMENTAL BRIEFING IS REQUESTED

The District Court has requested supplemental briefing from the parties and certain amicus curiae on the following two issues:

1. The applicability and affect thereon of the Idaho Geothermal Resources Act, I.C. § 42-4001-4015 (1977 and Supp. 1985), to this case; and
2. The alleged conflict between Idaho Constitution Article 15, Section 3 and the local public interest standard existing in the 1978 amendment to I.C. § 42-203.

ARGUMENT

I.

THE PUBLIC POLICY CONCERNS INCORPORATED IN THE IDAHO GEOTHERMAL RESOURCES ACT APPLY TO ALL USES OF THE RESOURCE, BUT THE BONDING AND PERMIT REQUIREMENTS APPLY ONLY TO USES CONNECTED WITH HIGH TEMPERATURE GEOTHERMAL HEAT.

A. The Idaho Geothermal Resources Act Is Intended To Differentiate Between Low Temperature And High Temperature Geothermal Sources.

The Idaho Geothermal Resources Act ("Act") regulates the development of the unique and limited natural geothermal resources within the state. Ch. 301, § 1, 1972 Idaho S. L. 749. "Geothermal resource" means the natural heat energy of the earth, located in any position or at any depth below the surface of the earth that may be extracted from the material medium of any geothermal resource. I.C. § 42-4002(c). Only petroleum, oil, hydrocarbon gas or other hydrocarbon substances are excluded by the Act as not being material mediums which transmit the natural heat energy of the earth. I.C. § 42-4002(e). All other substances found below the earth's surface which contain or transmit heat, including naturally heated warm water, fluids or brines and superheated water (transforms into steam upon exposure to the atmosphere), brines, associated gases or steam are material mediums. I.C. § 42-4002(e).

Geothermal experts, federal agencies, federal statutes, sister state statutes, the Department of Water Resources, and the Act differentiate between low temperature (primarily water) and high temperature geothermal sources. See, e.g., E. Berman,

GEOHERMAL ENERGY 22-23 (1975); Geothermal Energy Research, Development and Demonstration Act of 1974, 30 U.S.C. §§ 1101 et seq.; Geothermal Steam Act of 1970, 30 U.S.C. §§ 530, 1001 et seq.; WASH. REV. CODE § 79.76.303(1) (1985 Supp.); UTAH CODE ANN. § 73-22-3(5) (1983 Supp.); Forward to State of Idaho, Department of Water Resources, Rules and Regulations: Drilling for Geothermal Resources, November 1982 and other editions. The temperature of the medium controls both the manner in which the medium is handled and its utilization to maximize the energy source.

B. High Temperature Geothermal Sources Have the Unique Capacity of Economical Generation of Electricity

High temperature geothermal sources have the unique capability of economical generation of electricity coupled with minimization of environmental degradation provided that: (1) high pressure gases and venting are controlled to avoid explosions, See H. Armstead, GEOHERMAL ENERGY, 121-30 (1978); and (2) the high contaminate content of material mediums transmitting the heat from deep depths below the surface are prevented from contaminating upper level ground water aquifers. P. Cheremisinoff and A. Morrissi, GEOHERMAL ENERGY TECHNOLOGY ASSESSMENT 136-39 (1976). The geothermal resources are "indirectly" used to produce electricity, i.e., the material medium is used to heat the water or other working liquid which transforms into vapor and turns the turbines of a generator. The current temperature threshold to enter the economical range of electrical generation

is in excess of 325°F. See, P. Kruger and C. Olte, GEOTHERMAL ENERGY, 163-75 (1973). Utilization of a binary cycle, with another gas such as freon, may bring the temperature threshold as low as 250°F. As a general rule, temperatures increase with an increase in depth below the earth's surface. Geothermal Resources Council Special Report No. 7, DIRECT UTILIZATION OF GEOTHERMAL ENERGY: A TECHNICAL HANDBOOK 1-3 (1979). Power generation from geothermal resources is relatively new and currently limited, but potentially is an attractive and efficient energy source. See H. Armstead, supra at 1-12.

Low temperature geothermal resources, the definition of which has become synonymous with low temperature hot waters, are best utilized through "direct" heat application. Typical direct heat applications include those uses mentioned in I.C. § 42-4003(e). While indirect electrical generation is relatively recent, direct heat applications have been utilized for centuries throughout the world and in Idaho.

C. Low Temperature Geothermal Waters Present Fewer Safety And Environmental Hazards Than High Temperature Geothermal Resources

Use of low temperature hot waters do not present the same safety and environmental hazards encountered when utilizing high temperature geothermal resources. These low temperature sources in Idaho are usually within 1,000 feet of the surface. See Forward State of Idaho, Department of Water Resources, Rules and Regulations: Drilling for Geothermal Resources, August 1975, on

file at the Department of Water Resources, Boise. They do not contain the high pressure fluid and gases encountered with deeper high temperature sources. The low temperature hot waters may actually be a component of the ground water aquifer and are typically less saturated with minerals and contaminants. See I.C. § 42-4005(e). Low temperature hot waters require substantially less sophistication and precautions to safely and efficiently utilize their energy in comparison with high temperature sources.

These distinctions are clearly realized in geothermal legislation. Oregon excludes heat sources with a bottom temperature of less than 250°F. and a depth less than 2,000 feet from coming under the definition of a geothermal resource. OR. REV. STAT. § 522-025. (1983). Federal research ignores sources with a temperature below 150°F. See Geothermal Resources Committee, Committee Minutes, P.18, November 9, 1972. Alaska and Utah require temperatures greater than 120°C. ALASKA STAT. § 42-06.060(4) (1983); UTAH CODE ANN. § 73-22-3(b) (1983 Supp.). California provides reduced bonding requirements for low temperature geothermal exploration and may exclude compliance entirely at the discretion of the director of public resources. CAL. PUB. RES. CODE §§ 3725, 3757.2 (West 1984). The state of Washington has comparable legislation to the Act which excludes "by-product" uses such as irrigation, space heating and heating greenhouses. WASH REV. CODE § 79.76.060 (1985 Supp.). Further, the Washington legislation excludes natural heat energy and

mediums from which it is not technologically practical to produce electricity. Id. at § 79.76.030(I). Clearly, the legislatures of Idaho's sister states did not intend to have development and maximization of low temperature geothermal uses thwarted by stringent construction specifications designed for high temperature uses and the maintenance of perpetual bonds.

The purpose of these varying statutes is similar to the policy behind the Act:

The legislature does therefore declare that it is the policy and purpose of this state to maximize the benefits to the entire state which may be derived from the utilization of our geothermal resources, while minimizing the detriments and costs of all kinds which could result from their utilization. This policy and purpose is embodied in this act which provides for the immediate regulation of geothermal resource exploration and development in the public interest.

Ch. 301, § 1, 1972 Idaho S. L. 750.

D. Low Temperature Uses Of Geothermal Water Are Excluded From The Application Requirements Of The Act.

The Act was created in an "emergency" situation in reaction to the energy crisis of the 1970s in an effort to realize the energy from high temperature geothermal resources. Ch. 301, § 18, 1972 Idaho S.L. 749. The Raft River area was viewed as one of the most promising high temperature geothermal areas in the United States. E. Berman, supra at 299-301. Admittedly, the Act was hastily and in some instances not clearly drawn. Read in its entirety with knowledge of its background, the Act's permit and bonding requirements are clearly not applicable to uses connected

with low temperature geothermal resources. The public policy concerns regarding the maximization of geothermal resources expressed in the Act are, however, applicable to all uses of the resource.

Beneficial uses such as irrigation, which utilize geothermal water, but fail to use the heat or material medium as a mineral source or energy source are governed by I.C. § 42-203A (1985 Supp.). I.C. § 42-4003(b). The statute states:

(b) Any application for a permit to construct a well which is made pursuant to this section, if the construction or operation of such well will involve the use of water, or if such well may be expected to yield water to be used, for any beneficial purpose, other than as a mineral source, an energy source, or otherwise as a material medium, shall be accompanied by an application to appropriate the public waters of this state in the form prescribed in chapter 2, title 42, Idaho Code, and by regulations adopted pursuant thereto, and such application to appropriate the public waters shall be governed in all respects by that chapter. (Emphasis added)

I.C. § 42-4003(b).

Similarly, new uses of low temperature geothermal resources occurring after January 1, 1972, such as use in a greenhouse, hot house, swimming pool, hot springs bath, hot water fish propagation facility, space heating plant, or similar facility are excluded from the application and bonding requirements of the Act provided that the user obtains a valid water permit and provides the director with sufficient information for the director to administer the remainder of the Act. I.C. § 42-4003(e). The exemption under Section 42-4003(e) reads as follows:

(e) Nothing in this act shall be construed as affecting any valid, vested water rights for water in use on or before January 1, 1972. No person operating or proposing to operate a greenhouse, hot house, swimming pool, hot springs bath, or hot water fish propagation facility, space heating plant, or similar facility, unless such operation is in conjunction with geothermal resource use not specified in this subdivision:

(1) shall be compelled to comply with any of the permit requirements of this act if such operation was in existence on January 1, 1972, and

(2) shall be compelled to comply with the geothermal resource permit requirements under this act if such person obtains a valid water right permit for such operation and provides the director with such data as he may require for the proper administration of this act.

The Department of Water Resources in its rules and regulations implementing the Act has consistently interpreted the Act to exempt the uses described under subsections (b) and (e) of 42-4003 from the permit and bonding requirements of the Act. Forward To State of Idaho, Department of Water Resources, Rules and Regulations: Drilling For Geothermal Resources, editions August, 1975, June 1978, November, 1982. This administrative interpretation of I.C. § 42-4003(e) by the Idaho Department of Water Resources has been in place since the inception of the Act. This construction of the statute by the executive and administrative officers of the state is entitled to great weight and should be followed unless there are cogent reasons for a change. Idaho Public Utilities Commission v. V-l Oil Co., 90 Idaho 415, 420, 412 P.2d 581, 583 (1966); Services, Inc. v. Neill, 73 Idaho 330, 334, 252 P.2d 190, 192-3 (1953); McCall v. Potlatch Forests, 69

Idaho 410, 413, 208 P.2d 799, 801 (1949); Breckenridge v. Johnston, 62 Idaho 121, 132, 108 P.2d 833, 837 (1941).

The interpretation of an administrative agency is entitled to more weight where it was promulgated close in time to passage of the statute and has endured. State of Idaho Ex Rel. Andrus v. Kleppe, 417 F. Supp. 873, 880 (D.C. Idaho, 1976). Further, a long and consistently practiced interpretation of an ambiguous statute by the enforcement official will also be given weight. Haworth v. Berntsen, 68 Idaho 539, 546, 200 P.2d 1007, 1011 (1949). If extended over time, the interpretation leads to the conclusion that the statute has received the tacit approval of the legislature. Wedgwood v. Hubbard, 63 Idaho 791, 795-6, 126 P.2d 561, 563 (1942). This interpretation has been left unaltered by three legislative amendments to other provisions of the Act. Ch. 301 § 2, 1972 Idaho S.L. 749; am. ch. 20 1974 S.L. 533; am. ch. 297 1974 S.L. 1753; am. ch. 238 1980 S.L. 526. There are no cogent reasons for upsetting the Department of Water Resources' interpretation of the Act.

E. The Department of Water Resources' Interpretation of I.C. § 42-4003(e) is correct.

Respondent anticipates that amicus curiae, College of Southern Idaho (CSI) will contest Respondent's long-standing interpretation of I.C. § 42-4003(e). Specifically, CSI construes subparagraphs (1) and (2) of I.C. § 42-4003(e) as dual requirements to be satisfied before a person is exempt from complying with the permit and bonding requirements of the Act.

Basically, CSI argues that the last word of I.C. § 42-4003(e)(1), which is "and", should be given its normal conjunctive meaning. This interpretation fails to consider the history of the enactment, contemporaneous construction, public policy to be served, other legislation upon the same subject and the evils to be remedied under the Act. CSI's proposed reading of the statute is contrary to sound principles of statutory construction. See Knight v. Employment Sec. Agency, 88 Idaho 262, 266, 398 P.2d 643, 645 (1965). In order to achieve the clearly intended purposes of the statute it is necessary to read the "and" at the end of section 42-4003(e) in the disjunctive. Such a reading is not contrary to accepted rules of statutory construction. A leading treatise on statutory construction describes the problems created by the interchangeable use of the words "and" and "or" as follows:

There has been...so great laxity in the use of these terms that courts have generally said that the words are interchangeable and that one may be substituted for the other, if to do so is consistent with the legislative intent.

1A Sutherland Stat. Constr. § 21.14 4th Ed, (1972).

The Washington court has, for example, observed that, "[t]he word at issue 'and' has been frequently interpreted by the courts to mean 'or'." State v. Keller, 98 Wash. 2d 725, 728, 657 P.2d 1384, 1387 (1983).

Respondent has consistently interpreted I.C. § 42-4003(e)(1) and (2) to read in the disjunctive. As the Idaho court has held, this administrative interpretation should normally be given great

weight:

A construction given a statute susceptible of various constructions by the executive and administrative officers of the state is entitled to great weight and will be followed by the court unless there are cogent reasons for change.

Ada County v. Bottolfson, 61 Idaho 363, 374, 102 P.2d 287, 293 (1940).

Respondent argues that CSI's interpretation would lead to absurd results which would conflict with the purpose of the Act and raise issues concerning constitutional protections of vested property interests. The "and" in I.C. § 42-4003(e)(1) must be read as "or" for I.C. § 42-4003(e) to achieve a reasonable result. "The significant point is that communication does not take place in a vacuum. It [the language] always occurs in a relational situation" and should be construed in light of that relational situation. 2B Sutherland, supra, § 45.01 (1984). "Statutory enactments should be read and construed in the light of conditions, affairs and circumstances existing at the time of their adoption." Young v. Wright, 77 Idaho 244, 246, 290 P.2d 1086, 1087 (1955); State v. Fite, 29 Idaho 463, 464, 159, P. 1183, 1184-85 (1916). Further, statutes must be construed as a whole without separating one provision from another. First Am. Title Co. of Idaho, Inc. v. Clark, 99 Idaho 10, 12, 576 P.2d 581, 583 (1978).

Crucial to the Respondent's reading of the statute is the first sentence of subsection (e) which states: "Nothing in this act shall be construed as affecting any valid, vested water

rights for water in use on or before January 1, 1972." Important here is the fact that prior to 1963 ground water in Idaho could be appropriated by applying the water to beneficial use without the need for a permit. See, Ex Rel Tappen v. Smith, 92 Idaho 451, 444 P.2d 412 (1968). Keeping the above two factors in mind, it is observed that subparagraphs (1) and (2) of 42-4003(e) cannot be read as dual requirements without being contradictory to the first sentence of subsection (3) because of a possible adverse affect upon vested beneficial use rights to ground water acquired prior to 1963.

For example, assume the existence of a 1950 beneficial use (non permit) ground water right used for heating a greenhouse. Under the dual-requirement reading of the statute the 1950 water right would satisfy subparagraph (1) but not subparagraph (2). The second paragraph would require the holder of the 1950 right to hold a valid water right permit which does not exist because the right is one of beneficial use. There is no procedure by which the holder of the 1950 water right could apply to the Department for a permit and retain the 1950 priority. The priority date would instead become the date of the filing of the application for permit. This example shows that a dual-requirement reading of the statute would be impossible to satisfy in every instance without adversely affecting certain water rights vested prior to January 1, 1972.

A dual-requirement reading of the statute contradicts the

first sentence of subsection (e), and would raise potential questions of due process and the taking of vested property rights without compensation in violation of Idaho Constitution, art. 1, §§ 13 and 14.

There are other indications that subparagraphs (1) and (2) were not intended to operate as dual requirements. Consider that the second sentence of subsection (e) begins, "No person operating or proposing to operate a greenhouse...." If subparagraphs (1) and (2) were intended to serve as dual requirements there would be no reason for the words "or proposing to operate." Either these words would have to be ignored or we would have to accept a reading of the statute which refers to, "[n]o person...proposing to operate a greenhouse...if such operation was already in existence...." Note that when subsection (e) is read as a dual requirement, the repeated language of "shall [not] be compelled to comply" in Subsection (2) is both repetitious and surplusage. "Statutes should not be construed so as to make mere surplusage of any of the provisions included therein. Pettis Ex Rel. United States v. Morrison-Knudsen Co., 577 F.2d 668, at 673 (1978); Sherwood v. Roberts, 103 Idaho 535, n.6 at 538, 650 P.2d 677, 680.

Furthermore, subparagraph (1) provides that certain persons "shall [not] be compelled to comply with any of the permit requirements of this act," whereas subparagraph (2) provides that certain persons "shall [not] be compelled to comply with the

geothermal resource permit requirements under this act." Note also that when subsection (e) is read as a dual requirement, the repeated language of "shall [not] be compelled to comply" in Subsection (2) is both repetitious and surplusage.

In addition, use of the varied language in the two subparagraphs does not appear to be inadvertant. Subparagraph (1) provides that for operations in existence on January 1, 1972, none of the permit requirements of the geothermal act apply. Other ground water permit requirements may or may not apply to the operation depending upon whether it came into existence before or after the 1963 effective date of the mandatory ground water permit statute.

Subparagraph (2), on the other hand, is couched in alternative language, and provides that for certain uses a person need not comply with the geothermal permit requirements if a valid water right permit is obtained. Thus, it is suggested that the phrase "any of the permit requirements of this act" in subparagraph (1) is referring to the two alternative permit requirements described in subparagraph (2). That is, neither a geothermal permit nor a water permit is required by this particular Act. Such a reading is consistent with the Respondent's interpretation of the statute. Further, such a reading makes it impossible to consider the two subparagraphs as dual requirements which must be satisfied before a person is exempt from the permit requirements of the geothermal act.

This interpretation also furthers the policy of the Act to develop low temperature geothermal resources while minimizing the detriments and costs of the application process and bonding requirements. "The particular words of a statute should be construed, if possible, to give meaning to all of its parts in light of legislative intent." Bastian v. City of Twin Falls, 104 Idaho 307, 310-11, 658 P.2d 978, 981-82 (1983).

F. Appellant Is Not Compelled To Comply With The Application Procedure Of The Geothermal Resources Act For Its Proposed Uses.

Appellant's proposed use of 6.60 cfs of geothermal ground water for irrigation is for a beneficial purpose "other than as a mineral source, an energy source, or otherwise as a material medium, consequently this application for appropriation is governed by I.C. § 42-203. I.C. § 42-4003(b).

The three other proposed uses aggregating to 8.0 cfs (0.40 domestic; 2.70 greenhouse; 4.90 space heating) are also governed by I.C. § 42-203 due to the fact that they are low temperature geothermal uses excluded from complying with the application provision of the Act. I.C. § 42-4003(e). Although Appellant is not required to comply with the application procedure of the Act, Appellant is required to provide the director with sufficient information in order to properly administer the policy and purpose of the Act under the local public interest criterion in I.C. § 42-203.

II.

THE LOCAL PUBLIC INTEREST STANDARD OF I.C. § 42-203 IS CONSTITUTIONAL

A. Appellant's Right to Appropriate Geothermal Ground Water Was Not Denied, But Merely Regulated Under I.C. § 42-203 In Accordance With Art. 15 § 3.

Appellant was not unconstitutionally denied the right to appropriate water for irrigation. Appellant's right to appropriate is subject to regulation requiring that it must utilize the special geothermal aspect of the water in a manner that would not waste the resource. The regulation of the manner and method of appropriating and applying the public waters of the state to a beneficial use is not a denial, and is in accord with Idaho Constitution art. 15 §§ 1 and 3. State Ex Rel. Tappan v. Smith, 92 Idaho 451, 456, 444 P.2d 412, 417 (1968). In Smith the supreme court upheld the statutory regulations of I.C. § 42-229 which make the permit system for appropriating ground water mandatory. The court stated that "[t]his section of the statute does not deny the right to appropriate ground water, but regulates the method and means by which one may perfect a right to the use of such water." Id. Article 15 § 3 has "never been interpreted to work an absolute impediment upon the state's right to deny certain appropriations of water." Note, The Effect of Bonnie and Clyde Upon the Acquisition of Water Rights in Idaho, 6 Idaho L. Rev. 105, 113 (1969). Cases regulating the right to appropriate water include: (1) the finding of the regulation of I.C. §§ 42-103 and 42-226 constitutional in Smith, supra, (2) voiding appropriations initiated in trespass contrary to state

policy, Lemmon v. Hardy, 95 Idaho 778, 519 P.2d 1168 (1974); Marshall v. Niagra Springs Orchard Co., 22 Idaho 144, 125 P.208 (1912); Tobey v. Bridgewood, 22 Idaho 566, 127 P.172 (1912) (suggesting the appropriation may be void only as to the person whose land was trespassed upon); Bassett v. Swenson, 51 Idaho 256, 5 P.2d 256 (1931); Jones v. McIntire, 60 Idaho 338, 91 P.2d 373 (1939); Idaho Power Co., v. Buhl, 62 Idaho 351, 111 P.2d 1088 (1941) (neither a constitutional use right nor a permit to appropriate may be acquired through trespass); see also Youngs v. Regan, 20 Idaho 275, 118 P. 499 (1911); (3) the use of the phrase "reasonable pumping levels" in I.C. § 42-226 interpreted to mean that "senior appropriators are not necessarily entitled to maintenance of historic [ground water] pumping levels," Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 584, 513 P.2d 627, 636 (1973); (4) denial of the right to appropriate stream water under I.C. § 42-203 because the use was speculative, Lemmon v. Hardy 95 Idaho 778, 519 P.2d 1168 (1974); and (5) upholding the application of the local public interest criterion of amended I.C. § 42-203 to a pending application for permit to appropriate surface water. Matter of Hidden Springs Trout Ranch, 102 Idaho 623, 636 P.2d 745 (1981).

Smith and the trespass line of cases alone provide adequate precedence for the constitutional regulation of the right to appropriate water. "If the state can deny appropriations to trespassers because of a public policy against trespassing, then

it should follow that the state can also deny appropriations to persons proposing water uses in conflict with the public interest." Grant, The Idaho Water Plan: Two Threshold Constitutional Problems and Suggested Solutions, 15 Idaho L. Rev. 442, 504 (1979). Having addressed the state's right to regulate the use and manner of the appropriation of water rights, the next issue is the constitutionality of the local public interest standard.

B. Regulation Under The Local Public Interest Standard Is Consistent With Article 15 § 3.

A study of the historical context and enactment of Idaho Constitution art. 15, § 3, as discussed in detail by Professor Grant, reveals that the probable intent of the framers was not to give appropriators an absolute right to water. Grant, supra at 492-503. "The more likely intent in 1889...was merely to avoid the uncertainty surrounding irrigation development experienced in Colorado and the upheaval that recognition of a dual system of water rights had produced in California." Id. at 498. Justice Bakes, concurring in State, Dept. of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974) stated that the intent of the framers was not to limit the constitution of Idaho to inflexible terms, but "was used to mandate the supremacy of the prior appropriation doctrine over the riparian system." Id. at 449, 530 P.2d at 933.

The Colorado Supreme Court came to the same conclusion in interpreting a constitutional provision very similar to Idaho's

in Colorado River Water Conservation Dist. v. Colorado Water Conservation Board, 197 Colo. 473-74, 594 P.2d 570 (1979).
Colo. Const. art. 16, § 6 reads:

The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

The court interpreted the first sentence as follows: "The reason and thrust for this provision was to negate any thought that Colorado would follow the riparian doctrine in the acquisition and use of water." Id. at 474, 594 P.2d at 573.

The framers did not exclude the reasonable regulation of water rights on public interest grounds. "[N]o state yet had a mandatory permit system, let alone a mandatory permit statute with a provision for disapproval of permits on public interest grounds [in 1889]." Grant, supra at 498.

The framers were cognizant of the need for Idaho to develop an appropriation system to be operated in the public interest. I. N. Coston, one of the drafters, explained the purpose of art. 15 § 3 as follows:

We did not desire to incorporate all the details of an irrigation system that should be necessary to meet all exigencies of the future or all circumstances that surround us. We only aimed to

incorporate here a foundation upon which future legislatures might create a law to the best advantage of the public good.

Idaho Constitutional Convention. Vol. II. Proceedings and Debates, 1122-1124 (1889).

The purpose of building upon art. 15 § 3 for the best advantage of the public good was furthered by the 1964 amendment to the Idaho Constitution approving of art. 15 § 7. Respondent's prior arguments contained in Respondent's Brief concerning the statutes implementing art. 15 § 7 and the State Water Plan are hereby incorporated in this supplemental brief by reference.

C. The Local Public Interest Standard Is Not Unconstitutionally Vague.

Generally, a statute is presumed to be constitutional and the party challenging the statute must prove its invalidity beyond a reasonable doubt. Methodist Hospital of Sacramento v. Saylor, 49 Cal App3d 464, 488 P.2d 161, 97 Cal. Rptr. 1 (1975). In addition, if reasonably possible, a statute should be construed so as to avoid a declaration of invalidity for vagueness. See Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L. Ed.2d 539 (1974). It is also possible to refer to other related constitutional provisions and statutes, such as Idaho Const. art. 15 § 7; other statutes implementing art. 15 § 7; and the Idaho Geothermal Resources Act, I.C. §§ 42-4001-4015, in order to avoid declaring a statute void for vagueness. 2A Sutherland, supra at § 45.12 n.16; see State v. Tippie 269 Or. 661, 665, 525 P.2d 1315, 1317 (1974).

The existence of the local public interest standard under I.C. § 42-203 is an integral part of the State Water Plan and art. 15, § 7. The statement of purpose for H.B. 620 which amended I.C. § 42-203 to add the local public interest criterion provided:

Inclusion of this criteria in the code should help to bring about more beneficial use of water and protect the interest of all waterusers.

H.B. 620, 2nd Reg. Sess. 44th Idaho Leg. 1978, on file at the Idaho State Law Library.

The modern meaning of a "beneficial use" entails more than the permittee's personal plans, for "even if the user's benefits exceed his costs, someone must also count the cost he imposes on others." Trelease, Alaska's New Water Use Act 2 Land & Water L. Rev. 1, 26 (1967). "Foregone benefits of alternative uses of the water are "induced adverse effects" of a project, to use the economist's language, and must be counted as costs. Id. at 27.

Precise definition of the local public interest is impossible in light of the vast numbers of potential "induced adverse effects." The Idaho Water Resource Board has, however, adopted a State Water Plan which has been implemented by the Legislature to provide guidance. Under facts similar to the present case, the Colorado Supreme Court noted prior case law which stated:

In cases dealing with other areas of legitimate legislative activity where precision was determined to be impossible...such broad standards as 'reasonable' and 'necessary' have been found sufficient as standards, although incapable of precise definition.

Colorado River, supra, at 479, 594 P.2d at 577.

The term "local public interest" is not so vague that it does not indicate the task which art. 15 § 7 and the Idaho Legislature intended the Idaho Department of Water Resources to accomplish. See Id.

D. Respondent Constitutionally Regulated Appellant's Appropriation Of Geothermal Ground Water.

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Appellant's water appropriation is located in a geographic area designated as a "geothermal area" under I.C. § 42-4003(f). Consequently, even though Appellant is exempt from complying with the permit requirements of the Act, the Act may be considered in calculating the "induced adverse effects" under the local public interest standard. Appellant's proposed use of geothermal water for irrigation fails to utilize the unique attribute of heat. This failure would result in distribution of geothermal energy and constitutes waste under I.C. § 42-2002(h)(2) and is contrary to the legislative declaration of policy to maximize the benefits to the entire state from utilization of geothermal energy. Ch. 301, § 1, 1972 Idaho Sess. Laws. 749.

Furthermore, this unreasonable, inefficient means of diverting geothermal ground water is "inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest." Baker v. Ore-Ida Foods, Inc. 95 Idaho 575, 583, 513 P.2d 627, 635 (1973). The costs incurred by the public include the loss of geothermal energy that another appropriator may be willing to utilize. Further,

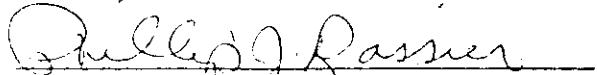
Appellant already has cold water appropriation rights for a significant portion of the land sought to be irrigated with geothermal water and made no showing that additional cold water was not available. Clearly it was in the local public interest to prevent the waste of this geothermal water resource.

CONCLUSION

The Idaho Department of Water Resources respectfully requests the District Court to affirm the decision of the director in approving application for permit no. 47-7680 upon conditions because the application and bonding provisions of the Idaho Geothermal Resources Act do not apply and because the local public interest criterion of I.C. § 42-203 is constitutional.

DATED this 22nd day of July, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 1985, two true and correct copies of the foregoing RESPONDENT'S SUPPLEMENTAL BRIEF was mailed, postage prepaid to:

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