

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 BRIEF

Appeal from the Idaho Department of Water Resources

A. Kenneth Dunn, Director
Bobby Fleenor, Hearing Officer, Presiding

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STATEMENT OF THE CASE

Nature of the Case

This case involves an appeal of an administrative decision by the Idaho Department of Water Resources (Department) approving appellant's application to appropriate water upon a condition prohibiting the use of geothermal water solely for irrigation purposes under the local public interest criterion of I.C. § 42-203.

Course of the Proceedings

1. On November 20, 1980, application for permit no. 47-7680 was filed with the Department to appropriate 14.60 c.f.s. of ground water. The proposed uses of the water are to supply space heating for 110 homes (reduced to 99 at conference), commercial and recreation use, and irrigation of 430 acres of land. (R. pp. 1, 17).

2. On March 31, 1982, a conference was held before the Department at which the applicant-appellant and several protestants to the application were represented. 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. (R. p. 39).

3. On August 4, 1983, the Department issued a Proposed Memorandum Decision and Order approving the application for permit subject to the following pertinent condition:

(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.

(R. pp. 54, 60).

4. On August 31, 1983, the Department issued an Order Adopting Proposed Memorandum Decision and Order, no exceptions having been filed within the 15 day period provided. (R. p. 140).

5. The Department's Order Adopting Proposed Memorandum Decision and Order was sent to the applicant-appellant and other interested parties on September 7, 1983. (R. pp. 5, 53).

6. On October 6, 1983, the Department received from applicant-appellant a Motion To Modify In Part The Memorandum Decision, asking for a reconsideration of the decision based upon the fact that the applicant had previously expended approximately \$95,000 in developing and installing an irrigation system for use in conjunction with the permit. (R. p. 141).

7. On December 5, 1983, the Department issued an order denying the motion to modify the decision. (R. p. 142).

8. On January 5, 1984, the appellant filed its petition of appeal with the District Court appealing from the Department's Memorandum Decision and Order dated August 4, 1983.

9. On February 16, 1984, the Department filed with the District Court the Agency's Record on Appeal.

10. On or about March 23, 1984, appellant filed its Motion to Augment Record with a copy of water right permit no. 47-7705 in the name of Dan C. Skeem and/or Wayne B. Skeem. The motion was denied April 27, 1984 because of appellant's failure to meet the 20-day time limitaion of I.R.C.P. 83(q).

11. Appellant's appeal brief refers to and makes a local public interest argument based upon the Department's approval of water right permit no. 47-7705. (Appellant's Brief at 16-17).

Statement of the Facts

1. Application for permit no. 47-7680 to appropriate the public waters of the State of Idaho was filed with the Department on November 20, 1980 by Royal Crest Inc. (R. p. 1).

2. The application sought to appropriate 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

On December 10, 1981 the application was amended to show the geothermal use to be for the heating of 110 homes. (R. p. 1, 56). The commercial use is described as being for use in greenhouses. (R. p. 1).

3. The points of diversion for the three artesian wells are described as follows: SE1/4NE1/4, SE1/4SE1/4, Section 10, SE1/4NW1/4, Section 14, Township 9 South, Range 14 East, B.M., Twin Falls County. (R. pp. 1, 56).

4. The location for the proposed irrigation use is 430 acres described as 245 acres in Section 10, 70 acres in Section 11 and 115 acres in Section 14, all within Township 9 South,

Range 14 East, B.M., Twin Falls County. (R. pp. 2, 56).

5. Surface water rights are claimed to exist for the irrigation of 195 of the 430 acres proposed to be irrigated with the geothermal ground water sought to be appropriated under application for permit no. 47-7680. (R. p. 2).

6. The application for permit states that, after cooling, excess geothermal water will be turned into Mud Creek and an unnamed stream tributary of Silo Creek. (R. p. 2).

7. The application was assigned from Royal Crest, Inc. to Collins Bros. Corp. on December 15, 1981. (R. pp. 15, 16).

8. Protests to the amended application were filed on January 11, 1982 by Fred and Frances Kambrich, Mr. and Mrs. Dale Durrant, Mr. and Mrs. G. W. Anderson, and Robert S. Luntley. (R. pp. 19, 20, 21.).

9. The matter was set for hearing before the Department on March 31, 1982. At the close of a pre-hearing conference, the parties agreed to allow the Department to reach a decision based upon the conference and upon the records of the Department. (R. p. 39).

10. Included in the record after the conference was a letter from protestant Robert S. Luntley received by the Department on April 7, 1982. (R. p. 40). A copy of the Luntley letter was sent to the counsel for the applicant on April 7, 1983. (R. p. 43).

11. The April 7, 1982 letter from protestant Luntley 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.

(R. p. 40).

12. On April 20, 1983, the Department received a response from counsel for the applicant to the April 7, 1982 letter of protestant Luntley. The response letter does not respond to Mr. Luntley's assertion that the use of warm geothermal water for irrigation purposes is contrary to the public interest.

(R. pp. 44-45).

13. Water right permit no. 47-7261 with a proposed 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 the appellant using geothermal water under permit 47-7680. (R. pp. 120-123). Permit no. 47-7261 was assigned to appellant on December 15, 1981. (R. p. 16).

14. Water right permit no. 47-7551 with a proposed 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. (R. pp. 130-133). Permit no. 47-7551 was assigned to appellant on December 15, 1981. (R. p. 16).

15. The three artesian geothermal wells authorized as points of diversion under permit no. 47-7680 are located within the areal extent of the geothermal reservoir in the Banbury Hot Springs area. (R. pp. 2-3, 47, 30-32). The reported temperature of the water from Collins Bros. wells number 2 and 3 are 82 degrees and 93 degrees Fahrenheit respectively. (R. pp. 108, 110). The temperature of Collins Bros. well number 1 was not reported by the well driller. (R. p. 107).

16. 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. (R. pp. 67-68).

17. 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.

(R. p. 68).

18. 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. (R. p. 67).

19. Wells owned by persons protesting appellant's application for permit no. 47-7680 are located within the Banbury Hot Springs area and produce thermal water with temperatures ranging from 86 to 104 degrees Fahrenheit. (R. pp. 104, 105, 106).

20. The Banbury Hot Springs area is described as being located immediately south of the Snake River between Salmon Falls Creek and Deep Creek in Twin Falls County. (R. p. 67).

21. On April 12, 1982, the Director of the Department created the Banbury Hot Springs Groundwater Management Area pursuant to I.C. § 42-233b, which identifies the area as one that may be approaching the conditions of a critical ground water area. (R. p. 112).

Issues Presented on Appeal

Appellant has presented seven issues on appeal. Respondent presents no additional issues on appeal.

1. Whether the agency's findings of fact must be supported by the evidence?

2. Whether the agency's conclusions of law must be supported by the evidence?

3. Whether the agency's conclusions of law must be consistent with Idaho law?

4. Whether the agency's conclusions of law must be consistent with other conclusions of law in the same case?

5. Whether the agency's order must be supported by and consistent with the findings of fact and conclusions of law?

6. Whether the agency's failure to approve appellant's application in full represents an unconstitutional denial of appellant's right to appropriate water?

7. Whether the "local public interest" standard of I.C. § 42-203 is unconstitutionally vague?

POINTS AND AUTHORITIES

I.

The standard of review by the District Court of the Idaho Department of Water Resources' decision is the substantial evidence rule. I.C. §§ 67-5215(g) and 42-203 (Supp. 1984); Van Orden v. State Dept. of Health and Welfare, 102 Idaho 663 (1981); Grindstone Butte Etc. v. Idaho, P.U.C., 102 Idaho 175 (1981).

II.

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).

III.

The word "deplete" means to reduce or lessen, as by use, exhaustion, or waste. Black's Law Dictionary 525 (4th ed. 1968).

IV.

Article XV, Section 3, Idaho Constitution, states as follows:

Water of natural stream - Right to appropriate - State's regulatory power - Priorities. - The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; 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 (subject to such limitations as may be prescribed by law) 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. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for

public and private use, as referred to in section 14 of article 1 of this Constitution.

V.

Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor. Article I, Section 14, Idaho Constitution.

VI.

I.C. § 7-704 (Supp. 1984) states in part as follows:

Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.
2. That the taking is necessary to such use.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

VII.

I.C. § 42-203 (Supp. 1984) states in part as follows:

In all applications whether protested or not protested, where the proposed use is such . . . (5) 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 [t]he director of the department of water resources may reject such application and refuse issuance of permit therefor, or may partially approve and grant permit for a less quantity of water than applied for, or may grant permit upon conditions.

VIII.

An administrative agency acting in an adjudicative capacity may decide matters of policy or determine a rule for future action as well as dispose of a particular controversy. 2 Am Jur 2d Administrative Law § 316.

IX.

All ground waters in the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. I.C. § 42-226.

X.

I.C. § 42-229 states in part as follows:

The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application, permit and license procedure as provided in this act.

XI.

I.C. § 42-103 states as follows:

Right acquired by appropriation. - The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.

XII.

The mandatory permit system imposed by I.C. § 42-229 for the appropriation of ground water does not deny the right to appropriate ground water, but merely regulates the method and means by which one might perfect a right to the use of water. State ex rel Tappan v. Smith, 92 Idaho 451 (1968).

XIII.

Prior to its amendment in 1978, I.C. § 42-203 contained the following criteria required to be considered by the director:

1. Whether the proposed appropriation will reduce the quantity of water under existing water rights;
2. Whether the water supply itself is insufficient for the purpose for which is it sought to be appropriated;
3. Whether it appears to the satisfaction of the department that such application is not made in good faith, is made for delay, or speculative purposes; and
4. Whether the applicant has sufficient financial resources with which to complete the work involved therein.

XIV.

The following fifth criterion was added to I.C. § 42-203 by Ch. 306, 1978 Sess. Laws:

5. Whether the proposed appropriation 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.

XV.

Policy No. 1 of the State Water Plan, Idaho Water Resource Board (1976, 1982) states as follows:

POLICY 1: Public Interest

Application for future water permits shall not be approved if they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest. Section 42-203, Idaho Code, should be amended to provide the following: (1) protection for all existing water rights. Nothing in this plan shall adversely affect water rights established and vested under the Constitution and laws of Idaho; (2) all new water uses both consumptive and non-consumptive such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged to have equal desirability as beneficial uses subject to Article XV, Section 3, of the state Constitution; (3) if conflicts occur between meeting new water uses, the approval or denial of the application shall consider the public interest including an evaluation of the beneficial and adverse economic, environmental and social impacts as identified in the State Water Plan as adopted by the Idaho Water Resource Board.

XVI.

I.C. § 42-1736 (Supp. 1984) which required legislative review and approval of the State Water Plan before it could become effective is unconstitutional since it purports to authorize the Legislature to perform functions constitutionally assigned to the Water Resource Board by Article XV, section 7, Idaho Constitution. Idaho Power Co. v. State, 104 Idaho 570 (1983).

XVII.

The local public interest criterion of I.C. § 42-203 does not deny the right to appropriate water, but merely regulates that right to ensure that the unappropriated waters of the state are put to beneficial use in a manner consistent with the local public interest. State ex rel Tappan v. Smith, 92 Idaho 451 (1968).

XVIII.

Provisions of the Constitution which are apparently in conflict must be reconciled if at all possible. Idaho Power Co. v. State, 104 Idaho 570 (1983); Engelking v. Investment Board, 93 Idaho 217 (1969).

XIX.

The local public interest criterion of I.C. § 42-203 is consistent with the policy supported by the Idaho Supreme Court that what constitutes a "beneficial use" of the state's water resources is dynamic and therefore may change with time in accordance with what is necessary and desirable for the citizens of the state. State Dept. of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440 (1974).

XX.

Statutes alienating public trust resources will be construed in light of the public trust doctrine requirements which take precedence even over vested water rights. Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622 (1983).

XXI.

In construing statutes, courts must generally presume that legislative acts are constitutional and that the Legislature has acted within its constitutional powers, and any doubts concerning interpretation of statutes should be resolved in favor of finding the statute constitutional. State v. Rawson, 100 Idaho 308, 311 (1979).

XXII.

The concept of void-for-vagueness prohibits holding a person criminally responsible for conduct which he could not reasonably understand to be proscribed. State v. Lopez, 98 Idaho 581 (1977).

XXIII.

The local public interest criterion required to be met prior to the issuance of a permit to appropriate water does not either forbid or require the doing of an act by an applicant for permit. I.C. § 42-203.

XXIV.

An applicant for a water right permit is not authorized to appropriate water until after a permit has been issued by the director of the Department. I.C. § 42-103.

ARGUMENT

I. THE DEPARTMENT'S FINDINGS OF FACT NUMBERS 4, 5 and 6 ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

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(g) (Supp. 1984) sets forth the standard for the District Court review of the decision of an administrative agency in a contested proceeding. I.C. § 67-5215(g) states:

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:

* * * *

(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . . (emphasis added).

Further, I.C. § 42-203 (Supp. 1984) states in part as follows:

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.

See also, Van Orden v. State Dept. of Health and Welfare, 102 Idaho 663 (1981); Grindstone Butte Etc. v. Idaho, P.U.C., 102 Idaho 175 (1981). Accordingly, the District Court should apply the substantial evidence rule in its review of the Department's

findings of fact.

Findings 4, 5 and 6 of the Department's decision 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. 59).

B. Finding of Fact No. 4 is supported by substantial, competent evidence.

With respect to finding of fact 4, the following evidence in the record is cited in support thereof:

(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. (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. (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. (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. (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." (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."

(7) Open File Report 80-563, Table 1. Record of Wells for Well nos. 9S-14E, 4BDCl, 9ADCl, and 23ABDl showing water levels above land surface at the distance of 145, 167, and 25 feet respectively. (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.

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

With respect to finding of fact 5, the following evidence in the record is cited in support thereof:

(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 (R. pp. 97, 103) which may be matched with the points of diversion under the various ground water rights of the parties.

The order of the Department creating the Banbury Hot Springs Groundwater Management Area 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 that the wells of the parties are within the Banbury Hot Springs Groundwater Management Area.

D. Finding of Fact No. 6 is supported in part by substantial, competent evidence.

Appellant is correct in its assertion that there is no evidence in the record regarding a Department field exam of appellant's surface water permit no. 47-7261 which found that 131 acres of land being irrigated thereunder are within the same place of use sought to be irrigated with thermal ground water under permit no. 47-7680.

This error, however, to the extent that it exists, must be considered to be harmless error which works no prejudice upon the appellant. A comparison of the authorized place of use under surface water permit no. 47-7261 (R. p. 121) with the proposed place of irrigation use of the thermal ground water under permit no. 47-7680 (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. The reference to the findings of the field exam therefore works no prejudice upon the appellant and must be 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 (1979). The more important part of finding of fact 6 that appellant holds permit 47-7261 for irrigation of some of the lands described in application for permit 47-7680 is supported by substantial competent evidence.

The District Court should affirm findings 4, 5 and 6 of the Department's decision.

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

Appellant asserts that conclusions of law 3 and 5 of the Department's decision are invalid for the reasons that they are not supported by the evidence or findings, are contrary to Idaho law, and are not consistent with other conclusions of law in the decision.

The conclusions of law in the Department's decision are as follows:

(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.

(2) A plan for casing and sealing these wells shall be submitted to the Director for approval prior to the water being diverted under this permit.

(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.

(4) Applicant is entitled to use groundwater to supplement water from surface sources for irrigation.

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

(R. p. 59).

A. The record contains substantial, competent evidence that a hot water aquifer would be depleted by appellant's proposed irrigation use.

Appellant argues, first, that the Department's conclusion of law 3 is invalid because there is no evidence that a hot water aquifer would be depleted by appellant's proposed irrigation of 430 acres with thermal ground water. This argument apparently stems from appellant's understanding of the meaning 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 3 is to "reduce or lessen" or "waste" the artesian hot water aquifer "as by use" for a purpose that could be served using a cold water source. Appellant is not understood to maintain that the record does not support a conclusion that it 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 3 is not intended to imply that appellant's proposed use of the thermal water for irrigation

would necessarily exhaust the resource. All large uses of the resource would, however, be deemed to result in some depletion of the resource. This would be untrue only if the resource could be considered to be inexhaustable and unaffected by diversions of water from the aquifer. Evidence is present in the record in the form of Open File Report 80-563 and the statements of the protestants which supports a conclusion that the resource is not inexhaustable and that it is affected by diversions of water from the aquifer.

B. Conclusion of law 3 is not inconsistent with conclusions of law 1 of the Department's decision.

Appellant argues that conclusion of law 3 is inconsistent with conclusion of law 1 of the Department's decision because it is asserted that conclusion 1 states unequivocally that there is no depletion that would be caused by appellant's proposed use of water. Conclusion of law 5, however, does not state that there will be no depletion caused by appellant's proposed use of water. What conclusion 5 states is that the reduction in artesian pressure which may be expected to result from an additional diversion of water from the artesian aquifer does not constitute cause as a matter of law to deny a new permit. Based in part upon this conclusion the Department did approve a new diversion of water from the aquifer by the appellant. Whether reduction in artesian pressure to the detriment of senior users constitutes legal cause to deny a junior user from diverting water is a separate issue from whether it is in the public

interest to allow a limited thermal water resource to be used for irrigation when a cold water source could be used for the same purpose.

C. Conclusion of law 3 is not contrary to Article XV, Section 3 of the Idaho Constitution as argued by appellant.

Appellant argues that conclusion of law 3 of the Department's decision is contrary to Article XV, Section 3 of the Idaho Constitution because that section it is argued provides that domestic and agricultural uses have priority over all other uses without differentiation between hot and cold water. Article XV, Section 3 of the Idaho Constitution reads as follows:

Water of natural stream - Right to appropriate - State's regulatory power - Priorities. - The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; 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 (subject to such limitations as may be prescribed by law) 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. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article 1 of this Constitution.

Appellant's reference to the priority of domestic and

agricultural uses under Article XV, section 3 is apparently intended to refer to the preference given to domestic and agricultural rights during times of water shortage. This preference does not give a priority to domestic and agricultural water rights during times of shortage. Rather the preference allows domestic water users and certain agricultural water users, during times of shortage, to acquire by exercise of eminent domain the senior priority water rights of other types of water users upon payment of just compensation. The provision states that the taking shall be subject to the provisions of law regulating the taking of private property for public and private use, as referred to in Article I, section 14 of the Idaho Constitution.

Article I, section 14, Idaho Constitution, provides that: "[p]rivate property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor." The applicable Idaho law for the exercise of the power of eminent domain is contained in chapter 7, title 7, Idaho Code. I.C. § 7-704 sets forth the facts prerequisite to taking in part as follows:

- Before property can be taken it must appear:
1. That the use to which it is to be applied is a use authorized by law.
 2. That the taking is necessary to such use.
 3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

I.C. § 7-704 (Supp. 1984).

Applying the preference language of Article XV, section 3, as conditioned by the requirements of I.C. § 7-704, it may be

concluded that a junior agricultural water user could only acquire the thermal water rights of a senior water user using the water for manufacturing purposes if the agricultural user could show that the taking is necessary to such use. Such a showing would appear to be difficult to make if it could be shown that there was cold water available for the irrigation use as is demonstrated by the facts in the present case.

D. Conclusion of law 3 is authorized by I.C.
§ 42-203.

Appellant argues that there is no law or regulation in the state to support conclusion of law 3 of the Department's decision, 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. Statutory authorization for making conclusion of law 3 is contained in I.C. § 42-203 which provides in part as follows:

In all applications whether protested or not protested, where the proposed use is such . . . (5) 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 [t]he director of the department of water resources may reject such application and refuse issuance of permit therefor, or may partially approve and grant permit for a less quantity of water than applied for, or may grant permit upon conditions.

I.C. § 42-203 (Supp. 1984).

In the present case the director determined, based upon the statements of the protestants and the evidence contained in the record, that a cold water source is available to satisfy the

irrigation purposes of the appellant and that it is not in the local public interest to deplete an artesian hot water aquifer for irrigation under these circumstances. Such a conclusion is clearly authorized by the provisions of I.C. § 42-203. The director's 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 also authorized by I.C. § 42-203. There is no requirement that the Department have first adopted a regulation prohibiting the use of thermal water for irrigation under certain circumstances before reaching such a decision in an administrative proceeding before the Department. An administrative agency acting in an adjudicative capacity may decide matters of policy or determine a rule for future action as well as dispose of a particular controversy. 2 Am Jr 2d Administrative Law § 316.

E. Conclusion of Law 5 is supported by the findings.

Appellant states that conclusion of law 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 specifically based upon the anticipated effect of appellant's proposed diversions 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 5.

It is noted, however, that conclusion 5 is supported by

finding of fact 8 which finds that I.C. § 42-203 requires the Department to consider the impact of a proposed appropriation upon other water rights.

III. THE DEPARTMENT'S ORDER IS CONSISTENT WITH THE EVIDENCE AND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DECISION.

Appellant argues that conditions 2, 3, 5 and 6 of the Department's order should be set aside because they are not supported by the evidence, the findings of fact or the conclusions of law. Conditions 2, 3, 5 and 6 of the Department's order read as follows:

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.

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.

A. Condition 2 of the Department's order is consistent with and supported by the evidence and the findings of fact and conclusions of law of the decision and is not violative of the state constitution.

Appellant concedes that condition 2 of the Department's

order could be supported by conclusion of law 3, but that it should nevertheless be set aside because conclusion 3 is not supported by the evidence or the law. As has been previously argued in this brief under argument II-A, conclusion of law 3 which states that "[i]t 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" is supported by substantial, competent evidence in the record. The record contains evidence previously discussed to the effect that appellant's wells will divert water from the artesian hot water aquifer, that the diversion of water for irrigation would deplete the resource, that there is cold water available for irrigation use, and that the use of the hot water for irrigation purposes only is not in the public interest.

Appellant's argument that condition 2 of the order is violative of the state constitution is identical to its argument asserting that conclusion of law 3 violates Article XV, section 3 of the Constitution. The response to this argument is at argument II-B of this brief and is repeated here by reference to the previous argument.

Finally, appellant argues that there is no finding of exactly what the public interest is or how appellant's proposed use would violate the public interest. The local public interest as defined by the legislature in I.C. § 42-203 is the "affairs of the people in the area directly affected by the proposed use." This definition while not specifically quoted in the findings of fact may be considered to be incorporated within the reference to

I.C. § 42-203 contained in finding of fact 8. The statements of the protestants contained in the record, together with evidence regarding the availability of cold water for irrigation use supports a determination in this case that the use of hot artesian water for irrigation purposes is not in the local public interest.

- B. Conditions 3, 5 and 6 of the Department's order are appropriate conditions to the permit authorized by I.C. § 42-203 which provides for granting approval of a permit upon conditions.

Appellant argues that condition 3 of the Department's order requiring other cold water rights with the same place of use to be developed and used to the fullest extent possible for irrigation before this permit is used for irrigation is arbitrary and should be set aside.

Condition 3 is not arbitrary in light of the evidence, findings and conclusions previously discussed which support the determination of the Department that the use of artesian hot water for irrigation purposes is not in the public interest.

Appellant is wrong in its assertion that there is no evidence in the record regarding the availability of cold water under appellant's other permits for irrigation of the land sought to be irrigated by the thermal water under this permit. A comparison of the places of use for surface water permits 47-7261 and 47-7551 with the proposed place of use under permit 47-7680 provides such evidence.

Appellant complains that there is no definition of what

the Department means by its use of the phrase "fullest extent possible" as used in condition 3. It should be considered that the Department intended the ordinary meaning of the words to apply and thus there does not appear to be any need to further define them.

Appellant's assertion that condition 3 could only be properly imposed upon the adoption of regulations has been previously addressed under argument II-D and need not be repeated here.

Appellant argues that condition 5 of the Department's order, which provides that water diverted under the permit shall not exceed that necessary for domestic, commercial, and geothermal heating of 99 homes, is unconstitutional because it gives a priority to these uses over agriculture. Condition 5 is consistent with the Department's determination that the use of water solely for irrigation under this permit is not in the public interest. The condition does not create a priority for commercial and recreational uses over agricultural uses. Rather the condition implements a determination that it is not in the public interest to use the hot artesian water for a purpose which does not benefit from the heat provided by the thermal resource.

Conditions 3, 5 and 6 of the permit are consistent with the evidence and the findings of fact and conclusions of law and should not be set aside.

IV. THE LOCAL PUBLIC INTEREST CRITERION OF SECTION 42-203, IDAHO CODE, DOES NOT VIOLATE ARTICLE XV, SECTION 3 OF THE IDAHO CONSTITUTION.

Appellant raises as its sixth issue whether the Department's failure to approve appellant's application in full, without conditions, is an unconstitutional denial of appellant's right to appropriate water as guaranteed by Article XV, section 3 of the Idaho Constitution. The pertinent portion of Article XV, section 3 for the purposes of this discussion is contained in the first sentence thereof which reads as follows:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.

The Department's approval of permit 47-7680 upon conditions, which is at issue in this case, involves a permit to appropriate the unappropriated ground waters of the state. All ground waters in the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. I.C. § 42-226. In 1963 the Legislature amended I.C. § 42-229 to make the application, permit and license procedure for appropriating ground water mandatory. The amended statute reads in part as follows:

The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application, permit and license procedure as provided in this act.

The mandatory permit system for appropriating ground

water was reiterated by the Legislature in its 1971 amendment of I.C. § 42-103 making the permit system mandatory for surface water appropriations. The statute read as follows:

Right acquired by appropriation. - The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.

The question of whether the Legislature could make the ground water permit system mandatory in view of the language contained in Article XV, section 3 of the Constitution was answered by the Supreme Court in State ex rel Tappan v. Smith, 92 Idaho 451, (1968). The Supreme Court decided in Smith that the mandatory permit system imposed by section 42-229 does not deny the right to appropriate ground water, but merely regulates the method and means by which one might perfect a right to the use of such water. The Court states that the statute is in accord with Article XV, section 3 of the Constitution. 92 Idaho at 456.

Part of the permit procedure made mandatory by section 42-229 for appropriating ground water is contained in I.C. § 42-203 which sets out the criteria which the Department must consider before issuing any permit to appropriate water. Prior to the amendment of 42-203 in 1978 the statute contained the following criteria which were required to be considered by the director:

1. Whether the proposed appropriation will reduce the quantity of water under existing water rights;

2. Whether the water supply itself is insufficient for the purpose for which is it sought to be appropriated;

3. Whether it appears to the satisfaction of the department that such application is not made in good faith, is made for delay, or speculative purposes; and

4. Whether the applicant has sufficient financial resources with which to complete the work involved therein.

On March 29, 1978, I.C. § 42-203 was amended by Ch. 306, 1978 Session Laws, to provide that for all applications, consideration should be given by the director to all of the criteria set forth in the statute, whether or not the application is protested. There was also added a fifth criterion for the director to consider:

5. Whether the proposed appropriation 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 amendment of section 42-203 to include the local public interest criterion was an implementation in part of Policy No. 1 of the State Water Plan. The State Water Plan was adopted by the Idaho Water Resource Board in December 1976 pursuant to Article XV, section 7 of the Idaho Constitution which empowers the Board to "formulate and implement a state water plan for optimum development of water resources in the public interest." Policy No. 1 of the State Water Plan as adopted by the Board in 1976 and as reevaluated by the Board on January 19, 1982 pursuant to I.C. § 42-1734(b)(6) reads as follows:

POLICY 1: Public Interest

Application for future water permits shall not be approved if they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest. Section 42-203, Idaho Code, should be amended to provide the following: (1) protection for all existing water rights. Nothing in this plan shall adversely affect water rights established and vested under the Constitution and laws of Idaho; (2) all new water uses both consumptive and non-consumptive such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged to have equal desirability as beneficial uses subject to Article XV, Section 3, of the state Constitution; (3) if conflicts occur between meeting new water uses, the approval or denial of the application shall consider the public interest including an evaluation of the beneficial and adverse economic, environmental and social impacts as identified in the State Water Plan as adopted by the Idaho Water Resource Board.

The discussion following Policy 1, contained in the State Water Plan, provides the following insight into the Board's reasons for adopting the policy:

Since statehood, questions have been raised as to whether it is in the public interest to issue water rights without considering their effect upon those not directly affected by the proposed diversion. In disputes, the question of an application being in the public interest has been raised. In the recent Malad Canyon Case, the Idaho Supreme Court decision contains language suggesting that decisions be made on a case-by-case basis as to whether a proposed appropriation of water is a beneficial use. That language seems to indicate that the question of whether the proposed use is beneficial in the public interest should be addressed. Decisions made by the director could be appealed to District Court if any applicant was dissatisfied with the director's decision. The proposed criteria applies only to new applications.

Following the adoption of the State Water Plan by the

Water Resource Board in December, 1976, the Legislature enacted I.C. § 42-1736 during the 1977 legislative session which required legislative review and approval of the plan before it could become effective. Policy No. 1 as modified by the Legislature pursuant to I.C. § 42-1736 reads as follows:

POLICY NO. 1: PROTECTION OF EXISTING WATER RIGHTS

The State Water Plan shall be a guide concerning the uses of water within the State of Idaho. Water rights and the administration of water rights shall be governed by statute. Section 42-203, Idaho Code, should be amended to provide the following: (1) protection for all existing water. Nothing in this plan shall adversely affect water rights established and vested under the constitution and laws of Idaho; (2) all new water uses, both consumptive and non-consumptive such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged beneficial uses subject to Article XV, Section 3 of the state Constitution; (3) if conflicts occur between meeting new water uses, the approval or denial of the application shall consider the local public interest as defined by statute.

H.C.R. No. 48, Sess. Laws 1978, p. 1003.

In considering the effect of the Legislature's review and modification of the State Water Plan pursuant to section 42-1736, the Supreme Court held in Idaho Power Co. v. State, 104 Idaho 570, 661 P.2d 736 (1983), that 42-1736 is unconstitutional since it purports to authorize the legislature to perform functions constitutionally assigned to the Water Resource Board by Article XV, section 7 of the Constitution. For the purposes of the present analysis it is therefore concluded that Policy 1 as approved by the Board is effective.

In amending section 42-203 to add the local public interest criterion the Legislature was implementing Policy 1 which had been formulated by the Water Resource Board pursuant to specific constitutional authority to formulate a state water plan for optimum development of water resources in the public interest. Because only the Legislature can pass legislation, the Water Board must depend on the Legislature to fulfill some of its constitutional responsibilities. See Idaho Power Co., supra, at 573-74.

Appellant asserts that the 1978 amendment to section 42-203 is unconstitutional because it denies appellant the right to divert or appropriate water to beneficial use. The local public interest criterion, however, like the mandatory permit requirement considered by the Court in the Smith case, does not deny the right to appropriate water, but merely regulates that right to ensure that the unappropriated waters of the state are put to beneficial use in a manner consistent with the local public interest.

The history of the 1978 amendment to section 42-203 adding the local public interest criterion clearly shows that it was intended to implement in part Article XV, section 7 of the Idaho Constitution. Provisions of the Constitution which are apparently in conflict must be reconciled if at all possible. Idaho Power Co., supra, at 573; Engelking v. Investment Board, 93 Idaho 217 (1969). Only when an irreconcilable conflict exists will the court resort to methods of statutory or constitutional interpretation

which would have one provision prevail over another. 104 Idaho at 573; 93 Idaho at 221.

The facts in the present case demonstrate that any conflict which may exist between Article XV, sections 3 and 7 of the Constitution need not be considered irreconcilable. Appellant's application to appropriate water was in fact approved by the Department, thus, there was not a denial of the right to appropriate water. Further, the conditions attached to the approval of the permit do not prohibit the use of the thermal ground water for irrigation, but rather provide that it is not in the public interest to do so unless the water is first used for a purpose which requires the heat from the thermal water. It is further noted that in this case the evidence establishes that there is cold water available for at least part of the land which appellant desires to irrigate with the hot artesian water. The local public interest criterion of I.C. § 42-203 should not be considered in conflict with the provisions of Article XV, section 3 of the Constitution when an interpretation exists which avoids the conflict. 104 Idaho at 573.

It must also be recognized that a striking down of the local public interest criterion of I.C. § 42-203 would have consequences reaching far beyond the scope of the present case. The public interest provision provides an important corner stone for the continued conservation and development of water resources in the State of Idaho. Article XV, section 7 of the Constitution calls for a State Water Plan "for optimum development of water

resources in the public interest." Striking the public interest criterion from section 42-203 would represent a serious blow to the water resources planning process begun by the people of the State of Idaho with the approval of Article XV, section 7 to the Constitution in 1965.

The local public interest criterion of section 42-203 is consistent with the policy supported by the Idaho Supreme Court in State Dept. of Parks v. Idaho Dept. of Water Admin, 96 Idaho 440 (1974), that what constitutes a "beneficial use" of the state's water resources is dynamic and therefore may change with time in accordance with what is necessary and desirable for the citizens of the state. The responsibility toward the interests of the public in allocating the public resources of the state has been very recently highlighted by the Supreme Court in its decision in the case of Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622 (1983). The Court adopted for Idaho in this case the rule expressed by the California court in National Audobon Society v. Superior Court of Alpine County, 33 Cal.3rd 419, 658 P.2d 709 (1983), which provides that statutes alienating public trust resources will be construed in light of the public trust doctrine requirements. The public trust doctrine was described by our Supreme Court as taking precedence even over vested water rights. 105 Idaho at 631. If the interests of the public may affect even vested water rights under the public trust doctrine surely the lesser interference created by the consideration of the local public interest in the process of

granting new permits to appropriate water must be constitutionally permissible.

Finally, in construing statutes, courts must generally presume that legislative acts are constitutional and that the Legislature has acted within its constitutional powers, and any doubts concerning interpretation of statutes should be resolved in favor of finding the statute constitutional. State v. Rawson, 100 Idaho 308, 311 (1979).

V. THE LOCAL PUBLIC INTEREST CRITERION OF SECTION 42-203, IDAHO CODE, IS NOT UNCONSTITUTIONALLY VAGUE.

Appellant argues that the local public interest criterion of I.C. § 42-203 is unconstitutionally vague. Appellant asserts that it is impossible to predict what activities are proscribed by the statute.

The Idaho Supreme Court recently described the void-for-vagueness concept as follows:

The concept of void-for-vagueness arose from a common law practice of refusing to enforce legislation deemed too indefinite to be applied. It has evolved to a protection generally regarded as embodied in a Due Process Clause and prohibits holding a person criminally responsible for conduct which he could not reasonably understand to be proscribed. [citations omitted].

State v. Lopez, 98 Idaho 581, 590 (1977).

The statutory language of which the appellant complains in this case states as follows:

In all applications whether protested or not protested, where the proposed use is such

* * * *

(5) 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 [t]he director of the department of water resources may reject such application and refuse issuance of permit therefor, or may partially approve and grant permit for a less quantity of water than applied for, or may grant permit upon conditions.

I.C. § 42-203 (Supp. 1984).

The local public interest criterion of section 42-203 does not either forbid or require the doing of an act by the appellant. An applicant under section 42-203 is not authorized to appropriate water until after a permit has been issued by the director of the Department. I.C. § 42-103. If the director determines upon the evidence considered that an application for permit should be denied or conditioned in a particular manner to protect the local public interest, that fact will be made clear to the applicant in the order denying the permit or issuing the permit upon conditions.

The local public interest criterion of section 42-203 is not unconstitutionally vague.

Appellant makes reference in its brief at pages 16-17 to water right permit 47-7705. This permit is not a part of the record in the present appeal. Respondent asks that the Court strike this portion of the appellant's brief.

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 con-

ditions because the challenged findings of fact and conclusions of law are supported by substantial evidence and because the local public interest criterion of I.C. § 42-203 is not unconstitutional.

DATED this 24th day of October, 1984.

JIM JONES
Attorney General

PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October, 1984, a true and correct copy of the foregoing RESPONDENT'S BRIEF was mailed, postage prepaid, addressed to: Mr. Robert C. Weaver, WEAVER and DYKAS, 130 North Broadway, Buhl, Idaho 83316.

PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources