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DEPARTMENT OF WATER RESOURCES

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR CUSTER COUNTY

IN RE: IDAHO DEPARTMENT OF WATER RESOURCES AMENDED FINAL ORDER CREATING WATER DISTRICT NO. 170 THOMPSON CREEK MINING COMPANY Petitioners, v. IDAHO DEPARTMENT OF WATER RESOURCES Respondents.

FILED IN CHAMBERS AT REXBURG, MADISON COUNTY, IDAHO, 22 Feb 2008 AT 10:30 a.m. Brent J. Mann DISTRICT JUDGE

Case No. CV-06-66

I. SUMMARY

The Director of the Idaho Department of Water Resources may create, revise, abolish, or combine water districts, "if such action is required in order to properly administer uses of the water resource." Here, the Director relied on this statute to create Water District 170 ("WD170"); Thompson Creek objects. According to Thompson Creek, Section 42-604's plain meaning restricts the Director's ability to create water districts to situations of absolute necessity. The Court finds Section 42-604 ambiguous. The Court is persuaded that the legislative intent of Section 42-604, as determined by its context and object, is to afford the Director sufficient authority to create WD170, if the Director discerns such action required. The Director's Amended Final Order is affirmed.

1 I.C. § 42-604 (emphasis added).

II. ISSUES ON APPEAL

1. Whether the Director's failure to record and provide a transcript of the entire hearing regarding the creation of WD170 violates due process principles and Sections 67-5242(3)(d) and 67-5279(3)(a),(b), and (c) of the Idaho Code;
2. Whether the Director was biased in favor of creating WD170, in violation of due process principles and Section 67-5279(3)(a) and (c) of the Idaho Code;
3. Whether the Director's representations to the public that he was required to create WD170 pursuant to a previous agreement violates due process principles and Section 67-5279(3)(a) and (c) of the Idaho Code;
4. Whether the agency record contains substantial evidence that WD170 is "required in order to properly administer uses of the water resource," as required by Sections 42-604 and 67-5279(3)(d) of the Idaho Code;
5. Whether the organizational attributes ascribed to WD170 by the Director violate Idaho's water district statutes in Title 42, Chapter 6 of the Idaho Code and, accordingly, Section 67-5279(3)(a) and (b) of the Idaho Code;
6. Whether the procedure employed by the Director in creating WD170 was arbitrary, capricious, or an abuse of discretion pursuant to Section 67-5279(3)(e) of the Idaho Code;
7. Whether substantial rights of Thompson Creek have been prejudiced by the Director's creation of WD170 pursuant to Section 67-5279(4) of the Idaho Code; and
8. Whether Thompson Creek should be excluded from WD170 based upon contract principles.

III. STANDARD OF REVIEW

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code.² Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency.³ The court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not

² I.C. § 42-1701A(4).

³ I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992).

supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.⁴ The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the petitioner has been prejudiced.⁵

IV. BACKGROUND

Thompson Creek appeals the Director's *Amended Final Order* creating WD170.⁶ The Director issued the order creating WD170 after a year long process: in May 2005 the Idaho Department of Water Resources filed a motion for "interim administration"; in September 2005 the SRBA approved interim administration; in October 2005 the Director issued notices informing affected individuals of hearings regarding the proposed water district; in November 2005 the Director held a hearing on the proposed water district; in March 2006 the Director issued a final order creating WD170; and in April 2006 the Director issued an amended final order. According to Thompson Creek, the creation of WD170 was in error.

Thompson Creek argues that the creation of WD170 involved unlawful procedure, biased decision makers, misinterpreted statutes, unsubstantiated legal conclusions, and abused discretion. These errors, it claims, require this Court, under the Idaho Administrative Procedure Act, to remand this case back to the Director. The Court has before it a lengthy record, an Office Depot box full, yet the case hinges on the interpretation of one sentence. The Court will start there.

V. DISCUSSION

1. Idaho Code Section 42-604 is ambiguous.

The Court has free review over the construction and interpretation of statutes, even when such statutes relate to an agency's area of expertise.⁷ The objective in interpreting a statute is to derive the intent of the legislative body that adopted the act. Analysis begins with the literal language of the enactment. Where the statutory language is unambiguous, the clearly expressed

⁴ I.C. § 67-5279(3); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

⁵ I.C. § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222.

⁶ *Amended Final Order Creating Water District No. 170*, R., pp. 197-238 (April 6, 2006).

⁷ *Hayden Lake Fire Prot. Dist. V. Alcorn*, 141 Idaho 388, 398, 111 P.3d 73, 83 (2005).

intent of the legislative body must be given effect. Where the language of a statute or ordinance is ambiguous—where reasonable minds might differ as to the statute’s meaning—the court looks to rules of construction for guidance and may consider the reasonableness of proposed interpretations.⁸

Here, the statute in question, the language at issue, is the second paragraph of Section 42-604:

The director may create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts by entry of an order if such action is *required* in order to properly administer uses of the water resource.⁹

In this case, the Director expressly relied on this language to create WD170,¹⁰ and it is this reliance that gave rise to the present appeal. That the parties disagree over this phrase is understandable; the statute is ambiguous—the language yields multiple meanings upon which reasonable minds may differ.

The ambiguous language is the last phrase, “if such action is *required* in order to properly administer uses of the water resource.” According to Thompson Creek, this language creates a strict standard for the Director: any director instituted changes to a water district—creation, revision, abolishment, or combination—must be justified by showing of *absolute necessity*. This is a reasonable interpretation. Merriam Webster defines *required* as “to demand as necessary or essential.”¹¹ If the legislature wanted a less stringent standard—in the director’s sole discretion, as the director deems necessary, the director may, as the director deems appropriate—then the legislature would not have used the word *required*.¹²

However, the Director’s interpretation is also reasonable. Merriam Webster also defines *required* as “to call for as suitable or appropriate.”¹³ This reading would allow the director to create, revise, abolish, or combine water districts *as suitable, as appropriate* to the proper

⁸ *Ada County v. Gibson*, 126 Idaho 854, 893 P.2d 801 (Idaho App. 1995) (citing several Idaho Supreme Court cases).

⁹ I.C. § 42-604 (2007) (emphasis added).

¹⁰ *Amended Final Order*, R. p. 207, ¶ 20.

¹¹ Merriam Webster’s Collegiate Dictionary (10th edition).

¹² For examples of the legislature’s ability to insert discretionary language see I.C. §§ 42-237a, 42-247, 42-352(3), 42-502, 42-1701A(2), 42-2013.

¹³ Merriam Webster’s Collegiate Dictionary (10th edition).

administration of the uses of the water resources. This reading would afford the Director more discretion to initiate changes to a water district.

2. The legislative intent of Section 42-604, as indicated by the Section's context and object, is to afford the Director discretion in the creation, revision, abolishment, or combination of water districts.

When a statute is ambiguous, courts discern the intent of the drafters by considering the express language, the context in which the language is used, and the statute's objects.¹⁴ First, as discussed above, Section 42-604's express language does little to advance either interpretation; *required* has definitions that support either Thomson Creek's or the Director's interpretation.

Section 42-604's context indicates a legislative intent to afford the Director discretion in water district creation. The legislature placed the Section among other sections that grant the Director broad discretion over water district governance: "[t]he director ... shall have direction and control of the distribution of water from all natural water sources within a water district"¹⁵; and "[t]he director ... is authorized to adopt rules and regulations for the distribution of water ... as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof."¹⁶ These statutes give the director discretion in the direction and control within a water district, and discretion in the adoption of rules and regulations for the distribution of water.

The paragraph immediately preceding the phrase in question also gives context: "[t]he director ... shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district"¹⁷ Section 42, Chapter 6 grants the Director authority to direct and control distribution within water districts; the statute grants the Director authority to adopt rules and regulations for distribution of water from natural water sources throughout Idaho; and the statute mandates that the Director divide Idaho into water districts. Section 42-604 must be read in that context.

After granting so many powers, it is inconceivable that the legislature would limit the Director to only create a water district after a showing of *absolute necessity*. A director that must

¹⁴ *Ada County v. Gibson*, 126 Idaho 854, 893 P.2d 801 (Idaho App. 1995).

¹⁵ I.C. § 42-602.

¹⁶ I.C. § 42-603.

¹⁷ I.C. § 42-604.

divide Idaho into water districts must have some discretion in the creation of water districts. A director that has power to adopt rules and regulations for the distribution of water can surely revise the boundaries of a water district. Any reading of Section 42-604 must account for its context and that context is director discretion. The Director's reading—that the director may create a water district *as appropriate* to the proper administration of the uses of the water resources—is consonant with Section 42-604's context.

Legislative intent to grant the director discretion over water district creation is also evident by the object of Title 42, Chapter 6. This statute's purpose is to vest sufficient power in the director to secure distribution of water resources according to Idaho law.¹⁸ Thompson Creek's interpretation—that the director can only create a water district by showing absolute necessity—frustrates this object.

One of the Director's main tools in supervising the distribution of the state's water resources is the water district. As discussed above, the legislature mandated that the Director divide Idaho into water districts. The legislatively-approved regime for administering water rights in Idaho following a court adjudication of the rights is through the structure of a water district operating under the supervision of the Director of the Department of Water Resources. Thompson Creek's interpretation would divest the director of the ability to divide the state into water districts because the Director would be powerless to create one—it is nearly impossible to show *absolute necessity*. Without the ability to create a water district, the Director would be unable to divide the state into water districts, and the very purpose of Title 42, Chapter 6 would be frustrated. The director would lack sufficient power to secure distribution of water resources according to Idaho law.

Thompson Creek's interpretation defies the object of Title 42, Chapter 6 in another way; Thompson Creek's interpretation would effectively remove the power to create, revise, abolish, or combine water districts from the Department of Water Resources and place that power with the courts. Thompson Creek's *absolute necessity* test is so onerous that any disgruntled water user could immediately appeal any director decision to the courts where the courts would be forced to determine, on a case by case basis, whether the director showed an *absolute necessity*.

¹⁸ I.C. §§ 42-602, 42-603, 42-604.

Rather than the Idaho Department of Water Resources governing water district creation and modification, the courts would be pouring over appellate records to determine whether the director established *absolute necessity*. The object of Title 42, Chapter 6 is to confide such decisions with the Director, not the courts. Thompson Creek's interpretation would do damage to that allocation of decision making power.

Of course, disgruntled water users may still appeal, and the Court will look to see if a decision to "create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts" was based on *substantial evidence in the record, done in an arbitrary manner, done in a discriminatory manner, or done in violation of due process*. Thompson Creek alleges the Director's decision erred in these ways as well, and it is to these potential errors that the Court turns next.

3. The Director's Amended Final Order contained substantial evidence from the record to support his decision; the order creating WD170 was not arbitrary, capricious, or an abuse of discretion.

The Court read the Director's *Amended Final Order*, and, in particular, the Court read the Director's Conclusions of Law to make sure those conclusions were based on the Findings of Fact—they were.¹⁹ The Director's *Amended Final Order* relied on the factual findings from affidavits,²⁰ the hearing testimony, and written comments to reach its decision. Substantial evidence supported the Director's order and it is not arbitrary, capricious, or an abuse of discretion.

4. WD170's organizational attributes are justified within the powers afforded the Director by Title 42, Chapter 6.

Thompson Creek alleges that three organizational attributes of WD170 went beyond the powers afforded the Director: 1) WD170 included sub-districts, and there is no statutory authority for the creation of sub-districts; 2) WD170 improperly restricts the discretion of water users to select an advisory committee; and (3) WD170 contains the option of selecting and

¹⁹ *Amended Final Order*, R. pp. 204 to 210.

²⁰ *See Luke Aff.*, R. p.15 (May 13, 2005).

funding of a watermaster that violate the statutes governing water districts. The Court will address each of these arguments in turn.

First, the Director has authority to create sub-districts. As discussed above, Section 42-604 grants the Director discretion in the creation of water districts. The authority to create sub-districts derives from the power to create water districts in the first place—it is part of the organizational structure of the water district. The Court read the paragraph in the Director’s order that created the sub-district²¹ and does not anticipate the grave detriment foreseen by Thompson Creek. Maybe sub-districts would be illegal if they prevented the distribution of the water resources in accordance with the prior appropriation doctrine, but the Court does not see how their use in WD170 violates Idaho law.

Thompson Creek’s second alleged organizational flaw, that WD170 improperly restricts the discretion of water users to select an advisory committee, derives from a misunderstanding of the Director’s *Amended Final Order*. The order explicitly affords the water users the discretion to select an advisory committee “that includes, but need not be limited to, representation from advisory committees of existing water districts.”²² The order grants adequate discretion.

And third, the Director did not violate a statute regarding watermaster funding. The relevant portion of the Director’s order reads, “[t]he water right holders may elect to have the district contract with the Department to provide watermaster services. Under a district contract with the Department, the watermaster will be a direct employee of the Department.”²³ Section 42-605(3) provides for the selection of watermasters, and the water right holder discretion afforded by the *Amended Final Order* is in accord with Section 42-605(3). In conclusion, the organizational attributes of WD170 do not violate Idaho statutes.

²¹ *Amended Final Order*, R. p. 204, ¶ 9.

²² *Id.* at R. p. 209, ¶ 31.

²³ *Id.*

5. The Director's failure to record and provide a transcript of the question-and-answer session preceding the hearing violated neither Thompson Creek's due process rights nor Section 67-5242(3)(d).

The Director failed to record a question-and-answer session held prior to the November 2005 hearing about the creation of WD170. Thompson Creek claims that the unrecorded question and answer session violated its due process rights and Section 67-5242(3)(d). (This section requires that the presiding officer “[s]hall cause the hearing to be recorded....”)

Due process requires notice, a hearing, and an adversary proceeding. Due process also requires that the agency develop a record, should it be appealed, the reviewing Court will be able to determine whether the state agency's decision was based upon the record. In this case, notice was given,²⁴ public hearings were held to allow persons attending “an opportunity to provide oral testimony regarding the creation of the proposed district,”²⁵ and Thompson Creek was afforded an adversary proceeding to present evidence against creation of WD170. Those impacted by the water district were also given approximately a month and a half to submit written comments on creation of WD170.²⁶

The Director did not rely on the question-and-answer session in its creation of WD170. According to the Director, “[p]rior to commencing the hearing, the Director described factors he considered in proposing to establish the Upper Salmon Water District and answered questions about the establishment of the proposed water district and how the district was envisioned to function, both over a period of approximately 60 minutes.”²⁷ Because the Director did not rely on any testimony given at the question-and-answer session, it did not need to be recorded to preserve Thompson Creek's due process rights

Nor did the Director's failure to record the question-and-answer session violate Section 67-5242(3)(d). That statute only requires that “the hearing” be recorded: the presiding officer

²⁴ See *Motion for Order of Interim Administration of Water Rights in Basins 71 and 72 and Notice of Hearing*, R. p.3 (May 13, 2005); *Notice of Public Information Meeting and Hearing*, R. pp. 99-101 (October 7, 2005).

²⁵ The Department held hearings on interim administration as well as a public information meeting and hearing regarding the creation of WD170.

²⁶ *Notice of Public Information Meeting and Hearing*, R. pp.99-100.

²⁷ *Amended Final Order* at R. p.199 ¶ 14.

“shall cause the hearing to be recorded at the agency expense.” Section 67-5249(2)(e) states that the record shall include “the record prepared by the presiding officer under the provisions of section 67-5242, Idaho Code, together with any transcript of *all or part* of that record.”²⁸ Informal question and answer sessions need not be recorded if an agency does not rely on the comments made in reaching a decision.

6. Thompson Creek has not established that their due process rights were violated by the Director bias or the Director’s public representations.

“The Due Process Clause entitles a person to an impartial and disinterested tribunal ...”²⁹ Since the *Eacret* decision cited by both parties, the Idaho Supreme Court further defined “impartiality” as it applies to a quasi-judicial body. In the 2007 case, *Turner v. City of Twin Falls*, the Idaho Supreme Court addressed whether Twin Falls City Council acted as an impartial decision maker when it granted review of a planning and zoning decision.³⁰ While the facts of this case and *Turner* differ, the Idaho Supreme Court’s definition of “impartiality” applies here:

[Impartiality] means ‘the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.’ In the context of due process, it does not mean ‘lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case.’ It does not mean having ‘no preconceptions on legal issues, but [being] willing to consider views that oppose his preconceptions, and remain [ing] open to persuasion, when the issues arise in a pending case.’ Impartiality under the Due Process Clause does not guarantee each litigant a chance of changing the judge’s preconceived view of the law.³¹

Here, Thompson Creek claims that the Director’s decision was not impartial because, it argues, the Director wrongly believed that the W&SR Agreement necessitated creation of WD170; according to Thompson Creek, because the Director believed WD170 necessary, he

²⁸ I.C. § 67-5249 (2)(e) (2007).

²⁹ *Eacret v. Bonner*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004).

³⁰ *Turner v. City of Twin Falls*, 144 Idaho 203, 159 P.3d 840 (2007).

³¹ *Id.* (citing *Republican Party of Minn. V. White*, 536 U.S. 765, 122 S.Ct. 2528 (2002)).

already decided the issue prior to the November hearing, hence, the Director was not impartial. However, the Director explicitly dismissed that basis for creation of WD170 in the *Amended Final Order*.³²

Surely the Director entered the November hearing with preconceived notions about the merits of creating WD170: the Director had been through months of interim administration, notices, and hearings regarding its creation. But, as stated above in *Turner*, those preconceptions do not disqualify the Director; the Director was impartial if he was willing to consider views that opposed his preconceptions. The Director's *Amended Final Order* is filled with examples of the Director's consideration of Thompson Creek's positions—the Director simply disagreed with Thompson Creek's views. Even if Thompson Creek did not, or could not, change the Director's preconceived view of the law, the Director's decision indicates that he treated Thompson Creek impartially; the Director applied the law to Thompson Creek just as he would any other party.

7. Neither the prejudice of Thompson Creek's substantial rights, nor exclusion of Thompson Creek from WD170 on contract principles is an independent basis for appeal.

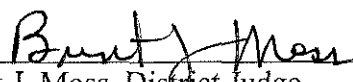
Whether WD170's creation prejudices the substantial rights of Thompson Creek is a requirement for standing, but not an independent basis for appeal.³³ Similarly, Thompson Creek is not in a position to ask the Court to exclude it from WD170 based on contract principles as that is not an issue the Court can address on appeal.

VI. CONCLUSION

For the reasons stated above, this Court affirms the Director of the Department Water Resource's *Amended Final Order* creating WD170.

So ordered.

DATED this 22 day of February, 2008.


Brent J. Moss, District Judge

³² *Amended Final Order*, R. p. 207, ¶¶ 19 to 22.

³³ I.C. § 67-5279(4).

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision was this 22 day of February, 2008, served upon the following individuals via U.S. Mail, Postage Prepaid:

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