

FOLLOWING THE LAW IN IDAHO: LEGAL AND INSTITUTIONAL IMPEDIMENTS TO CONJUNCTIVE WATER MANAGEMENT

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INTRODUCTION

There are extensive and diverse water resources within the state of Idaho. Idaho's total withdrawals for all water uses rank fourth in the nation behind populous California, Florida and Texas (USGS, 1981). Idaho ranks second only to California in number of irrigated acres. This allows Idaho to lead the nation with the highest withdrawal rate per capita of 19,000 gallons per day (Palmer, 1991). The ground and surface water resources of the state support a successful agricultural economy. The Snake River, its tributaries, the springs, spring-fed tributaries and the Snake River Aquifer are all hydrologically interconnected in southern Idaho. Over time, the surface and groundwater resources have been managed with different rules and administrative policies. The different approaches to a hydrologically connected resource led to legal and institutional impediments to integrated management of ground and surface water.

Idaho uses the doctrine of prior appropriation to administer water rights. The Idaho Department of Water Resources (IDWR) is the state's water resource management agency. The majority of the early water rights in Idaho were for surface water to be used on farms, ranches and in the irrigated tracts of early reclamation projects. However, the state did not require a permit to appropriate surface water until 1971.

Idaho's agriculturalists turned to groundwater as a source for irrigation water in the 1940's. A dramatic increase in groundwater pumping for irrigation in southern Idaho lasted into the 1980's (Stacy, 1991). In 1963, the state required a permit to pump groundwater, but it was not until 1986 that the Idaho Legislature gave IDWR the authority to shut down unauthorized wells. Finally, in 1994, the Idaho Legislature required all groundwater users to install meters to measure how much water they used. This requirement is still being implemented by IDWR. Surface water users have long been required to measure their water use. The Idaho Legislature also approved a full moratorium on new water developments in the Snake River Plain in 1994.

Until 1994, IDWR continued to issue permits for groundwater pumping despite the growing competition between senior-priority surface water rights and junior priority groundwater users. This practice also proceeded despite clear evidence that surface and groundwater was hydrologically interconnected. This laissez-faire attitude continued until the water supply in the Snake River Basin was overappropriated by one and half times (Stuebner, 1995).

In 1987, the State of Idaho began the Snake River Basin Adjudication (SRBA) to determine the quantity, priority date and source of every water right in the Snake River Basin in Idaho. The adjudication was required as part of a negotiated settlement known as the Swan Falls Agreement. The settlement ended years of litigation between the Idaho Power Company, the State of Idaho and Upper Snake River basin irrigation interests relating to the utility's water rights on the Snake River. The goal of the adjudication is to give a full and accurate accounting of water rights in the Snake River Basin.

The state has been divided into 43 basins for water management. Over 174,000 water right claims were filed in the Snake River Basin Adjudication which makes it one of the largest general stream adjudications in the western states (Report by IDWR, 1996). When the SRBA began in 1987, the entire adjudication was expected to only take a decade. In 1996, the adjudication court is still working on the state law based claims in the first three basins. They were established as test basins by the court to identify procedural and legal issues which would need to be resolved early on in the course of the adjudication.

One of these original test areas is Basin 36 which rests on the Snake River Plain in southern Idaho. It is a productive agricultural area with much competition between surface and groundwater users. A denied request for water by a farmer in Basin 36 eventually reached the adjudication court in Twin Falls, Idaho. This court case highlights the problems of water management in Idaho.

THE SNAKE RIVER PLAIN

The Snake River Plain is an arid and intensively farmed area of southern Idaho. Much of the Snake River Plain receives less than 10 inches of rain each year. Despite the arid climate, the region is a productive agricultural region which produces potatoes, sugar beets, wheat, mint, hops, barley and seed corn. The agriculture in the region is dependent on surface water from the Snake River and its tributaries and also on the Snake River Aquifer. Over 3.6 million acres of desert and grasslands have been converted to irrigated agriculture (Stuebner, 1994).

The Snake River is the primary source of surface water of irrigators in the Snake River Plain. The flows of the Snake River near King Hill, Idaho, yield a mean annual runoff of 7.8 million acre-feet (USGS, 1994). The U.S. Geologic Survey (USGS) Station at King Hill is located near the southwestern end of the Snake River Plain and is near the end of IDWR administrative Basin 36.

The Snake River Aquifer lies under this productive agricultural region. It extends under approximately 10,000 square miles of central and eastern Idaho. This part of the Snake River Plain is underlain by basaltic lava flows which have fractures and cavities to hold and recharge the enormous aquifer. The aquifer is fed by rainfall and melting snow from the surrounding mountain ranges. The majority of the streams on the northern side of the Snake River Plain meander over permeable basalt lava beds and eventually disappear into the porous volcanic rocks where the groundwater moves at an estimated 2 to 10 feet per day. The water generally moves in a southwest direction within the aquifer.

The yearly influx and discharge of the aquifer is 8 million acre-feet (Shallat, 1994). The Snake River both is recharged by and recharges the Aquifer depending on the location. Springs are fed by the aquifer which in turn flow into streams. Part of the water applied to fields for irrigation percolates to the aquifer, and some of it also returns to streams or rivers. A significant portion of the water diverted is lost to the system through consumptive use.

Despite the vast quantity of water in the Snake River Aquifer, the large rate and quantity of withdrawals has affected the flows of springs, rivers and streams. Every gallon pumped from the aquifer in some way impacts water available to surface water sources. Unfortunately, the state has never known how much water is withdrawn or diverted, how much is consumptively used and how much returns to the rivers or percolates back to the aquifer. These unanswered questions and the related problems of exaggerated water right claims and an overappropriation of the water supply in the basin are impediments to effective conjunctive water management.

THE MUSSER CASE

The brothers Alvin and Tim Musser own 486 acres in Gooding County in southern Idaho. The brothers lease their property to Howard Morris who farms it. The Mussers have a water right for 4.8 cubic feet per second (cfs) for irrigation purposes with a priority date of April 1, 1892. Water for the Musser's right discharges from a group of seeps and springs known as Curran Springs. The water is collected and diverted from the Martin-Curran Tunnel and Ditch. Their property lies in administrative Basin 36 which is one of the first three test basins to be completed in the Adjudication.

The Idaho Department of Water Resources recognized the Musser's water right as valid because they have recommended it in the Director's Report for Basin 36 in the Snake River Basin Adjudication. A Director's Report is filed in the adjudication court by IDWR when they have completed investigations of all water right claims filed in an individual basin. The SRBA court will eventually make a decree on the water rights for the basin. The procedure is designed to prevent a water user from possessing a water right which exceeds the water duty for the number of acre-feet per acre which is set by the state for that region. IDWR will eventually submit a Director's Report to the court for each

basin as they work through the adjudication.

Southern Idaho experienced a drought in the late 1980's and early 1990's that increased the awareness of the connection between ground and surface water. Flows from the Curran Springs, the source of the Musser's water right were diminishing. The Mussers did not receive their full water right in 1991, 1992 or 1993.

The drought also affected farming practices. Originally, the Musser's entire 486 acres was farmed with a combination of grain, corn and hay. The decrease in the amount of water available forced them to leave 50 acres idle in 1991. In 1992, Mr. Morris who leases the Musser property had to switch to less valuable and less water consumptive crops due to the continued shortfall of their water right. The inadequacy of water continued into 1993 when 100 acres were left idle, and Mr. Morris continued his change from preferred cropping patterns. The shortfall of irrigation water also damaged the crops which were planted. Mr. Morris later testified that it was virtually impossible to calculate the amount of damage he has sustained as a result of not receiving the full water right (Musser v. Higginson, hereafter Musser I).

On May 15, 1993, the Mussers and other landowners in the area with similar priority dates to surface water rights made a call for water to the watermaster of Basin 36. A call is the term used to describe a request by a water right holder to fulfill the full amount of their water right. In response to the call, the Basin 36 watermaster made a written demand for the water to Director Keith Higginson of IDWR on May 26, 1993. Director Higginson rejected the watermaster's demand for water on June 8, 1993.

The Mussers made another call for the distribution of decreed water rights through their attorney to the Department of Water Resources on June 16, 1993. Director Higginson rejected the request again on June 18 and cited his June 8 letter to the watermaster.

Director Higginson declined because the junior-priority water rights in the area used water from the Snake River Aquifer. He explained that there was no way to determine exactly how to reduce or close off other water rights fairly to insure the flow to the Martin-Curran Tunnel used by the Mussers. Meeting the flows for the Musser's water right could have required IDWR to curtail pumping by hundreds of groundwater users during the irrigation season.

The decision by the Director to reject the Musser's call for water shows how much times had changed in Idaho. In 1935, irrigators with junior-priority rights in the Teton basin of northeast Idaho diverted all the upstream water. The Governor called out the National Guard to enforce the provision of "first in time, first in right" in the Teton basin (Newell, 1975).

In his refusal, the Director also made reference to a policy set up by IDWR and the Idaho State Legislature which precluded him from taking action in such cases. The policy to which he referred was IDWR's interpretation of an Idaho water law. Idaho Code 42-226 recognizes the doctrine of "first in time is first in right" but says that a reasonable exercise of this right will not block the full economic development of the Snake River Aquifer and other underground water resources." The law calling for full economic development of the Snake River Aquifer was passed in 1951.

This law divided the administrative approach to ground and surface water despite the fact that the two sources were interconnected. The law encourages full economic development of the Snake River Aquifer and infers that the priority date system will only be reasonably applied. This language relieved groundwater users of worrying about the impacts on others from their pumping. On the other hand, surface water users had long been strict adherents to "first in right, first in time" because they often lived in basins in which the rivers and creeks had been fully appropriated since the early part of the century. In those areas, particular attention is paid to who is diverting and how much water is being diverted from a ditch or stream. Ground and surface water users were placed on an inevitable collision course.

In 1955, a University of Idaho scientist sensed this inevitable confrontation while working on a survey of the groundwater resources in the state. He stated that "the present groundwater laws in Idaho appear to be adequate to cope with any contention for groundwater rights that might arise, but after these laws are more thoroughly tested changes

and additions will probably be made (Kinnison, 1955).” Nearly 40 years, later the Musser case thoroughly tested the law and administrative procedures governing groundwater use in Idaho.

THE TRIAL

After the IDWR Director’s refusal, the Musser’s attorney filed a complaint and request for a writ of mandate with the Snake River Basin Adjudication Court in Twin Falls. A writ of mandate is a legal decree that compels the performance of an act which the law specifies as a duty belonging to an office (Idaho Code, 7-302).

The lawsuit went before Judge Daniel Hurlbutt who presides over the SRBA Court. The attorneys for the Mussers argued that their water right for 4.8 cfs with its priority date of April 1, 1892 should be fulfilled by the Director according to the doctrine of prior appropriation. They also asked to be awarded attorney’s fees.

IDWR staff measured the flow from the Martin-Curran Tunnel and found it to be only 2.83 cfs on July 1, 1993. (Musser I) The Musser’s counsel restated the shortfall of his clients’ water right and emphasized the duty of the Director of the Department of Water Resources to deliver it. They established a clear legal injury from not receiving their full water right.

The State of Idaho Attorney General’s office represented IDWR in the case. The attorneys for the Department of Water Resources presented four main arguments against delivery of the water. (Musser I) Director Keith Higginson was the primary witness for IDWR.

The Director continued to argue that a “policy” of IDWR prevented him from taking action and justified his refusal to meet the demand for water. However, the judge pointed out that there was never any written policy produced by IDWR in the court proceedings. Testimony by Director Higginson concerning the policy was that “a decision has to be made in the public interest as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource.” (Musser I) This argument was rebuffed by the judge because no formal rule or regulation had ever been adopted or produced to affect the procedures available to the public. The testimony of the Director showed that IDWR was leaning towards encouraging more groundwater development at the expense of surface water users.

IDWR also argued the case should be converted from a judicial proceeding into an administrative “contested case” proceeding. This type of administrative procedure would have required the Mussers to hire hydrologists or engineers to determine and prove which junior-priority water right users were causing injury to their water right. The judge also shelved this defense by IDWR.

Next, attorneys for the Department of Water Resources asserted that the distribution of water is accomplished through the organization of water districts. Judge Hurlbutt cited the law within the Idaho Code which defines the Director’s duty to distribute water. Idaho Code 42-602 explains that the “distribution of water shall be accomplished either (1) by watermasters supervised by the Director; or (2) directly by employees of the Department of Water Resources under the authority of the Director in those areas of the state not constituted into water districts.” Judge Hurlbutt dismissed this argument because the “the existence or nonexistence of water districts is wholly irrelevant to the Director’s duty to distribute water.” (Musser I)

The IDWR’s final argument in defense of their refusal to honor the call for the senior-priority water right was that IDWR could not act until the court makes a legal finding on the interconnection between surface and groundwater in Basin 36. The judge cited the Director’s Report for Basin 36 submitted by the Director and IDWR to the adjudication court. The Director’s Report for Basin 36 said that the springs, spring-fed tributaries, the Snake River and the Snake River Aquifer are hydrologically interconnected and will be administered conjunctively (Hurlbutt, 1993). Director Higginson himself later testified that he had been aware that surface and groundwater were connected during his 19 year tenure as Director. Judge Hurlbutt dismissed this argument and essentially said that IDWR did not have to wait for him to tell them something that they already knew.

On August 5, 1993, Judge Hurlbutt ruled in favor of the Mussers and said that the Director of the Idaho Department of Water Resources has a clear legal duty to distribute the water under the prior appropriation doctrine. The judge went on to say that the failure to deliver the water was arbitrary and capricious and ordered a writ of mandate for the Department of Water Resources and the Director to deliver the water. In his decision, Judge Hurlbutt also found that the crops planted by Mr. Morris were suffering damage due to lack of water. Since the Mussers and Mr. Morris could not sue the state over crop loss, the only judicial remedy available was the demand for water. Judge Hurlbutt did not specify how to deliver the water, but left that to the discretion of the Director and IDWR.

The Mussers and their law firm were also awarded attorney's fees. Judge Hurlbutt ordered that they not be paid out of IDWR's adjudication account, but the regular budget for IDWR. He reasoned that the Mussers had not sought an adjudication, but a service from IDWR to deliver the water to fulfill their senior right.

In the words of Judge Hurlbutt, the director's refusal to deliver the water was "without reasonable basis in fact or law," and the that the director and IDWR was asked to "perform a duty which is clear, unambiguous and constitutionally required." (Musser I) The Department of Water Resources followed with the only available course of action. They appealed the decision to the Idaho Supreme Court.

TO THE IDAHO SUPREME COURT

Attorneys for both sides continued with legal skirmishes on various issues in the decision through the fall and winter of 1993. The main part of these contests were IDWR's attempts to get a stay or relief from the writ of mandate issued by Judge Hurlbutt. There were also several legal maneuvers by IDWR to escape having to pay legal fees to the Mussers.

The parties presented their oral arguments to the Idaho Supreme Court mid-February, 1994. On February 28, 1994, the Idaho Supreme Court upheld Judge Hurlbutt's decision in the adjudication court in the Musser case in a unanimous decision.

The Supreme Court agreed that the adjudication court correctly issued a writ of mandate commanding the Director of the Department of Water Resources to deliver water to fulfill the Musser's water right. Justice Byron Johnson said that "although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water" (Musser v. Higginson, hereafter Musser II).

The Idaho Supreme Court also upheld the award of attorney fees to the Mussers. IDWR had argued that the adjudication court had abused its authority in awarding attorney costs and fees. The Supreme Court went further and also upheld the order to pay the Musser's attorney fees and costs out of the regular operating budget for IDWR and not the SRBA account.

Although the Idaho Supreme Court decision was quite clear and unanimous, IDWR still asked for a rehearing of the case. It was denied on April 22, 1994.

THE RESULTS

Neither the Idaho Supreme Court nor Judge Hurlbutt specifically defined how the water should be delivered. The judiciary felt the details and decisions of water management and allocation belonged to the Director and the Department of Water Resources.

The response by the Department of Water Resources for the irrigation season in the spring and summer of 1994 was to send a notice to all users of ground water from the eastern Snake Plain Aquifer. The notice described a series of scheduled public hearings on conjunctive management rules for ground and surface water across the state. The notice also advised ground water users that curtailment of junior-priority groundwater rights from the Eastern Snake Plain Aquifer may be commenced this year if senior-priority rights make a call for priority distribution of water. The notice went on to say that "if the investigation by IDWR of a call by a senior-priority right determines that the senior-priority

right is not being met, junior-priority rights will have to be shut off even if this results in under-utilization of the aquifer” (Stapilus, 1994).

The public meetings were held, and a set of rules were developed during a negotiated rulemaking process. The conjunctive management rules were adopted by IDWR in October, 1994. However, the rules were challenged by another surface water users group who claimed that parts of the new conjunctive management rules were unconstitutional because they contained provisions which are contrary to the doctrine of prior appropriation. The Idaho Supreme Court only decided in the spring of 1996 which court has jurisdiction to hear the challenge to IDWR’s new rules. The main issue is still to be considered by the court system.

IDWR, in partnership with the University of Idaho, also completed a hydrologic study on the Snake Plain Aquifer. The study was primarily a computer model to provide more detailed information on the flow of water through the aquifer. It considers lands irrigated in the model area by both ground and surface water.

Luck changed for farmers in southern Idaho. The drought which began in 1987 and lasted through the summer of 1993 ended during the winter of 1993-94. The winters of 1993-94 and 1994-95 received sufficient moisture to reduce the acute competition among water users. The Mussers and others did not make calls for water to meet their surface water rights. IDWR was not faced with the curtailment of hundreds of junior-priority groundwater pumpers. The requirement for groundwater pumpers to measure their water use and the moratorium on new water development which both began in 1994 likely contributed to reducing the shortfalls.

The adjudication process is continuing in Idaho, but slowly due to the number and complexity of the claims. The principal purpose of the adjudication is to identify a correct list of water rights and determine the relationship of all the rights to one another. The state will also know for the first time how much water is consumptively used and lost to the system by each claim. Knowledge of the relationship among all claims is essential before the ground and surface water can be managed conjunctively in the Snake River Basin.

The Musser case displays the enduring problems to be faced prior to effective water resource management. The State of Idaho attempted to use two different legal and administrative systems to manage a resource which is hydrologically connected. Not applying the doctrine of prior appropriation to all water sources consistently has left many conflicts to resolve. The conjunctive management of surface and groundwater will result after a slow and painful process due to the length of time that they were considered separate.

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