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A & B Irr. Dist. V. IDWR Appellant's Reply Brief Dckt. 39196

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Docket No. 39196-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION
DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A
GROUND WATER MANAGEMENT AREA

A & B IRRIGATION DISTRICT,
Petitioner-Appellant,

v.

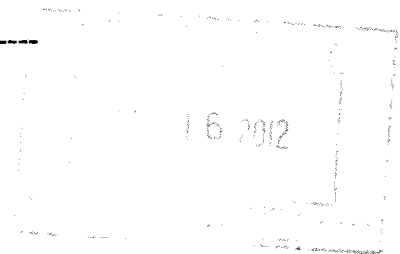
IDAHO DEPARTMENT OF WATER RESOURCES,
and GARY SPACKMAN, in his official capacity as Interim Director
of the IDAHO DEPARTMENT OF WATER RESOURCES; and,
Defendants-Respondents,

v.

THE CITY OF POCA TELLO, and THE IDAHO GROUND WATER APPROPRIATORS,
INC.,
Intervenors.

A&B IRRIGATION DISTRICT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District for Minidoka County
Honorable Eric J. Wildman, District Judge, Presiding



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INTRODUCTION

The Idaho Department of Water Resources (“IDWR” or “Department”) fails to provide a reasoned response to A&B’s appeal. Although IDWR agrees the term “disposed of” in section 67-5246 is unambiguous, the agency fails to acknowledge the statute’s plain meaning. Moreover, IDWR refuses to accept this Court’s precedent where the term “dispose of” has a settled legal meaning, to finally determine.

Instead, IDWR urges the Court to change the statute’s meaning to either “accept” or “grant or deny,” terms not used by the legislature. IDWR’s argument does not justify the District Court’s erroneous decision. Indeed the court used the wrong analysis concluding that the statute is ambiguous because the court believed the statute is subject to conflicting interpretations. Clerk’s R. Vol. 1 at 171. Since there is only one *reasonable* interpretation of the term “dispose of,” the statute is not ambiguous. Regardless if the result would be absurd, when a statute is unambiguous the Court cannot revise or change the statute and must apply the law as written. Since the terms “dispose of” have only one plain meaning, to finally determine, the District Court erred as a matter of law when it dismissed A&B’s petition for judicial review.

Recognizing the flaw in the District Court’s analysis, the Department turns away from this Court’s precedent and the settled legal meaning and instead attempts to substitute the terms “accept” or “to grant or deny” for the statutory terms “dispose of.” Contrary to the agency’s wish to rewrite the statute, the terms are not the same. In a nutshell, if the legislature had only wanted the agency to “accept” or “grant or deny” a petition for reconsideration within 21 days, it would have used those words. Moreover, the plain language of the statute overrides the

Department's rules and its own interpretation. Regardless, the Department did not *grant* A&B's requested relief as it suggests. Instead, the agency unilaterally enlarged the 21-day time limit contrary to the law. As such, A&B's petition for reconsideration was denied by operation of law and the district properly exercised its right to appeal the Director's final order.

Assuming for argument's sake that the statute was ambiguous—the *Simplot* test for agency deference is inapplicable because the Department is not the sole agency charged to interpret Idaho's APA (I.C. § 67-5201 *et seq.*). When a statute applies generally to multiple agencies, prior case law clarifies that no one agency is granted deference for interpreting the statute in question.

In summary, it is evident that the Department cannot provide a valid response without contradicting itself or making up procedures that do not exist under the statute. A&B's interpretation of the unambiguous statute, consistent with the Court's use of the terms "dispose of" is the only reasonable construction. A&B respectfully requests the Court to reverse the District Court.

ARGUMENT

I. The Statute is Unambiguous and the Department's Interpretation is Unreasonable.

Although the Department agrees with the District Court's decision, the agency admits that the statute is unambiguous.¹ *IDWR Respondents' Brief* ("IDWR Br.") at 8. Despite agreeing with A&B that the terms "dispose of" are unambiguous, IDWR urges the Court to construe the

¹ The District Court found that the statute was ambiguous and applied the four prong test announced in *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206 (1991). Clerk's R. Vol. 1 at 171.

statute and even offers secondary authority to aid in its interpretation.² *See id.* at 10-12.

However, based upon its plain language argument, IDWR's position is unreasonable and begs the question, if the statute is unambiguous why does IDWR turn to outside comments and articles to justify its argument and construction of the statute? Since the Department concedes the statute is unambiguous, it must accept A&B's interpretation as the Department cannot identify another reasonable construction of the terms "dispose of" as used in section 67-5246.

The Idaho Supreme Court recently found that, "[a]n unambiguous statute would have only one reasonable interpretation. An alternative interpretation that is unreasonable would not make it ambiguous." *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 265 P.3d 502, 509 (2011). Consequently, if a statute is unambiguous, it only has one reasonable interpretation. Moreover, the Court does not engage in statutory construction and must apply the plain meaning of an unambiguous statute. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011). A&B provided numerous examples in prior cases where the Court used "dispose of" (or some past or plural version thereof) in terms of finality. IDWR ignores this Court's precedent and attempts to dismiss the prior examples as not being representative of the terms "dispose of" as used in the APA. Instead, IDWR relies upon a dictionary definition to argue the terms mean merely "to attend to" or "settle."³ *IDWR Br.* at 10.

However, the Department's alleged distinction fails because the terms "dispose of" would be ambiguous if given the Department's different interpretation. The terms cannot mean to

³ Even the definition IDWR relies upon does not support its argument. *IDWR Br.* at 9. The dictionary definition cited by IDWR includes "to transfer or part with," "to get rid of," and "settle." The Director's June 1st order did not do any of these actions by refusing to decide and resolve A&B's petition.

“finally determine” in one context of Idaho law and then something else in the context of the APA. However, that is the result of IDWR’s contradictory argument. Since IDWR agrees the statute is unambiguous, the agency must accept the law’s plain meaning and recognize its effect. IDWR failed to comply with the statute in this case. Consequently, A&B’s petition for reconsideration was denied by operation of law. *See* I.C. § 67-5246(4).

The District Court found that the term was “ambiguous” because it was not defined within the APA and on the theory that “reasonable minds might differ as to its interpretation, making it subject to conflicting interpretations.” Clerk’s R. Vol. 1 at 171, 172. However, just because words within a statute are not defined and are subject to conflicting interpretations does not equate to ambiguity. The Court recently held that, “[a] statute is ambiguous where the language is capable of more than one reasonable construction.” *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 265 P.3d 502, 509 (2011) (emphasis added). However, the Court further explained that “***an unambiguous statute would have only one reasonable interpretation,***” and that “an alternative interpretation that is unreasonable would not make it ambiguous.” *Id.* (emphasis added).

The District Court, and now IDWR, wrongly tried to revise the unambiguous statute to accommodate their desired results. Although IDWR agrees the statute is unambiguous, it argues that A&B’s interpretation is unreasonable because it would lead to absurd results based upon the potential variety and complexity of the issues presented upon reconsideration. Clerk’s R. Vol. 1

at 172.⁴ IDWR’s only argument is that the result of the statute seems absurd, and therefore the plain language must have some other interpretation. *IDWR Br.* at 9. However, *Verska* holds that the Court has “never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so.” 265 P.3d at 509. Even if the Department’s flawed reasoning was correct, and this unambiguous statute did produce an absurd result, that fact itself would not matter and the Court would still apply the unambiguous language as written. If IDWR disagrees with the legislature’s 21 day timeframe to decide or “dispose of” petitions for reconsideration, the agency must take that up with the legislature, not a rewrite of the statute through the courts.

A&B’s interpretation of the statute using its plain meaning is the only reasonable interpretation. The Department and the District Court cannot offer another reasonable interpretation, and the fact that it will (in their opinions) produce absurd results is irrelevant—the statute must be applied as written.

A. The Department’s Interpretation Erroneously Adds Terms and Alters the Plain Meaning of the Statute.

The Department attempts to create a completely new process separate and apart from its order allegedly “disposing of” A&B’s petition for reconsideration. IDWR claims that it only has to “act on” or issue some written order “granting” the petition in order to comply with the time limits set by the APA—after “granting” a petition within 21 days. The agency argues that it can

⁴ The Department and district court erroneously make numerous assumptions without any evidence in the record regarding what is practical to be accomplished within 21 days. The petition for reconsideration is a tool to correct mistakes or errors based upon the record before the agency, not an entirely “new” procedure in which the Department gets to choose whether to schedule additional briefing, hearings, etc.

create a whole new unfettered process for briefing, or oral arguments to decide the petition's merits. *IDWR Br.* at 9.

This interpretation would contradict the plain meaning of the statute, and would create additional rules and procedures not codified anywhere in the Idaho statutes, nor promulgated in the Department's own procedural rules. The Department attempts to rewrite the statute by arguing the petition merely needs to be "accepted" or "granted" within 21 days, and that those terms carry the same meaning the same as the term "dispose of" in I.C. § 67-5246.

Contrary to IDWR's theory, "disposed of" does not have the same meaning as "accept" or "grant." The Department clings to a dictionary definition that states "dispose of" means "to attend to; settle: disposed of the problem quickly...to get rid of; throw out." *IDWR Br.* at 9. Even accepting IDWR's definition there is no question that the Director failed to "attend to" or "settle" A&B's petition for reconsideration. More importantly, the Department did not dispose of the petition, nor did the agency finally grant or deny it. Instead, the Director placed the petition into a legal purgatory whereby the Director became the sole arbiter as to when the petition would be finally decided.⁵ Although the legislature clearly defined that time frame to be 21 days by statute, IDWR erroneously enlarged that timeframe with its erroneous interpretation of the law.

In summary, the Department cannot create new procedural rules and timelines contrary to the clear and unambiguous terms in the statute. By failing to dispose of A&B's petition for

⁵ If IDWR, or any other state agency, believes the time limits under the APA are unreasonable, the agency must seek a change in the law, not apply an erroneous interpretation in practice.

reconsideration within 21 days, the petition was denied by operation of law. The District Court should have recognized the legal effect of the agency's failure.

B. The Department's Explanation Regarding the Time Frame for Judicial Review and "Dispose of" Further Illustrates Why its Interpretation is Unreasonable.

The Department cannot have it both ways. The agency wants the Court to believe that "disposing of" simply means "granting" or "denying" A&B's petition and that there is an additional procedure and decision (on the merits) that may take place on an indefinite schedule beyond the statute's 21 days. Pursuant to this argument, there are multiple decisions and steps—there is a decision whether to "grant or deny" the petition and then a later-in-time decision on the merits (whether to grant or deny the requests for relief in the petition). A&B's petition for reconsideration asked that the Department to reconsider its final order and change its erroneous decision. Merely "granting" the petition to further consider the petition did not dispose of anything under the law. Instead, the Director's decision left A&B's petition in an undefined legal limbo, definitely not "settled" or "finally decided."⁶ Consequently, the agency's failure to "dispose of" the petition resulted in a denial by operation of law, forcing A&B to file its petition for judicial review with the District Court. Clerk's R. Vol. 1 at 26.

However, the Department argues that it is significant that section 67-5273(2) uses the language "decision thereon" and not "disposes of" which in IDWR's opinion means the

⁶ Furthermore, any argument by the Department that a party could force the issue through a mandamus action is absurd considering the very argument postulated here is that they have this whole other undefined procedure that places no limits upon how they proceed, or duty to act.

Amended Final Order. IDWR Br. at 17. There is no basis for IDWR’s argument. The statute referenced by IDWR states as follows:

(2) A petition for judicial review of a final order... must be filed within twenty-eight (28) days of the service date of the final order,... or, **if reconsideration is sought**, within twenty-eight (28) days after the service date of **the decision thereon...**

I.C. § 67-5273 (emphasis added).

Contrary to IDWR, the statute does not say if reconsideration is “granted,” but rather if reconsideration is “sought.” Pursuant to the Department’s argument it is creating further ambiguity regarding what “the decision thereon” actually means within section 67-5273(2). For example, it could mean the decision to “dispose of” the petition, or the Department’s second decision on reconsideration, the order regarding the actual merits of the petition. Under that interpretation a party would be left with two timeframes to file a petition for judicial review. This is just another reason why the Department’s interpretation is unreasonable and should be rejected.

II. The Department’s Rules Cannot Conflict With the Plain Language of the Statute.

The Department, a state agency, cannot promulgate administrative rules that are contrary to statute. Moreover, it is the judiciary’s sole responsibility to interpret the law and decide whether an administrative rule contradicts the wording of a statute. *See Holly Care Ctr. v. State, Dept. of Employment*, 110 Idaho 76, 82, 714 P.2d 45, 51 (1986). Contrary to IDWR’s argument in this case, the opinions and comments of the attorney general’s office on the APA, or model administrative rules implementing the APA, do not substitute for the plain language of the law.

Moreover, opinions of the attorney general are considered advisory and not binding on the courts. *See id.*⁷

As highlighted by the Department, administrative rule 37.01.01.740.02.d uses the words “to grant or deny.” *See IDWR Br.* at 19. Contrary to IDWR’s rules, section 67-5246 does not contain the words “to grant or deny,” but instead states “dispose of.” Accordingly, the agency rules add language not found within the statute as drafted by the legislature. If the plain language of the statute means “to grant or deny” it is unclear why the Department felt it was necessary to change the language in its procedural rules and not use the terms “dispose of” as enacted by the legislature. Since “dispose of” has a different settled legal meaning, the statute differs from what IDWR has promulgated in its rules. IDWR has no authority to enact rules different than what is authorized by statute, therefore the plain language of the statute controls. Consequently, IDWR’s argument relying upon the language in its rules is without merit and should be rejected.

Moreover, IDWR did not technically *grant* (or settle) anything in the June 1st or June 9th orders. Instead, the Director attempted to usurp the statutory deadline and extend the amount of time the agency had within which to render a decision to dispose of A&B’s petition. The plain language of the APA does not authorize IDWR to issue an initial decision to “grant or deny” a petition solely for the purpose of allowing more time to rule on the merits. Since IDWR’s rules

⁷ The attorney general opinions act as advisory guides to all departments, agencies, offices, officers, boards, and other state entities in matters involving questions of law. Although they may provide beneficial insight in certain cases, the ultimate interpretation of a law rests with the judiciary.

contradict the language in the statute, IDWR's argument fails as a matter of law. *Holly Care Ctr.*, 110 Idaho at 82, 714 P.2d at 51. The Court should reverse the District Court accordingly.

III. If the Statute is Ambiguous, IDWR is Not Entrusted with the Responsibility to Administer I.C. 67-5246, and Therefore the District Court Erroneously Applied the *Simplot* Test.

The first step in the four prong *Simplot* test asks if a statute is ambiguous the court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue, and only then will it be "impliedly clothed with power to construe" the law. *See J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991) (quoting *Kopp v. State*, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979)). Although IDWR recognizes this first step in the analysis, it fails to recognize how this criteria is not met in this case. *IDWR Br.* at 21-22.

Without explanation or authority—the district court (and now IDWR), automatically presume that "the Department is entrusted to administer Idaho Code 67-5246 with respect to petitions for reconsideration filed in the administrative actions before it." Clerk's R. Vol. 1 at 172. The APA is not a statute specific to IDWR. Instead, the APA is generic and governs numerous state agencies. Pursuant to the *Simplot* test regarding deference, IDWR is not entrusted with the interpretation of the APA any more or less than any other state agency. As explained in A&B's *Opening Brief* (at 16), the Department's expertise and authority to administer statutes fall within the purview of Title 42, Idaho Code. Although section 42-1701A requires hearings before the Director to be conducted in accordance with the APA, IDWR is not unique in that requirement. *See e.g.* Idaho Department of Environmental Quality, I.C. § 39-

105(1) (all hearings of the director are governed by chapter 52, title 67, Idaho Code).

Accordingly, the hearing statute for IDWR does not justify its argument on this issue.

The case law shows how the District Court and IDWR incorrectly interpreted this first prong. In *J.R. Simplot Co., Inc.*, the Idaho Supreme Court noted that “the Tax Commission is ‘impliedly clothed with power to construe’ the tax statutes at issue.” 120 Idaho at 863, 820 P.2d at 1220. The holding was made in regards to Title 63—where the tax commission would have particular expertise and be granted some deference. Likewise, in *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 571, 21 P.3d 890 893 (2001), the Court found that “[t]he Industrial Commission correctly concluded that it is entrusted with the responsibility of administering worker’s compensation law in Idaho. This responsibility is clearly set forth in I.C. §§ 72-201, -506, -508. The first phase of the four prong test is satisfied.” Finally, in *Garner v. Horkley Oil*, 123 Idaho 831, 833, 853 P.2d 576, 578 (1993), the Court stated it is “undisputed that the Department of Employment has been entrusted to administer the Employment Security Act and can adopt regulations as necessary for the proper administration of the act, I.C. §§ 72-1331, 72-1333...”

These cases all show how the various agencies are entrusted with the responsibility to implement the statutes specific to the relevant agency. When a statute applies generally to various agencies, no particular agency is entrusted by the legislature to administer it and therefore receive the *Simplot* deference. In *Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107, 116, 73 P.3d 721, 730 (2003), the Court found that the Idaho Transportation Department’s interpretation of section 54-1904C and what constituted a “clerical mistake” for

purposes of obtaining relief from forfeiture of a bid bond when withdrawn was not entitled to deference, as the agency had not been entrusted by the legislature with the responsibility of administering the bid bond statute. Specifically the Court held:

ITD has not been entrusted by the legislature with the responsibility to administer Idaho Code § 54-1904C. ***That statute applies generally to any public entity receiving bids for public works construction, not just to bids submitted to the ITD.*** Therefore, any interpretation by the ITD of the statute would not be entitled to deference.

Westway Const., Inc., 139 Idaho at 116, 73 P.3d at 730 (emphasis added).

IDWR has no response to this controlling rule of law. Instead, IDWR suggests that each agency is granted deference to interpret the APA how it sees fit. To the contrary, well-established precedent clearly provides that each state agency only has particular expertise in the statutes concerning the areas they regulate. IDWR is charged with granting water rights, administration of water rights, and other requirements related to water resource matters. IDWR has no expertise to interpret a statute of generic and broad application like the APA. Just like the Court found the Idaho Transportation Department was not the sole agency charged with implementing the bid bond statute, so too is IDWR not the sole agency charged to implement the Idaho APA. Since the first prong of the *Simplot Test* is not met in this case, the District Court erred in granting deference to IDWR's interpretation of section 67-5246. The Court should reverse the District Court accordingly.

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CONCLUSION

The Department failed to “dispose of” A&B’s petition for reconsideration within 21 days as required by section 67-5246. By operation of law, the petition was denied on June 1, 2011. A&B properly filed a timely petition for judicial review. The district court failed to properly interpret the plain and unambiguous statute and consequently erred in dismissing A&B’s petition for judicial review. In addition, the district court wrongly denied A&B’s motion to strike. The Court should reverse and remand the case accordingly.

Dated this 16th day of February, 2012.

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I HEREBY CERTIFY that on the 16th day of February, 2012, I served true and correct copies of the foregoing A&B Irrigation District's *Reply Brief* upon the following by the method indicated:

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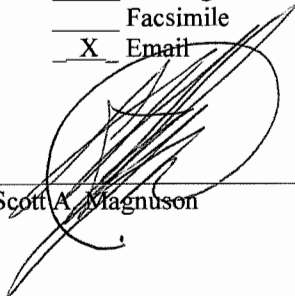
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