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ATTORNEYS FOR IDAHO GROUND WATER APPROPRIATORS

BEFORE DEPARTMENT OF WATER RESOURCES

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

Docket No.: 37-03-11-1

**IGWA'S RESPONSE TO MOTION
FOR DECLARATORY RULING**

COME NOW Idaho Ground Water Appropriators, Inc., and its Ground Water District members, for and on behalf of their respective members (collectively "IGWA"), through counsel, and hereby file IGWA's Response to Motion for Declaratory Ruling filed by A&B Irrigation District on March 21, 2008.

I.
BACKGROUND

On July 26, 1994 A&B Irrigation District (“A&B”) filed a *Petition for Delivery Call* (“Delivery Call”) with the Idaho Department of Water Resources (“Department” or “IDWR”). The Delivery Call requested that the Director of the Department take those actions “necessary to insure the delivery of ground water to [A&B] as provided by its water right to protect the people of the State of Idaho of depletion of ground water resources which have caused material injury to [A&B], and to designate the Eastern Snake Plain Aquifer as a ground water management area. . . .” *Delivery Call* at 3.

On November 16, 1994 a pre-hearing conference was held and the outline of a proposed stipulation by the parties was presented by counsel for A&B. On May 1, 1995, A&B, the Department and the parties entered into an agreement which was provided for in the *Pre-hearing Conference Order* (“Pre-hearing Order”) which stayed action on the Delivery Call until “further notice to the parties.” *Pre-hearing Order* at 8. The stipulation provided that any party may file a “Motion to Proceed at any time to request the stay be lifted.” *Id.*

On March 16, 2007, A&B filed a Motion to Proceed with IDWR requesting that the Director lift the stay, requested IDWR to proceed with administration to address material injury suffered by A&B and to designate the ESPA as a ground water management area. *Motion to Proceed* at 1. On October 19, 2007, the Director of the Department issued a *Notice of Motion to Proceed Filed by A&B Irrigation District; and Order Lifting Stay, Setting Hearing Schedule, and Appointing Independent Hearing Officer* (“Order Lifting Stay”) advising the parties that A&B had filed a Motion to Proceed and that he was lifting the stay governing the Delivery Call. The Order Lifting

Stay further provided that the proceedings under the Delivery Call would “proceed under IDWR’s Rules for Conjunctive Management of Surface and Ground Water Resources.” Id. at 1.

On January 28, 2008, IDWR issued an *Order of January 29, 2008* (“January 29 Order”) denying A&B’s Delivery Call and Motion to Proceed finding that A&B had not suffered any material injury. The Order relied in part on the Idaho Ground Water Act and its provisions for “reasonable ground water pumping levels.” See I.C. § 42-226.

On March 21, 2008, A&B filed a *Motion for Declaratory Ruling and Brief in Support of A&B’s Motion for Declaratory Ruling* (“Brief in Support”), arguing that the Idaho Ground Water Act is inapplicable and that its provisions for “reasonable ground water pumping levels” was likewise inapplicable. Instead, A&B contends that the law applicable to its pre-1951 ground water rights requires protection of their “historic pumping levels” without consideration of reasonableness or effect upon junior ground water users.

This Response to *A&B’s Motion for Declaratory Ruling* is timely filed.

II. **INTRODUCTION**

In its *Motion for Declaratory Ruling*, A&B argues that Idaho’s Ground Water Act codified at Idaho Code § 42-226 *et seq.* does not apply to ground water rights which were established before 1951 which was the year the Act was enacted. Based thereon, A&B argues that its pre-1951 water rights are protected to their “historic pumping level” without consideration of reasonableness or effect upon junior ground water users as otherwise required under Idaho’s Ground Water Act. However, A&B is clearly wrong. A&B’s ground water rights are subject to Idaho’s Ground Water Act.

First, the Ground Water Act itself clearly states that “the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act.” I.C. § 42-229 (emphasis added). Further, the Idaho Supreme Court in *Baker v. Ore-Idaho*, 95 Idaho 575, 513 P.2d 627 (1973) applied the Ground Water Act to pre-1951 water rights and is the controlling law.

Second, neither the original nor the amended language in I.C. § 42-226 “specifically except” pre-1951 water rights. Moreover, Idaho constitutional and statutory law mandates consideration of reasonable pumping levels of senior water users as required by the Ground Water Act to promote full economic development of the State’s ground water resources. If this were not the case, A&B would essentially set the level of use in the ESPA in violation of constitutional principles of optimum use and development of the water resources in the public interest, regardless of whether its pumping levels were reasonable or not.

III. FACTS RELEVANT TO A&B’S MOTION

A&B claims there are several material facts that are not disputed. However, IGWA disputes many of the facts as presented by A&B and believes many are irrelevant to the questions presented in A&B’s motion.

IGWA specifically disputes that A&B is “entitled” to divert 1100 cfs, rather if it is determined that its means of diversion are reasonable and they are at a reasonable pumping depth, then A&B is authorized to divert up to 1100 cfs under Water Right No. 36-02080 provided the water is put to beneficial use. Brief in Support at 5. Although ground water levels have generally declined in the ESPA since 1950, ground water

pumping is but one of many causes of the decline, and, there is evidence that the ESPA is approaching equilibrium. Because protecting ground water rights for irrigation purposes to “historical ground water pumping” levels is not the standard or the law in Idaho, it is not surprising that no curtailment of “out-of-priority diversions of ground water” has occurred to protect those levels. Brief in Support at 5-6. Finally, the “facts” that A&B sets forth as numbers 7 and 8 regarding the expense they have incurred and the reduction in their diversion capacity are subject to discovery and are specifically disputed. Further, these facts are not relevant to A&B’s motion that only requests a ruling on what is the “applicable law” to be applied to the administration of its Delivery Call.

The only facts arguably relevant to A&B’s Motion is that A&B’s water right bears a priority date of 1948¹, they divert from approximately 177 wells and the ESPA is a rechargeable aquifer that is not currently being “mined.” Order of January 29, 2008 at 3 ¶¶ 12, 13 and at ¶ 35; Aff. of Temple at ¶11.

IV. DISCUSSION

A. The Idaho Ground Water Act Applies to Pre-1951 Ground Water Rights for Irrigation

The Idaho Ground Water Act itself clearly states that “the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act.” I.C. § 42-229 (emphasis added). This plain and unambiguous language in the Ground Water

¹ Although A&B’s water right in this case bears a 1948 priority date, there are some factual questions regarding the development of A&B’s water right and the dates of development that have not been fully developed. In other words, it appears that most of A&B’s wells were not drilled until after 1951. Depending upon this Hearing Officer’s decision with regard to A&B’s Motion for Declaratory Ruling, such facts may be relevant in the administration of A&B’s water rights or in determining which points of diversions still enjoy the benefit of the early priority date.

Act clearly expresses the Idaho legislature's intent that its provisions be applied both retroactively and prospectively.

This intent of the Idaho Ground Water Act was upheld and applied by the Idaho Supreme Court in *Baker v. Ore-Ida*, 95, Idaho 575, 513 P.2d 627 (1973). In that case, the Supreme Court applied the "reasonable ground water pumping levels" of the Ground Water Act to pre-1951 ground water rights. In so doing, the Supreme Court held that "a senior appropriator is only entitled to be protected to the extent of the 'reasonable ground water pumping levels' as established by the [IDWR]." *Baker* at 584, 513 P.2d at 636. Although "historic pumping levels" may have been the standard prior to the enactment of the Ground Water Act, the Supreme Court found that the legislature clearly intended to "change the common law rule" through the enactment of the Ground Water Act.

Baker makes it clear that the reasonable pumping levels requirement in the Ground Water Act applies to "historic" and "senior" water rights shutting the door on A&B's claim that its water rights are exempt from the Ground Water Act's provisions.

In the enactment of the Ground Water Act, the Idaho legislature decided as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote full economic development of the resource We conclude that our legislature attempted to protect historic water rights while at the same time promoting full development of ground water.

Id. at 584, 636. There would be no reason to conclude that it was necessary to "modify private property rights in ground water" if the Ground Water Act only applied to water rights that were yet to be developed. That should end the inquiry.

In light of its holding in *Baker*, the Idaho Supreme Court overruled all prior cases that were inconsistent with the principle of "reasonable" pumping levels, including the case of *Noh v. Stoner*, 53 Idaho 651, 29 P.2d 1112 (1933). The Supreme Court

explained: “We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest [and] inconsistent with the Ground Water Act.” *Id.* at 583, 513 P.2d at 635. Thus, *Noh* was overruled not only because it was inconsistent with the Ground Water Act but also because it was inconsistent with the constitutional mandate of optimum development of water resources.

Despite the fact that *Noh* was unambiguously overruled by the Idaho Supreme Court, A&B nevertheless relies upon it in support of its argument for “historic” pumping levels. Notably, A&B did not inform the Hearing Officer of this adverse precedent.²

A&B also relies upon the case of *Musser v. Higginson*, 125 Idaho 392, 393, 871 P.2d 809, 810 (1994) for its argument that the Ground Water Act does not apply to pre-1951 ground water rights. In that case, the Supreme Court “noted” that “[b]oth the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute.” *Id.* This statement, however, is clearly dicta and does not control.³ The question on the application of the Ground Water Act to pre-1951 water rights was not briefed nor argued on appeal.⁴

In *Musser*, the Supreme Court affirmed the trial court’s issuance of writ of mandate against the director of IDWR because the director refused to take any action whatsoever upon a delivery call made by the Mussers and because they had no other

² Although the standard in *Noh* may apply in circumstances involving single domestic wells that pre-date the domestic exception in the Ground Water Act of 1978, the standard in *Noh* does not apply to the 177 wells used for irrigation purposes as is the case with A&B. *See, Parker v. Wallentine*, 103 Idaho 506, 513, 650 P.2d 648, 655, fn 11 (1982).

³ Further, this passing note implies that both the 1951 Act and the 1986 Act have the same language, which they clearly do not as discussed below in Section IV.B.

⁴ This is supported by the appellate briefing filed in that case and by the Supreme Court’s acknowledgement that the argument was only made “at the hearing to consider whether the writ would issue.” *Musser*, 125 Idaho at 296, 871 P.2d at 813.

“adequate, plain or speedy remedy at law.” *Musser* at 394, 871 P.2d at 811. The Supreme Court held that the director’s refusal to act on the delivery call was a breach of the director’s “clear” and “mandatory, ministerial duty.” *Id.* *Musser* was not a case that wrestled with applying the Ground Water Act or the reasonable pumping level requirement to pre-1951 ground water rights. In fact, the one case on point regarding the application of Idaho’s Ground Water Act to pre-1951 ground water rights – *Baker v. Ore-Ida* – is not even mentioned or cited by the Supreme Court in its *Musser* decision.

Musser is simply a case which analyzed and applied Idaho law concerning writs of mandate. A&B’s reading of *Musser* is unacceptable because it would effectively overrule *Baker* and the precedent established therein without even a mention of the case or its precedent. Therefore, the only reasonable conclusion is that *Musser* is distinguishable and inapplicable to the matter before this Hearing Officer.

B. Idaho Code § 42-226 Does Not “Specifically Except” Pre-1951 Water Rights from the Administration Under the Ground Water Act

A&B argues that the last sentence of Idaho Code § 42-226 excepts A&B’s water right from administration under the Ground Water Act and excepts their water right from the reasonable pumping level requirement and essentially overrules the Supreme Court’s holding in *Baker*. This sentence when read with the exceptions language in Idaho Code § 42-229 creates what appears to be an ambiguity in the statute. However, a brief history and analysis of the Ground Water Act and Idaho’s constitutional requirements of optimum beneficial use in the public interest supports the Idaho Supreme Court’s application in *Baker* of the Ground Water Act and the reasonable pumping level requirement to pre-1951 ground water rights.

It is a fundamental law of statutory construction that statutes that relate to the same subject are to be construed together in order to give effect to the intent of the legislature. *State v. Creech*, 105 Idaho 362, 367, 670 P.2d 463, 468, *cert. denied*, 465 U.S. 1051, 79 L. Ed. 2d 722, 104 S. Ct. 1327 (1984). In attempting to discern and implement the intent of the legislature, the court may seek edification from the statute's legislative history and contemporaneous context. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (Ct. App. 1999). In this case, reading Idaho Code §§ 42-226 and 42-229 together in conjunction with a consideration of legislative history, it is clear that the administration of both pre-1951 and post-1951 water rights is to be governed by the act and that only those water rights "specifically excepted" are not: (i.e. "Drilling and use of wells for domestic purposes excepted." I.C. § 42-227 (emphasis added); "Drilling and use of wells for drainage or recovery purposes excepted." § I.C. 42-228 (emphasis added)).

In 1951 the Idaho Legislature enacted legislation known as the Ground Water Act. Idaho's current Ground Water Act is codified at Idaho Code §§ 42-226 through 42-239. Section 1 of the Ground Water Act as passed in 1951 reads:

SECTION 1 GROUND WATERS ARE PUBLIC WATER. -- It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this 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. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1951 Idaho Sess. Laws, ch. 200 § 1, p. 423 (approved Mar. 19, 1951) (emphasis added).

This last sentence of the Ground Water Act is merely a confirmation that prior water rights are validated and confirmed, but does not provide a specific exception to pre-1951 water rights. Section 2 of the original Ground Water Act reads:

SECTION 2. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. - The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act; providing such wells and withdrawal devices are subject to inspection by the department of reclamation and the department of public health. Rights to ground water for such domestic purposes may be acquired by withdrawal and use

1951 Idaho Sess. Laws, ch. 200, § 2, p. 424 (emphasis added).

Further, the 1951 Ground Water Act in Section 4 specifically addressed administration of ground water rights and stated that administration of all non-excepted water rights (i.e. domestic water rights) “whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act.” 1951 Idaho Sess. Laws, ch. 200, § 4, p. 424 (emphasis added). Section 4 of the Ground Water Act is currently codified at Idaho Code § 42-229.

In 1953, the Idaho Legislature amended Section 1 of the 1951 Ground Water Act by adding the italicized language which qualified the application of the “first in time first in right” doctrine by emphasizing that it was the Legislature’s intent to develop the state’s ground water resources and that strict priority shall not block full economic development of the state’s under ground water resource.

SECTION L GROUND WATERS ARE PUBLIC WATER. -- It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined *and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground*

water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided. All ground waters in this 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. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1953 Idaho Sess. Laws, ch. 182, § 1, p. 278 (approved Mar. 12, 1953)(italics in original).

The 1953 amendment provided two important changes: 1) it qualified the application of the “first in time first in right” doctrine as it applies to ground water rights and 2) it protected “early” ground water users to a “reasonable pumping level” as established by the Department, not to their historic pumping levels. The only water rights “specifically excepted” from the Ground Water Act were domestic water rights and drainage or recovery wells. I.C. §§ 42-227 and 228. However, the administration of ground water rights, “whenever or however acquired or to be acquired” was still governed by the provisions of the Act, now including the reasonable pumping levels provision. I.C. § 42-229. Importantly, the use of senior water rights was not to block the full economic development of the ground water resources of the state.

In 1978, the Idaho Legislature amended Section 2 of the Ground Water Act, now I.C. § 42-227, to limit the exception on domestic wells stating that the drilling and use of wells for domestic purposes shall not be “subject to the permit requirement under section 42-229, Idaho Code.”⁵ Finally, in 1987, the Idaho Legislature amended 42-233 to restrict

⁵ The entire amended section for domestic wells now reads:

42-227. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of health and welfare and providing further that the drilling of such wells

the use of geothermal ground water resources. 1987 Idaho Sess. Laws, ch. 347, § 3 p. 741. The Legislature also added language relating to the reasonable pumping levels as it related to geothermal resources under Idaho Code § 42-226 that states:

In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resources to the extent that he determines such protection is in the public interest.

The 1987 act also amended the last sentence of Section 1 of the 1951 Ground Water Act as follows:

~~All This act shall not affect the rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed~~ its enactment.

1987 Idaho Sess. Laws, ch. 347, § 1, at 743. There was no direct comment by the legislature regarding the change to this last sentence. A&B fully admits, and in fact emphasizes, that this amendment to the last sentence in section 1 of the Ground Water Act was grammatical only. Brief in Support at 9 (emphasis in original). Importantly, Idaho Code §42-229 regarding the administration of ground water rights remains unchanged and still states that administration of all rights to the use of ground water, “unless specifically excepted herefrom”, are governed by the Ground Water Act. The original language of the 1951 Ground Water Act merely affirmed the existence of prior water rights, but did not “specifically except” administration of them from the provisions of the Ground Water Act, thus, the grammatical change in 1987 cannot mean anything more than that. On the other hand, the language in 1987 may be reasonably read to

shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use 1978 Idaho Sess. Laws, ch. 324, § 1, p. 819.

protect pre-1987 geothermal uses from the changes made to the “Act” in 1987. This latter interpretation has been the understanding of IDWR.⁶

This history of the Ground Water Act, coupled with the Supreme Court’s specific application in *Baker* to historic water rights makes it obvious that the law to be applied to A&B’s Delivery Call is reasonable pumping levels and not historic pumping levels. As stated by the Supreme Court in *Baker*, the Ground Water Act is:

consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interests . . . and that the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote full economic development of the resource. . . . Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels

Baker at 584, 513 P.2d at 636.

A broad non-specific exception from the requirements under the Ground Water Act and specifically the reasonable pumping levels provisions for A&B would effectively set the reasonable pumping level in the ESPA at a 1948 level, set unilaterally by A&B regardless of whether its pumping levels were ever reasonable, and would directly contradict Idaho constitutional and statutory law, including the holding in *Baker*. Idaho law seeks the “highest and greatest possible duty from the waters in the state in the interest of agriculture and for useful and beneficial purposes.” *Washington Sugar Co., v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1951); Art. 15, §§ 1, 3, and 7, Idaho Const.; 42-101. Additionally, “[i]t must be remembered that the policy of the law of this

⁶ In the Matter of Applications to Appropriate Water Nos. 63-32089 and 63-32090 In the Name of the City of Eagle, Final Order at 30 (2008) (“the effect of this latter amendment [to the last sentence] of I.C. § 42-226 under the 1987 act was to make the new restriction on the use of geothermal rights prospective only. Thus, all pre-1987 geothermal water rights for non-heating purposes remain unaffected by the restriction in the 1987 act.”)

state is to secure the maximum use and benefit of its water resources.” Mountain Home Irrigation Dist. v. Duffy, 79 Idaho 435, 319 P2d 965 (1957). Indeed, the governmental function in enacting but the entire water distribution under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources. *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977). Recently, the Idaho Supreme Court in *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, upheld the facial constitutionality of the Department’s Conjunctive Management Rules that incorporate these principles and the principles of reasonable use and optimum development of the water resources. See IDAPA 37.03.11.20.02 and 20.03.

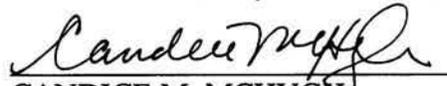
Guaranteeing A&B its historic pumping levels without any consideration of reasonableness would directly contradict the Ground Water Act’s intent to not allow senior, historic users to block the full economic development of the state’s under ground water resources. A&B’s argument that its ground water rights are not subject to the Ground Water Act and its reasonable pumping level requirement must be rejected.

V.
CONCLUSION

Based upon the foregoing, it is respectfully requested that the Hearing Officer declare that as a matter of law A&B’s ground water rights are subject to a “reasonable” pumping level requirement as mandated by the Idaho Ground Water Act and Idaho constitutional and statutory law.

DATED this 11th day of April, 2008.

RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED


CANDICE M. MCHUGH

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2008, the above and foregoing document along with Response of Southwest Irrigation District, Goose Creek Irrigation District & City of Burley to the Position of A&B's Objection to the Director's Order of January 29, 2008 was served by email to those with email or by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:



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