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**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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| **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**<br><br>**MEMORANDUM IN SUPPORT OF A&B's MOTION FOR DECLARATORY RULING** |

COMES NOW A & B Irrigation District ("A&B" or "District"), by and through counsel of record, and hereby submits this *Memorandum in Support of its Motion for Declaratory Ruling*, seeking a declaration as to the applicable law to be applied in the administration of ground water rights diverting from the Eastern Snake Plain Aquifer ("ESPA") in response to the delivery call of A&B.

By the Order of the Director dated October 19, 2007, the Honorable Gerald F. Schroeder was appointed as the hearing officer in this matter pursuant to Rules 410 and 413 of the

Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*). The scope of authority of the Hearing Officer has not been limited under the provisions of Rule 413.02. This Motion is submitted to the Hearing Officer under his authority provided by Rule 413.01.c which grants the Hearing Officer authority to preside at and conduct hearings, accept evidence in the record, rule upon objections to evidence, rule on dispositive motions and otherwise oversee the orderly presentations of the parties at the hearing. A&B's Motion is filed pursuant to Rules 260 and 565 and complies with said Rules as it has fully stated the facts upon which the Motion is based, refers to the particular provision of statutes, rules and controlling law upon which the Motion is based, and states the relief sought. Idaho's APA further provides:

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.
> (2) A petition for declaratory ruling does not preclude an agency from initiating a contested case in the matter.
> (3) A declaratory ruling issued by an agency under this section is a final agency action.

I.C. § 67-5232.

## Introduction

In 1908, over 150,000 acres of public lands located in what is now known as Minidoka and Jerome Counties, were withdrawn from public entry and in the same year a preliminary study was made in regard to the development of these lands under the Reclamation Act of 1902. (Act of June 17, 1902, ch. 1093, 32 Stat. 388; 43 U.S.C. §§372, *et seq.*).[1] These lands were commonly referred to as the Northside Pumping Division of the Minidoka Project. The Minidoka Project, a reclamation project, had been partially constructed and was in the process of being constructed by what is now known as the Bureau of Reclamation, Department of Interior,

[1] *See generally, Affidavit of Dan Temple in Support of A&B's Motion for Declaratory Ruling.*

United States of America ("BOR"). Additional studies of these withdrawn lands for reclamation were made between 1918 and 1921 in which a detailed topographic map of 154,378 acres was made, preliminary canal lines were run and pumping plant sites surveyed, and some land classified in a limited manner. From the 1918-1921 reports, it became clear that there was insufficient surface water from the Snake River to irrigate a significant portion of said withdrawn lands without additional storage being constructed, resulting in the authorization to construct American Falls Reservoir. After construction of American Falls Reservoir, a large portion of the water reserved for the Northside Pumping Division ("Division") was allotted to the Gooding Project, and funds appropriated for the Northside Pumping Division Project were transferred in 1930 to further the construction of the Gravity Extension Division (Gooding-Milner Canal) to deliver stored water to the Gooding Project.

By 1947, preliminary investigations by BOR had established that of the 114,400 acres of public land withdrawn for development under the Northside Pumping Division and classified in detail, it was then feasible to irrigate 13,650 acres with surface water and storage from American Falls Reservoir and Palisades Reservoir, referred to as Unit A, and approximately 64,000 acres in what was referred to as "Unit B" could be served from ground water diverted from wells. Recent private development and the need of land for Veterans returning from a war evidenced the need for additional agricultural lands. A plan of development was then prepared using water from the Snake River and from ground water sources. An Application for Permit to divert ground water was filed for the Division on September 9, 1948 for the irrigation of 66,664.3 acres by means of a series of wells therein described, with each well to have its own separate pump and distribution system to deliver water to the acres to be served by that well. This application was approved by the State Reclamation Engineer (now known as Director of Department of Water Resources) on

November 5, 1948. After these reports had been prepared, the Commissioner of Reclamation filed his report and recommendation as House Document No. 721, with the 81st Congress, Second Session, to support Congressional authorization for construction and maintenance of the Northside Pumping Division of the Minidoka Project. The project was approved on September 30, 1950 (65 Stat. 1083) by the United States Congress for construction under the provisions of the Reclamation Act of 1902.

The ground water right acquired by the United States from the State of Idaho pursuant to the statutory permit and license procedures, granted a right for the diversion of eleven hundred (1100) cfs from 177 wells for the irrigation of 62,604.3 acres of the Northside Pumping Division of the Minidoka Project with a priority of September 9, 1948. Farm units containing from 80 to 160 irrigable acres were made available pursuant to public land openings and drawings for homestead entries, with veteran preferences. Approximately 700 farm units were drawn for development by individuals, each of whom signed a recordable contract by which the homesteader would ultimately obtain title to the property and the right to receive water under the water right acquired by the BOR.

Thereafter, pursuant to Reclamation law, the landowners (homesteaders) formed an irrigation district pursuant to Title 43 of the Idaho Code, which district encompassed all of the farm units developed under the Northside Pumping Division. A repayment contract, which also authorized the transfer of operation and maintenance of the project to A&B, was entered into between A&B, the district formed by the landowners, and the Bureau of Reclamation, which was dated November 27, 1961 and signed on February 9, 1962, and all recordable contracts of the individual landowners were superseded by the repayment contract entered into by A&B, effective December 31, 1962. A partial decree for Water Right No. 36-02080 was issued by the

Snake River Basin Adjudication ("SRBA") District Court on May 7, 2003, which partial decree has been certified by the District Court to be a final judgment from which no appeals were taken. *See* **Exhibit A** to *Affidavit of Dan Temple in Support of A&B's Motion for Declaratory Ruling* (hereinafter "*Temple Aff.*").

**Material Facts to Which No Genuine Issues Have Been Raised**

Certain material facts determined by the Director in his Order of January 29, 2008 are not in dispute. Some of these facts, from the Findings of Fact ("FF") of that Order include:

1. A&B is entitled to divert 1100 cubic feet per second of ground water from the ESPA pursuant to decreed right No. 36-02080 for the irrigation of 62,604.3 acres of irrigable land within the District. FF32

2. Water Right No. 36-02080 has a priority date of September 9, 1948. FF32

3. The ESPA is hydraulically interconnected and has a common ground water supply. FF10, *see also* Rule 50 of the Rules for Conjunctive Management of Surface and Ground Water Sources (IDAPA 37.03.11 *et seq.*, "CM Rules" or "Rules").

4. Since 1950, ground water levels across the ESPA have declined while ground water pumping has dramatically increased. FF16; *see also, Temple Aff.*

5. Between February 19, 2002 and December 20, 2006, Water District Nos. 100, 110, 120, 130 and 140[2] were either created or the respective boundaries revised to provide for the administration of water rights diverting from the ESPA, pursuant to Chapter 6, Title 42, Idaho Code, for the protection of prior surface and ground water rights. FF19

6. Notwithstanding the creation of the water districts above referred to, there has

[2] Although the Director created Water District No. 140 by order of December 20, 2006, a contested case was initiated over that order, a case to which A&B is a party. A final order resolving that case has yet to be issued.

been no curtailment of out-of-priority diversions of ground water from the ESPA to protect historical ground water pumping levels established by A&B under its senior priority Water Right No. 36-02080.

7. During 1995 through the year 2006, A&B has expended approximately $2.476 million for well rectification to chase ground water to lower aquifer levels, over and above normal maintenance and repair, and expended in the years 2002 through 2005 over $1 million in drain well rectification to reduce operational waste and to increase water supplies occurring as the result of declining ground water tables. FF123; *see also*, ¶11.a. of A&B's *Motion to Proceed* filed March 16, 2007.

8. Notwithstanding the large expenditure of funds by A&B in chasing ground water, the maximum diversion capacity by A&B as a result of lowered ground water tables has been reduced by 12% from the 1100 cfs diversion rate to which it is entitled to under its Water Right No. 36-02080. FF1, CL23.

**Application of Ground Water Act to A&B's Delivery Call**

The Idaho legislature in its Act of March 11, 1903 (Session Laws 1903, p. 224) specifically recognized the right to appropriate "the waters of any natural streams, springs, or seepage waters or lakes or other public waters in the state of Idaho." The Idaho Supreme Court in *Le Quime v. Chambers*, 15 Idaho 405, 415, 98 P. 415 (1908), concluded that "seepage and percolating waters" may be appropriated in Idaho pursuant to the 1903 statute. The Idaho Supreme Court again, in *Bower v. Moorman*, 27 Idaho 162, 147 P. 496 (1915), noted that the statute in the state of Idaho had been amended to provide: "The right to the use of waters of rivers, streams, lakes, springs and subterranean waters may be acquired by appropriation." *Id.* at 180. The Court further noted that what was then § 3245, Rev. Codes, provides: "As between

appropriators, the first in time is first in right." *Id.* at 180. The Court then stated: "The first appropriator of water for use for beneficial purposes has the prior right thereto, and the right, once vested, will be protected and upheld, unless abandoned." (Cases cited.) *Id.* at 181. The Idaho legislature changed the manner of future appropriations and management of ground water when it enacted the Ground Water Act ("GWA") in 1951. 1951 Idaho Sess. Laws, ch. 200, pp. 423-29. Sections 1, 2 and 4 of the GWA were subsequently codified as I. C. §§ 42-226, -227 and -229. Section 1 of the GWA, codified as I. C. § 42-226, is entitled "GROUND WATERS ARE PUBLIC WATERS. -" and provides in part as follows: "All rights to use of ground water in this state however acquired before the effective date of this Act are hereby in all respects validated and confirmed." Section 2 of the GWA, as originally enacted, is codified as I. C. § 42-227, is entitled "DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. –" and provides in part: "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; . . ."

Under section 4 of the GWA, codified as I. C. § 42-229, and entitled "Methods of appropriation", as originally enacted, provided that the right to the use of ground water of this state may be acquired only by appropriation. It then stated: "Such appropriation may be perfected by means of diversion and application to beneficial use or by means of the application permit and license procedure in this Act provided." This section, as originally enacted, provided:

> All pleadings commenced prior to the effective date of this Act for the acquisition of rights to the use of ground water under the provisions of Chapter 2 of Title 42, Idaho Code, may be completed under the provisions of said chapter 2 and rights to the use of ground water may be thereby acquired. But the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this Act.

1950 Idaho Sess. Laws, chp. 200, § 4 (emphasis added).

This section, as originally enacted, remains essentially unchanged, except for the changes made by the Legislature in 1963, mandating that such appropriations after that date may be perfected only by means of the application permit and license procedure as provided in the Act.

In 1953, section 1 of the GWA (I.C. § 42-226) was amended to provide that 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 the reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided." (emphasis added). 1953 Idaho Sess. Laws, ch. 182, § 1, pp. 278-79. The 1953 amendments did not alter the provision which recognized that all rights to the use of ground water acquired before the effective date of this Act were in all respects validated and confirmed. I.C. § 42-227 also continued to provide that domestic wells "shall not be in any way affected by this Act."

Section 9 of the GWA, codified as I. C. § 42-233a, addresses the appropriation of water within a "critical ground water area." Though not particularly relevant to the issues before the Hearing Officer, it is significant to point out that although this section has had numerous amendments, it has always provided a means by which an application for permit is made with respect to an area that has not been designated as a critical ground water area. Perhaps the most significant amendment to this section of the Act would be an amendment made in 1978, S. L. 1978, ch. 366, § 2.

The amendment in 1978 provided that in the event an application for a permit is made with respect to an area that has not been designated as a critical ground water area:

> [I]f the applicant proposes to appropriate water from a ground water basin or basins in an amount which exceeds ten thousand (10,000) acre feet per year either

> from a single or a combination of diversion points, and the Director determines that the withdrawal of such amount will substantially and adversely affect existing pumping levels of appropriators pumping from such basin or basins . . ., the Director may require that the applicant undertake such recharge of the ground water basin or basins as will offset that withdrawal adversely affecting existing pumping levels or water rights.

Idaho Code § 42-233a (emphasis added).

It is significant to note that this provision was not dependent upon maintaining a "reasonable ground water pumping level" established by the Director, but provides for the protection of existing pumping levels of appropriators pumping from such basins at the time the proposal to appropriate water in excess of 10,000 acre-feet is made.

In 1980, the Idaho Legislature amended I.C. § 42-226 by adding a provision which requires that any application for a water permit that involves transfer of ground water outside the immediate ground water basin as defined by the Director and which involves sufficient water to irrigate 5,000 or more acres or for a total volume in excess of 10,000 acre-feet per year, must first be approved by the Director and the Idaho Legislature. S. L. 1980, ch. 186, § 1.

Finally, an amendment to section 1 of the GWA, I.C. § 42-226 was made to make, among other things, grammatical changes to the section. S. L. 1987, ch. 347, p. 741. The most significant change relating to the issues before the Hearing Officer in this case was the deletion of the provision that "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", and substituted the deleted language with the following:

> "This Act shall not affect the rights to the use of ground water in this state acquired before its enactment."

The specific exceptions to the Ground Water Act have been addressed by the Idaho Supreme Court. In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Court

addressed the issue as to whether or not the owner of a domestic well that had been drilled prior to 1978 was exempt from the provisions of I.C. § 42-226, including the "reasonable pumping levels" provision of said section. The Court, in reaching its opinion, carefully reviewed the GWA as originally enacted and subsequent amendments, and concluded:

> Until its amendment in 1978, the Ground Water Act specifically provided that wells developed only for domestic use "shall not be in any way affected by this Act." The language chosen by the legislature is unambiguous and this exclusionary language was not significantly modified until 1978. "The most fundamental premise underlying judicial review of the legislature's enactments is that, unless the result is palpably absurd, the courts must assume that the legislature meant what it said. Where a statute is clear and unambiguous the express intent of the legislature must be given effect." (Case cited)

103 Idaho at 510-511.

The Court also noted that "Under the plain language of the 1951 Act, domestic wells were exempt from the provisions of that Act." *Id.* at 511. The Court clearly noted that the exemption for domestic wells was not modified in the 1953 amendment to I. C. § 42-226 which amendment established the reasonable pumping level limitation on the doctrine of first in time is first in right, and noted that when the legislature considers the amendment of the statute, it has in mind all existing law on the same subject matter. *Id.*

The Idaho Department of Water Resources ("Department"), as *amicus curiae* in *Parker v. Wallentine*, *supra*, argued that the case could be decided without reference to the original GWA or its subsequent amendments, urging that the case could be decided as a "well interference" case. *See* 103 Idaho at 510, n. 4. The Court rejected the Department's argument, finding no provision exempting "well interference" in the GWA, and noting that the GWA was enacted to provide rules for determining under what circumstances a senior appropriator is entitled to protection from interference with his water rights by a junior appropriator. *See id.* The Court

then explained:

> The issue in this case is the type of protection to which Parker's right is entitled. Because the existence of such a right initially depends on whether Parker's domestic well is exempt from the reasonable pumping level provisions of I. C. § 42-226, we conclude that it is necessary in this case to determine the effect of the provisions of the Ground Water Act.

103 Idaho at 510, n. 4.

The Court also rejected the Department's claim that the GWA did not apply in that case because the issue of whether a senior appropriator of ground water is protected in the maintenance of a certain pumping level under I. C. § 42-226 is properly raised only if the junior appropriator has affirmatively demonstrated that he cannot reasonably divert ground water without lowering the senior's pumping level and that such lowering is necessary to achieve the goal of full economic development. In rejecting this argument, the Court stated:

> However, nowhere in the language of the Act did we find such a burden. Furthermore, we do not believe any such burden should be imposed, since as a practical matter it would be an impossible burden to satisfy. . . . Because it appears to be impossible to determine with certainty that a new well will not interfere with the existing wells, we decline to adopt the position of the Department in this regard.

*Id.*

Finally, the Court addressed the argument of the defendant-appellant Wallentine, supported by the Department's *amicus* brief, that the domestic well of Parker should not be exempt from the "reasonable pumping levels" provision of I. C. § 42-226, as such provision is necessary in order to be consistent with the policy statements contained in the 1953 amendment of I. C. § 42-226 favoring full economic development of ground water resources in the State. It was the argument of Wallentine and the Department that exempting domestic wells from the reasonable pumping level provisions of the Act would allow one shallow domestic well to block

the development of all irrigation wells in a given area. The Court also rejected this argument, noting that the decision as to how the optimum development of water resources in the State of Idaho can best be achieved is a policy decision exclusively within the province of the legislature.

The Court noted that Parker had a vested right to use water from his domestic well, and that right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water. The Court then cited with approval *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933); *Hutchins, Protection and Means of Diversion of Ground-Water Supplies*, 29 Cal. L. Rev. 1, 15 (1941); *Bower v. Moorman*, 27 Idaho 162, 147 Pac. 496 (1915), and other earlier decisions addressing the prior appropriation doctrine, and quoted with approval from *Noh* as follows:

> If subsequent appropriators desire to engage in such a contest [a race to the bottom of the aquifer] the financial burden must rest on them and with no injury to the prior appropriators or loss of their water.

103 Idaho at 513. (*See* further discussion, *infra*, under section entitled The Prior Appropriation Doctrine in Idaho Established by Case Law.)

The Idaho Supreme Court again had the opportunity to visit the Ground Water Act in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (Idaho 1994). The issue before the court in *Musser* was whether or not the Director of IDWR was required, under I. C. § 42-602, to distribute water from the Eastern Snake Plain Aquifer to the holders of senior rights in springs which are tributary to the Snake River and hydrologically interconnected to the ESPA ("the aquifer").

The Mussers sought a writ of mandate to compel the Director to deliver their full decreed

water rights and to control the distribution of water from the aquifer according to the priority date of the decreed water rights. The Director and the Department moved to dismiss the Mussers' request for a writ of mandate, arguing that the request was moot because after the Mussers initiated the action, the Director issued a Notice of Intent to Promulgate Rules which would allow the Director to respond to the Mussers' demand by providing for the conjunctive management of the aquifer and connected surface water sources. The Director also referred to the Ground Water Act (I.C. § 42-226) and stated that "A decision has to be made in the public interest as to whether those who are impacted by ground water development are unreasonably blocking full use of the resource." 125 Idaho at 396. The Court responded and held:

> We note that the original version of what is now I. C. § 42-226 was enacted in 1951. 1951 Idaho Sess. Laws, ch. 200, § 1, p. 423. Both 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. Therefore, we fail to see how I. C. § 42-226 in any way affects the Director's duty to distribute water to the Mussers, whose priority date is April 1, 1892.

*Id.*

The decision of the Idaho Supreme Court could not have been more clear. The SRBA District Court later followed this precedent in Presiding Judge Roger Burdick's *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Subcase No. 91-00005, July 2, 2001) ("*BW5 Order*"):

> First, the groundwater management statutes do not apply to water rights prior to their enactment in 1951. *Musser*, 125 Idaho at 396, 871 P.2d at 813 (statutes do not affect rights to the use of groundwater acquired before enactment of the statute).

*BW5 Order* at 27.

As recognized by the SRBA Court, the Supreme Court plainly held that Idaho's Ground Water Act does not apply to pre-1951 water rights. The SRBA Court followed Supreme Court

precedent, as must the Department and Director in this matter. *See Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 130 P.3d 1127, 1130 (2006) *citing Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77 (1990) ("When there is controlling precedent on questions of Idaho law 'the rule of stare decisis dictates that we follow it . . .'"). *See also*, 73 C.J.S. Public Administrative Law and Procedure § 55 ("An administrative agency is without power to render a judgment differing from a court's prior judgment or judicial precedent . . ."); *see e.g. Spraic v. United States Railroad Retirement Bd.*, 735 F.2d 1208, 1211 (9th Cir. 1984) ("An agency is bound to follow precedent established by an unappealed decision of a circuit court on any matter within that court's jurisdiction.").

The Department and Director are bound by the Idaho Supreme Court's precedent established in *Parker* and *Musser*, cases in which they were parties or *amicus*. Accordingly, the Department and Director must follow those decisions and the legal standards to be applied to A&B's request for water right administration to satisfy its pre-1951 senior ground water right.

**Application of Rules for Conjunctive Management**
**of Surface and Ground Water Resources**

The Director, in entering his preliminary Order dated January 29, 2008, regarding material injury, relies heavily upon the conjunctive management rules promulgated on October 7, 1994 pursuant to chapter 52, Title 67, Idaho Code, the Idaho Administrative Procedure Act, and § 42-603, Idaho Code. A facial challenge to the CM Rules was made by several surface water right holders, and ultimately reviewed by the Idaho Supreme Court in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (Idaho 2007). In the Supreme Court's review of the CM Rules, the Court reached numerous findings and conclusions in regard to the application of the Rules.

It first noted that:

> In 1994, pursuant to statutory authority found in Idaho Code sections 42-603 and 42-1805, the Director of the Idaho Department of Water Resources (Director), promulgated the CM Rules to provide the procedures for responding to delivery calls "made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001.

154 P.3d at 437-438.

In addressing the Rules, the Court further stated:

> However, as the IDWR points out, CM Rule 20.02 provides that: "[T]hese rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law." "Idaho law," as defined by CM Rule 10.12, means "[T]he Constitution, statutes, administrative rules and case law of Idaho." Thus, the Rules incorporate Idaho law by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules.

154 P.3d at 444.

The Court upheld the validity of the CM Rules against the facial challenge made, but in so doing, made it perfectly clear that application of the Rules must be consistent with applicable elements of the prior appropriation doctrine as established by Idaho law. CM Rule 20.02; 154 P.3d at 444. The Court made a careful and extensive review of several of the CM Rules. In reviewing CM Rule 30.01 entitled "Delivery call (petition)" and CM Rule 40.01 entitled "Responding to a delivery call", the Court concluded:

> The Rules simply require that a senior who is suffering injury file a delivery call with the Director and allege that the senior is suffering material injury. This is presumably to make the Director aware such injury is occurring and give substance to the complaint. . . . Nowhere do the Rules state that the senior must prove material injury before the Director will make such a finding. To the contrary, this court must presume that the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02.

154 P.3d at 444-45 (emphasis added).

In addressing the concerns of the district court that the CM Rules contain no objective standards from which to evaluate the criteria set forth in Rule 42 of the Rules, and in upholding Rule 42 against the facial challenge, the Court stated:

> Those factors, of necessity, require some determination of "reasonableness" and it is the lack of an objective standard—something other than "reasonableness"—which caused the district court to conclude the Rules were facially defective. Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director.

154 P.3d at 446.

It is this discretion that must be exercised by the Hearing Officer as well, so long as it is consistent with the law. It is respectfully submitted that in applying the factors set forth in Rule 42, any reasonableness standard contained in the GWA related to a "reasonable ground water pumping level" must be excluded from any consideration in regard to any water rights that have been exempted from the application of the GWA, as is the case with A&B's decreed pre-1951 Water Right No. 36-02080. It is well established in Idaho law that an administrative agency has no authority to enforce a rule in a manner that contradicts a statute. *See Moses v. Idaho State Tax Comm'n*, 118 Idaho 676, 678 (1990) ("This Court will not enforce a regulation that is, in effect, a rewriting of the statute."); *see also*, *Roeder Holdings LLC v. Board of Equalization of Ada County*, 136 Idaho 809, 813 (2001) ("In the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature or exercise its sublegislative powers to modify, alter, enlarge or diminish provisions of a legislative act that is being administered.") This is not to say that there is not a reasonableness standard under the prior appropriation doctrine, and such standard will be hereafter discussed as determined by legal precedent in interpreting the prior appropriation

doctrine in Idaho.

The *AFRD #2* Court further noted numerous legal standards that must be followed. While the Director has limited authority to consider post-adjudication factors in water right administration, the Director cannot ignore the decreed elements of a senior's water right. *AFRD* #2, 154 P.3d at 449 ("The presumption under Idaho law is that the senior is entitled to his decreed water right . . ."). Furthermore, the CM Rules must be read consistently with constitutional and statutory principles, and settled case law. As the Court stated: "The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has." 154 P.3d at 448-49. Finally, the Court held:

> The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by which to determine "how the various ground and surface water resources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A&B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579.

154 P.3d at 449.

**The Prior Appropriation Doctrine in Idaho Established by Case Law**

The prior appropriation doctrine and its application to the administration of ground water rights has been existence in Idaho for nearly 100 years. The Idaho Supreme Court in *Le Quime v. Chambers*, *supra*, addressed the matter of first impression in the state. One of the key issues was whether or not the waters of a spring located on the public domain could be appropriated under the laws of the State of Idaho since the waters flowing to make up the spring are purely seepage or percolating waters and do not come from any well-defined subterranean stream. It was argued that percolating and seepage waters are as much a part of the land itself as the soil, the rock, and stone found therein, and that such waters may not be the subject of appropriation or

diversion. The Court, after reviewing decisions from several other jurisdictions involving subterranean waters held:

> The fact that the water of this spring in its natural state, before any appropriation or diversion, was lost in the adjacent soil and did not flow off the land in a definite stream, can make no difference and in no way abridges the right of the first comer to locate and appropriate and develop the same for a useful or beneficial purpose.

15 Idaho at 414.

In support of the decision was the acknowledgment of a statute of this state, section 1 of the act of March 11, 1903 (Sess. Laws 1903, p. 224) which specifically recognized the right of any person, association, or corporation within this state to appropriate and divert "the waters of any natural springs, springs, or seepage waters or lakes or other public waters in the State of Idaho." (*See* I. C. § 42-103, as amended.)

The next case of significance decided by the Idaho Supreme Court was *Bower v. Moorman, supra.* Although this case involved artesian waters flowing from wells, it is applicable and has set the standard for administration of ground water rights in Idaho. For purposes of discussion, the primary issues involved in this case arose when Moorman commenced the drilling of an artesian well adjacent to Bower's property and within 300 feet of several artesian wells that had been dug and used by Bower, some of which were dug to a depth of 360 feet and some of which were but a few feet apart. *See* 27 Idaho at 169-170. Moorman's well had reached a depth of approximately 200 feet when he was enjoined from further proceeding by the action commenced by Bower.

The trial court in its findings of facts found: 1) that the loss of water in Bower's well was caused directly or indirectly by the sinking of Moorman's well, which was manifested by the increased flow therefrom; 2) that the sinking of Moorman's well would endanger the supply of

the water flowing from Bower's well; and 3) a portion of the water flowing from Moorman's well that would otherwise have flowed from Bower's artesian flow, could not be, by gravity flow, returned to Bower. 27 Idaho at 173.

The Court, in resolving the issues, first noted that percolating or subterranean waters were subject to appropriation in the State of Idaho, which fact was confirmed by section 3242, rev. codes, which then provided that: "The right to the use of water of rivers, streams, lakes, springs and subterranean waters may be acquired by appropriation." 27 Idaho at 180. It further noted the statute of the State of Idaho which provided that "As between appropriators, the first in time is first in right", and that the first appropriated water for use for a beneficial purposes has a prior right thereto, and the right, once vested, will be protected and upheld, unless abandoned. *Id.* at 181; *see* I.C. § 42-106 (formerly section 3245, rev. code) The Court then stated: "Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference." *Id.*

Court then considered the trial court's finding no. 15: "That the loss of water sustained by the plaintiffs . . . was . . . caused directly or indirectly by the sinking of defendants' said well." The Court found this finding was too indefinite and uncertain upon which to base a perpetual injunction. 27 Idaho at 182. The Court then, in addressing the evidence required to support a permanent injunction stated:

> The threatened injury must be material and actual. . . . It is incumbent upon the respondents to show that the acts against which they ask protection are not only threatened, but will in all probability be committed to their permanent injury. Such injury must be material and actual, and not fanciful, theoretical, or merely possible.

*Id.*

Finally, the Court stated:

> If the sinking of the Moorman well to the depth that the larger Bower wells had been sunk, or to a greater depth, would not interfere with the flow of the water in the Bower wells, or if there was a loss of water in the Bower wells that could be returned without material damage to respondents' well, and at the same time the Moorman well be supplied with water, the court would not be justified in preventing the completion of the Moorman well. . . .
>
> The issuing of a perpetual injunction would not be justified, should it become necessary to destroy the cement tank or basin within which the Bower wells are situated, if no permanent loss of water was caused. The necessity for changing a method or means of diverting the water from the cement tank or basin would not, of itself, deprive a subsequent appropriator of the right to divert and use unappropriated subterranean water. While the subsequent appropriator would be liable in damages, he would have the right to divert surplus subterranean waters.

*Id.* at 183.

The Court then also pointed out that in the event the drilling of the Moorman well caused a permanent loss of water in the Bower wells, which water could not be replaced from the well of Moorman without permanent injury to Bower, an injunction would issue. *See id.* at 184.

In *Hinton v. Little*, 50 Idaho 371, 296 Pac. 582 (1931), the Idaho Supreme Court reaffirmed the holdings of *Le Quime v. Chambers*, *supra*, and *Bower v. Moorman*, *supra*. In doing so, it rejected what is known as the English or common-law doctrine urged by appellants in that case, which provides that the owner of the surface of the ground owned all of the water within his land, or the so-called American doctrine. The court noted that the English doctrine cannot be applicable because:

> . . . when any one of the landowners in question, so far as the evidence now shows, takes water from his well, it diminishes the flow in the other wells; hence it would seem apparent that he is taking, not alone that which belongs to him, as underlying his land, but is, in some measure at least, taking either directly or indirectly that which comes from underneath the land of other owners.

50 Idaho at 374.

50 Idaho at 374.

The Court further noted that under the American doctrine, or the "correlative use" doctrine, each surface owner is entitled to take his proportionate share of the entire body of underground water, in the particular basin underlying the lands in question and affected by the different wells. This doctrine was also rejected by the Court when it stated:

> . . . we have a fairly well-defined announcement both by this court and the Legislature as to what rule is to be applied in this state in connection with the appropriation of underground waters. It appears to be now fairly well settled that all underground subterranean waters are percolating waters, that is, that there is more or less movement, both perpendicular and horizontal, through the earth and rocks. Therefore, whether underground waters move in a well-defined channel, either in a generally confined direction as to the points of the compass or spread out laterally, is merely a question of difference or degree.

*Id.* at 375.

The Idaho Supreme Court again approved the holdings of *Bower v. Moorman*, *supra*, and *Hinton v. Little*, *supra*, in the decision rendered in *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931). This case again involved the appropriation of artesian hot water developed from wells and a suit to enjoin junior appropriators from using their wells by which they divert artesian hot water in such manner as to deplete the flow in the wells of the senior appropriators. The decree entered by the lower court established the source of water and the control of diversion of artesian hot water from wells of junior appropriators when the flow was insufficient to provide water to all appropriators without injury to the senior right to the use of said water to the extent decreed.

The Court, after determining the manner in which water would be distributed under these rights, stated:

> The enforcement of this decree is committed, in the first instance, pending the creation, as provided by law, by the Commissioner of Reclamation of the State of Idaho, of a water district comprising the source of supply of the water rights

> herein decreed, to said Commissioner of Reclamation who is hereby appointed a commissioner of this court for that purpose, . . . Said Commissioner is hereby directed to regulate the flow of the wells of the parties hereto in accordance with the terms hereof and to make from time to time measurements of the flow of the said wells and keep a record thereof, and for this purpose may open and close, regulate and measure the flow of said wells.

51 Idaho at 349.

The Idaho Supreme Court in *Noh v. Stoner*, *supra*, expounded further on the administration of ground water rights. This case involved an injunction granted by the trial court restraining a junior appropriator from further depleting an artesian basin tapped by two wells of the respondent that were drilled and operated prior to appellants' well. The Court sustained the findings of the lower court that the wells drilled by appellants, the junior appropriators, operated at a level below the senior appropriators' pumps, and the water level in the artesian basin was lowered to such an extent that the senior appropriators' pumps were dry. In describing its findings, the Court stated: "In other words, appellants had pushed their point of diversion lower than respondents' point of diversion, and as a result there was no water at respondents' point of diversion." 53 Idaho at 653. The appellants, as the junior appropriators, urged:

> The necessity of a prior appropriation changing the methods or means of diverting water from the source or supply, by installing and employing reasonable and average, but more powerful pumps and increased pumping depth, will not deprive a subsequent appropriator of the right to divert and use unappropriated subterranean water, the prior appropriator must take the usual and reasonable measures to perfect such means.

*Id.*

The Supreme Court rejected this position and quoted with approval the doctrine approved by *Barrows v. Fox*, 98 Cal. 93, 32 Pac. 811 (1893), to this effect: "An earlier appropriator is not required to bear the expense incident or necessary to secure a flow of water to a later appropriator." 53 Idaho at 654. The Court further noted the substantial number of cases that

sustain the doctrine established by *Barrows v. Fox*, *supra*, and quoted with approval from 26 Cal. Jur. § 311, p. 112, as follows:

> "A court of equity may, under proper circumstances, compel a prior appropriator to change the manner of his use so as to prevent unnecessary injury to those having subordinate rights. . . ." The text, however, has this in addition: "Of course, any interference with the rights of prior appropriators is actionable. Whether a subsequent use causes such interference is a question of fact."

*Id.* at 654.

The Idaho Supreme Court then noted:

> In regard to surface water, it is statutory that an appropriator, prior or subsequent, may not change his point of diversion to the injury of another appropriator. I.C.A. § 41-108; *Bennett v. Nourse*, 22 Idaho, 249, 125 P. 1038; . . .

*Id.* at 655.

The Court applied this principle in determining who should bear the expense of lowering the prior appropriators' pumps so that they will receive the same amount of water as before. The Court clearly noted that any expense involved for such purpose must fall on the junior appropriators, and not the senior appropriator. In reaching this conclusion, the Court stated:

> In the instant case, the body of water tapped by respondents' and appellants' wells is depleted perpendicularly by appellants' wells.
>
> If appellants may now compel respondents to again sink the well to a point below appellants', to again receive the amount of water heretofore used, it would result ultimately in a race for the bottom of the artesian belt.

*Id.* at 656.

The Court then concluded:

> If subsequent appropriators desire to engage in such a contest, the financial burden must rest on them and with no injury to the prior appropriators or loss of their water. Otherwise, if the users go below appellants and respondents were to go below them, appellants would in turn, according to their theory, be deprived of their water with no redress.

Finally, the Idaho Supreme Court made it clear in 1982, in the case of *Parker v. Wallentine*, *supra*, that:

> The principles set forth in *Bower* and *Noh* balance the competing interest of the parties involved and the public and serve to effectuate the policy of maximum development of the water resources of this state. Under these principles, we hold that Wallentine has a right to divert any surplus subterranean water provided and so long as his diversion of such waters does not deprive Parker of his use of the water. Parker will not be deprived of any right to his use if water can be obtained for Parker by changing the method or means of diversion. The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator, Wallentine, so that Parker will not suffer any monetary loss. Thus, upon a proper showing by Wallentine that there is adequate water for both he and Parker, it is within the inherent equitable powers of the court upon a proper showing and in accordance with the views herein expressed to enter a decree which fully protects Parker and yet allows for the maximum development of the water resources of this state.

103 Idaho at 514 (emphasis added).

It is significant to note that the Court in *Parker* stated:

> Thus, in this case, the court could clearly condition the injunction on Parker's later acceptance of a well drilled at Wallentine's expense to a reasonable pumping level. (Emphasis added.) (See generally *Hutchins, Protection in Means of Diversion of Ground Water Supplies*, 29 Cal. L. Rev. 1, 15 (1940).) ("Courts have adequate power to arrange for physical solutions which will contribute to the conservation and beneficial use of the entire water supply while safeguarding existing rights of use.").

*Id.* at 514, n. 15.

In affirming the principles in *Noh*, the Court further explained that "*Noh* is applicable in circumstances such as these in which I.C. § 42-226 does not apply." 103 Idaho at 513, n. 11. Accordingly, the Idaho Supreme Court has plainly held that a senior ground water right (pre-1951) is not subject to the "reasonable ground water pumping level" provision in the GWA. The principle carries forward to application in A&B's case.

## Conclusion

A&B's decreed Water Right No. 36-02080, acquired on September 9, 1948, under which water is diverted by the District for the benefit of the landowners within the District to which said water right is appurtenant, has been clearly exempted from the Ground Water Act adopted by the Idaho Legislature in 1951. The exemption is consistent with the law of the State of Idaho which provides that "Statutes in Idaho are not to be applied retroactively in the absence of clear legislative expression to that effect. *Johnson v. Stoddard*, 96 Idaho 230, 234, 526 P.2d 835, 839 (1974) (Other cases cited.)" *Parker*, 103 Idaho at 511, n. 7. It is also clear, notwithstanding the exemption of this water right from the Ground Water Act, that the legal precedent established by case law in Idaho is consistent with the constitutionally enunciated policy of "optimum development of water resources in the public interest." *See* IDAHO CONST. art. XV, § 7.

The only real distinction between case law in Idaho dealing with the appropriation and administration of ground water rights and I. C. § 42-226, known as section 1 of the Ground Water Act, is that water rights acquired prior to the effective date of the Act are protected in the maintenance of their historical ground water pumping level from interference by diversions under junior ground water rights unless the point of diversion of ground water under the senior rights is changed to a lower ground water pumping level, at the expense of junior appropriators of ground water from the same source. It is also respectfully submitted that the adoption of the conjunctive management rules by the Director of the Idaho Department of Water Resources may not be applied in a manner as to deny A&B the right to have its Water Right No. 36-02080 administered under the legal standards and doctrines established by the courts of the State of Idaho, as such case law is a part and parcel of said CM Rules. Any CM Rule that is applied in a manner that is contrary to case law and applicable statutes is invalid. *American Falls Reservoir*

*District No. 2 v. Idaho Dept. of Water Resources*, *supra*, 154 P.3d at 444, 452; *see also*, *Roeder Holdings LLC*, 136 Idaho at 813-14.

Therefore, A&B requests the Hearing Officer to grant its *Motion for Declaratory Ruling* and issue a decision declaring the correct legal standards to be applied to A&B's pre-1951 ground water right for purposes of water right administration as defined by Idaho law.

Respectfully submitted this 21st day of March, 2008.

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## CERTIFICATE OF MAILING

I hereby certify that on this 21st day of March, 2008, the above and foregoing, was sent to the following by U.S. Mail proper postage prepaid and by email for those with listed email addresses:

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