Roger D. Ling, ISB #1018
Attorney at Law
P. O. Box 623
Rupert, Idaho 83350
Telephone: (208) 434-2717
Facsimile: (208) 436-6804

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for A&B Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES

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	**DOCKET NO. 37-03-11-1** **A&B IRRIGATION DISTRICT'S REPLY IN SUPPORT OF MOTION FOR DECLARATORY RULING**

COMES NOW, A & B IRRIGATION DISTRICT ("A&B" or "District"), by and through its counsel of record and submits this *Reply in Support of Motion for Declaratory Ruling* that was filed by A&B on March 21, 2008. This reply addresses the responses filed by the Idaho Ground Water Appropriators, Inc., Southwest Irrigation District, Goose Creek Irrigation District, and the City of Burley (collectively "IGWA") on April 11, 2008, and the City of Pocatello on April 14, 2008 (hereinafter collectively referred to as "Respondents"). For the reasons discussed below, and those identified in the original filings, A&B's motion should be granted.

INTRODUCTION

A&B seeks a declaratory ruling that its decreed senior ground water right is afforded the protections provided it by Idaho law. Pursuant to the common law in this state, as confirmed by the Idaho Supreme Court's decisions in *Parker* and *Musser*, A&B's diversion of ground water under its pre-1951 water right is entitled to protection from interference by junior ground water right holders. Contrary to the theories advanced by IGWA and Pocatello, the law does not require an "either/or" scenario to administer A&B's senior ground water right (i.e. recognizing A&B's historic pumping levels will result in the curtailment of all junior wells in the ESPA). Instead, junior ground water right holders have the choice to continue to pump out-of-priority, provided (1) A&B can continue to divert ground water at the rate it is entitled to divert under its pre-1951 water right; and (2) A&B is compensated by the junior appropriators for the costs incurred in changing its means and method of diversion from a water table that has declined as a result of diversions by junior appropriators and in pumping from a higher lift in order to maintain its right to the use of water under its senior ground water right.[1] IGWA and Pocatello ignore this choice they have as junior appropriators provided by Idaho law and instead advocate for a continual "race to the bottom of the aquifer" that the Supreme Court refused to allow in *Parker*:

> "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, *citing* *Noh v. Stoner*, 53 Idaho 651, 657 (1933).

As described in A&B's motion and supporting memorandum, the Ground Water Act (GWA) did not abrogate A&B's right to pump at its historic ground water level, or its right to be

[1] Assuming that changes in the methods and means of A&B's diversion will result in A&B being able to pump sufficient water to meet its senior ground water right no. 36-2080. Since some of A&B's wells have gone dry, it has been forced to abandon those points of diversion and cannot divert the water to which it is entitled from the remaining wells.

compensated for having to change its means and methods of diversion due to interference caused by junior appropriators. Instead, the Act plainly provides that it "shall not affect the rights to the use of ground water in this state acquired before its enactment". I.C. § 42-226. The Idaho Department of Water Resources ("IDWR") argued, on two separate occasions before the Supreme Court, that water rights exempt from the Act (Parker's 1964 domestic right and Musser's 1892 irrigation right) should not be allowed to "block the development of all irrigation wells in an area" or "block[] full use of the resource." *See* 103 Idaho at 511, and 125 Idaho at 396. In both cases the Court rejected this argument in favor of the water rights of the senior appropriator. This is not surprising given that Idaho is a prior appropriation state. The same arguments defeated in *Parker*, but now offered by IGWA here, should similarly be dismissed by the Hearing Officer. *Compare* IDWR's *amicus curiae* brief in *Parker* at 27 (Ex. A):

> "Domestic wells if protected in their historic pumping levels would create a major stumbling block to the achievement of full economic development of Idaho's water resources . . . The statute was explicitly aimed at preventing shallow wells from commanding the whole groundwater supply."

with IGWA's *Response Brief* at 4, 14:

> "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. . . 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."

As explained below, Idaho law has not abandoned the protections and rights afforded pre-1951 ground water rights. Indeed, the Supreme Court's decision in *Baker* makes it clear that under the GWA, junior appropriators who are subject to the Act cannot "mine" an aquifer. Indeed, in such a case where juniors are "mining" the resource they must be curtailed to protect

the full diversion rate and volume of a senior's ground water right.[2] It is respectfully submitted that the common law, as developed in Idaho also prohibits mining of an aquifer. Moreover, the *Baker* Court's statements that imply a "reasonable pumping level" applies to pre-1951 ground water rights have been clarified and overruled by the later decisions issued in *Parker* and *Musser*.

While IGWA and Pocatello attempt to distinguish and ignore the precedent established by *Parker* and *Musser*, their arguments, like IDWR's in those cases, are unavailing and contrary to the law of prior appropriation and the protections provided to senior ground water rights. *See e.g.*, *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 173 (2004) ("The decisions of this Court apply prospectively, to all future cases."). Even the Idaho Department of Water Resources has long recognized the *Parker* protections provided to senior ground water rights.[3]

Forcing a senior ground water right holder to spend millions of dollars to chase water to reduced aquifer levels, abandon dry wells, and incur the continued burden of interference by junior appropriators, is not the standard in Idaho. Again, the junior water right holders' "race to

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[2] Attachment A to the Director's August 30, 2004 Order *In the Matter of Ground Water Withdrawal in the Cottonwood Critical Ground Water Area* (attached to Pocatello's Response) plainly demonstrates that water right holders (part of the case before the Court in *Baker*) were entitled to receive their "decreed diversion rates and volumes", by priority, up until the allowed 4,000 acre-feet was pumped from the aquifer. Accordingly, junior ground water right holders are actually curtailed on an annual basis in that critical groundwater area given the restrictions ordered by the Director. Here, IGWA and Pocatello seek to avoid both curtailment as well as any mitigation responsibilities for interference with A&B's senior ground water right. Idaho law does not allow such a result.

[3] *See* Director Karl J. Dreher's September 22, 2005 Order *In the Matter of Application for Amendment of Permit No. 63-12488 in the Name of the City of Eagle* at 11, 27-28; and Hearing Officer Gary Spackman's October 3, 2007 Amended Preliminary Order *In the Matter of Applications to Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle* at 25-27. Both the former Director and Hearing Officer Spackman followed the law set forth by the Supreme Court in *Parker* in those orders. Coincidentally, the agency's prior interpretation of *Parker* and the protections recognized for pre-1951 ground water rights has apparently been changed by the current Director on February 26, 2008 in his Final Order *In the Matter of Applications to Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle* (i.e. *see* Final Order at 31 "The legislative history of the Ground Water Act demonstrates that the Idaho Supreme Court in *Musser* was incorrect when it noted "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."). This latter decision remains pending before the Director on reconsideration petitions filed by the parties in that case.

the bottom of the aquifer" argument is not justified under the common law or the GWA and should be rejected. Therefore, the Hearing Officer should grant A&B's Motion for Declaratory Ruling.

FACTUAL ISSUES RAISED BY IGWA AND POCATELLO

Although there appears to be no genuine issue as to material facts to be considered by the Hearing Officer in ruling upon A&B's motion, numerous facts have been misstated by the Respondents in the obvious attempt to discredit A&B and to divert the Hearing Officer from the issues raised by A&B's Motion for Declaratory Ruling. These misstatements, although in many instances not relevant, cannot remain unchallenged.

In IGWA's Response it is stated in its description of the "Background" of A&B's delivery call that IDWR had entered into an agreement with the parties "which was provided for in the Pre-Hearing Conference Order of May 1, 1995." *IGWA Response* at 2. Although efforts had been made to reach such an agreement with IDWR and all parties, no such agreement was ever reached. IGWA further states in its "Introduction" that A&B argues that its pre-1951 water rights are protected to their "historic pumping levels" without consideration of reasonableness or effect upon junior ground water users. *Id.* at 3. This is simply an inaccurate statement as to the position of A&B in its Motion for a Declaratory Ruling. As A&B pointed out in its Memorandum in Support of its Motion, and as hereafter repeated, the administration of the 1948 ground water right held by A&B is controlled by the common law as it has developed in the State of Idaho, which does carefully consider the effect upon the right of junior ground water appropriators to divert water from a connected ground water source.

Finally, IGWA acknowledges that A&B is authorized to divert up to 1100 cfs under its partial decree for Water Right No. 36-2080 provided that the water diverted under this right is

applied to a beneficial use. At the same time, IGWA in Footnote 1 on page 5 of its Response indicates that A&B's water right or its 1948 priority may be subject to further challenge. There clearly is no legal authority to support such a position given A&B's water right was partially decreed by the SRBA Court in 2003 and no further argument is presented to support this position.

ARGUMENT

Respondents oppose the Motion of A&B for a Declaratory Ruling establishing the law applicable to the administration of the water right of A&B with a priority of September 9, 1948. It appears that the Respondents rely primarily upon selected statutory enactments and the decision of the Idaho Supreme Court in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575 (1973). A careful review of the Idaho statutory enactments, including the GWA adopted in 1951 will show that there is no legal basis for the position taken by Respondents.

A&B acquired the right to use unappropriated waters from the Eastern Snake Plain Aquifer ("ESPA") on September 9, 1948 when its appropriation was initiated by an Application for Permit and proper steps were taken to perfect such right. Such right vested and dated back to the issuance of the Permit on that date. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927). *See also*, *Gard v. Thompson*, 21 Idaho 485 (1912) and *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26 (1915); and Idaho Code § 42-204.

I. Language in the 1953 and 1987 Amendments to the GWA Supports A&B's Motion.

As A&B has previously pointed out in its Memorandum in Support of its Motion, and as hereinafter discussed, the common law of the State of Idaho in regard to the appropriation and administration of ground water of the State had been extensively developed between 1899 and 1933. The State of Idaho adopted the Idaho Ground Water Act in 1951. Section 1 of that Act, codified as I. C. § 42-226, clearly pointed out that the GWA would not alter the administration of ground water rights acquired prior to the effective date of that Act when it stated: "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." This exception provision of section 1 of the GWA was not amended when section 1 of the Act was amended in 1953 to further provide, in part, that ". . . 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." 1953 Idaho Sess. Laws, ch. 182, sec. 1, pp. 278-79.

Applicability of the GWA was further expressed in section 15 of the Act added by the 1953 *Idaho Session Laws*, ch. 182, section 8, p. 277, and codified as I. C. § 42-237a. This section added to the GWA, entitled "Powers of the Director of the Department of Water Resources," provided that "In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources in his sole discretion is empowered: . . .

> g. To supervise and control the exercise and administration of all rights hereafter acquired to the use of ground waters and in the exercise of this power he may be [by] summary order, prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. . . .

Idaho Code § 42-237a(g) (emphasis added).

The GWA was again substantially amended by Chapter 347 of the 1987 *Idaho Session Laws*, beginning at p. 741. One of the purposes of the amendments provided by Chapter 347 was "to make grammatical changes" as stated in the title of the Senate bill adopted. One of those changes was to section 1 of the Act by amending the sentence in section 1 above referred to as providing an exception to "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," by changing it to read as follows, to-wit: "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." At the same time, no changes were made in 1987 to section 15, codified as section § 42-237a, subpart g., as above noted which authorized the Director certain powers "to supervise and control the exercise and administration of all rights hereafter acquired ". Reading the provisions of the Ground Water Act together it is clear that the GWA was not intended to affect pre-1951 water rights. Indeed, this is exactly the interpretation rendered by the Idaho Supreme Court in the *Parker* and *Musser* decisions.

II. The Applicable Supreme Court Cases Support A&B's Motion

Respondents rely heavily upon *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575 (1973), to claim that A&B's senior ground water right is subject to unmitigated interference by junior ground water rights. *See IGWA Response* at 6, 13; *Pocatello Response* at 8-10. *Baker* involved an action brought by senior ground water appropriators to enjoin junior appropriators from pumping from wells drawing from a common aquifer. The case focused on approximately 20 irrigation wells developed during the late 1950's and early 1960's in the Cottonwood Creek-Buckhorn Creek area of Cassia County in southern Idaho. 55 Idaho at 576.

The action was commenced by Baker, et al. seeking to enjoin defendants-appellants Ore-Ida Foods, et al. from pumping irrigation water from their wells until such time as plaintiffs'

wells resumed normal production. At the trial, the district court found that the parties and their predecessors in interest had developed irrigation wells having a certain order of priority. The district court also found that all the wells drew water from a common aquifer underlying the area, which aquifer was of an unknown depth but was capable of the metes and bounds description. The court found that the aquifer is recharged primarily by precipitation and that during the period 1961 through 1968, the parties had withdrawn water from the aquifer far in excess of the annual recharge rate. *See id.* at 577 ("In other words, the parties were apparently 'mining' the aquifer, i.e., perennially withdrawing ground water at rates beyond the recharge rate."). The trial court further found that the average annual natural recharge could be pumped entirely by the four senior wells, and therefore enjoined pumping from all other junior wells. The administration of the district court decree was then assigned to the Idaho Department of Water Administration (now IDWR). The appellants asserted that Idaho's GWA had superseded Idaho's common law rules relating to ground water and that, although they were junior, they were nevertheless entitled, under the adoption of correlative rights, to a mutual pro-rata share of the water in the aquifer. Appellants further asserted that pursuant to the GWA, senior appropriators may only enjoin junior appropriators from pumping by showing that the juniors' pumping has exceeded reasonable pumping levels.

The Supreme Court then closely examined the evolution and development of water law to place the important ground water issues before it in their proper perspective. The Supreme Court then noted that it was dealing with a "rechargeable" aquifer, which is a flow resource and the real problem is how best to utilize the annual supply without overdrafting the stock which maintains the aquifer's water level. The Court, in addressing problems concerning the maintenance of water table levels, noted that in *Nampa & Meridian Irr. Dist. v. Petrie*, 37 Idaho 45, 51 (1923), it

had concluded that a landowner within an irrigation district had no right to insist that the water table created by irrigation of lands within the irrigation district must be maintained for his use at the height it was when he first commenced use of said water, as the claim would defeat drainage that is not otherwise required to be curtailed by any law or constitutional provision.[4]

The Idaho Supreme Court then reviewed *Noh v. Stoner*, 53 Idaho 651 (1933), which had approved a compilation of earlier cases dealing with the administration of ground water rights. Surprisingly, and with little comment, the Court found that *Noh* was inconsistent with the full economic development of our ground water resources. This was surprising in view of the fact that the common law accepted by *Noh* did allow full economic development based upon the costs of the junior appropriator to mitigate damages caused to the senior's ground water right. It was even more surprising, however, as this was not an issue before the Court in *Baker*. The issue before *Baker* was whether or not the Court should allow diversions from the aquifer until it runs dry, or should approve a policy that recognizes curtailment of junior ground water rights is appropriate when the aquifer is being mined.

While the issue of costs incurred by the senior was apparently not addressed, it was clear that the seniors were entitled to their full decreed rates of diversion and volumes as against the rights of the junior appropriators. *See Attachment A* to Director Dreher's August 30, 2004 Order

[4] Contrary to Pocatello's misinterpretation of *Nampa & Meridian Irr. Dist. v. Petrie*, the case concerned a surface water irrigation district and an invalid claim to groundwater by an individual landowner, not competing established ground water rights as we have here. In *Nampa & Meridian Irr. Dist.*, the Court determined there was no "proof" that the Appellant (Blucher) had "secured water from a natural subterranean stream". 37 Idaho at 532. In other words, Blucher did not have a valid water right to public waters of the State. The first assignment of error makes it clear that "in the case of appellant Blucher, [the court] did not make sufficient allowance for damages to ***his waste water right*** caused by respondent's irrigation and drainage system." *Id.* (emphasis added). The case involved the senior surface water irrigation district and the drainage of lands that were saturated by the seepage and percolation from the district's canals. The Court refused to award damages to Blucher and his "waste water" right due to the interference caused by the drainage operations of the district. In other words, Pocatello's claim that the case applies to pre-1951 valid ground water rights and held that those rights have no "entitlement to water levels" is wrong. As discussed herein, the common law rights for senior ground water rights established and validated by *Noh* and *Parker* are not affected by *Nampa & Meridian Irr. Dist.* in any way.

(attached to Pocatello's Response). In other words, junior rights, all of which were subject to the GWA, were ordered to be curtailed to satisfy the senior rights in priority. This was consistent with the Court's decision in *Noh*. In that case, the Supreme 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.

53 Idaho at 656. To avoid this result, the *Noh* Court stated:

> 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 regress.

Id. at 657 (emphasis added).

The Court in *Noh* then affirmed the trial court's grant of an injunction restraining appellants, adjoining landowners, from further depleting an artesian basin tapped by the respondents' wells, drilled and operated prior to appellant's well. In affirming the trial court, the Idaho Supreme Court noted that the diversion of water by the junior water right holder interfered with the water table and caused a change of the point of diversion of the senior appropriator, and such injury was material and actual. *See* 53 Idaho at 655 ("the findings and conclusions herein are sufficient to meet the stated requirements in the quoted case.") (identifying "material and actual" injury standard from *Bower v. Moorman*).

This holding in the *Noh* Court did not seem to be inconsistent with the court's finding in *Baker*, as it stated: "If the junior appropriators were permitted to continue pumping in the amount of their asserted rights, they would mine the aquifer." 95 Idaho at 583. This is clearly

prohibited under the Idaho Ground Water Act, I. C. § 42-237a(g), which provides in pertinent part:

> . . . Water in a well shall not be deemed available to fill a water right therein the withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

Idaho Code § 42-237a(g).

The *Baker* Court then proceeded to reject the appellant's view that the GWA and the phrases "reasonable pumping levels" and "full economic development" command a decree granting each of the appropriators, regardless of seniority, a proportionate amount of the aquifer's water.

The next significant review of the Ground Water Act was made by the Idaho Supreme Court in *Parker v. Wallentine*, 103 Idaho 506 (1982). In this case, the owner of a pre-1978 domestic well brought action seeking an injunction against pumping of water from a junior irrigation well located on property owned by the defendant. The defendant resisted an order from the trial court granting a preliminary injunction and the ultimate grant of a permanent injunction on the basis that the GWA of 1951, and the 1953 amendments, allowed him, as a junior appropriator, to pump from the aquifer until the water table reached a "reasonable ground water pumping level". The district court found that section 42-227 (section 2 of the Ground Water Act) exempted domestic wells from the "reasonable pumping levels" provision of section § 42-226. The Idaho Supreme Court affirmed the decision of the district court and held that domestic wells drilled prior to 1978 were exempt from the provisions of I. C. § 42-226.

In support of its opinion, the Supreme Court noted that until its amendment in 1978, the GWA specifically provided that wells developed only for domestic use "shall not be in any way affected by this Act." It then stated:

> 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 expressed intent of the legislature must be given effect." Citing *State Dept. of Law Enforcement v. Wone 1955 Willy's Jeep*, 100 Idaho 150, 153, 595 P.2d 299, 302 (1979).

103 Idaho at 511.

The *Parker* Court further discussed the state policy of "maximum use and benefit" and "optimum development." In this regard, the Court stated:

> The policy of maximum use was recognized in *Bower v. Moorman*, 27 Idaho 162, 147 P. 496 (1915), a case involving a permanent injunction against interfering with a prior appropriator's well. The Court stated that "[a]ny 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 such interference." 27 Idaho at 181, 147 P. at 502. However, the Court in *Bower* held that the evidence was not sufficient to justify the issuance of a perpetual injunction against the completion of the interfering well. *Id.* The Court went on to hold that "[t]he necessity for changing the method or means of diverting the water . . . 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, 147 P. at 503 (emphasis added). Thus, the Court stated: "If the sinking of the [subsequent appropriator's] well . . . would not interfere with the flow of the water in the [prior appropriator's well], or if there was a loss of water in the [prior appropriator's well] that could be returned without material damages to [the prior appropriator's] well and at the same time the [subsequent appropriator's] well be supplied with water, the court would not be justified in preventing the completion of the [subsequent appropriator's] well." *Id.* at 182, 147 P. at 502.

> In essence, the Court in *Bower* held that a perpetual injunction should not be granted if, by changing the prior appropriator's method or means of diversion, both parties can be supplied with water. The right of a subsequent water user to divert unappropriated waters was similarly alluded to in *Noh*, but as in *Bower*, that right was conditioned upon the subsequent appropriator's payment of damages.
>
> The principles set forth in *Bower* and *Noh* balance the competing interests 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 waters 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.

103 Idaho at 513-14.

The reasoning and statutory construction of the GWA used by the *Parker* Court finding that domestic water rights acquired prior to 1978 are exempt under the provisions of the GWA is equally applicable to the exemption of any other ground water rights acquired prior to 1951. The language noted by the Court and found to be unambiguous under section 2 of the GWA, codified as I. C. § 42-227, provided that domestic wells "shall not be in any way affected by this act." This language remained until an amendment in 1978. Likewise, the language contained in section 1, that: "All rights to the use of ground water however acquired before the effective date of this act are hereby in all respects validated and confirmed," provides a similar exclusion to those rights acquired prior to 1951.

The Respondents' efforts to isolate and ignore *Parker* are not supported. While IGWA and Pocatello attempt to limit *Parker's* application to "domestic" water rights only, they refuse to acknowledge the Court's language defining the rights and protections afforded senior ground water rights and the constitutional basis for that protection:

> Although we hold that Parker's domestic well is exempt from the reasonable pumping level provisions of I.C. § 42-226, we must still determine whether Parker has an interest in his domestic well **which arises independent of the Ground Water Act.** Prior to the enactment of the Ground Water Act, the doctrine of prior appropriation, i.e., first in time is first in right, governed the appropriation of ground water in the State of Idaho. Although this doctrine was modified in certain respects by the enactment of the Ground Water Act, the law applicable to ground water used for domestic purposes was not significantly modified by the Act. **Under the doctrine of prior appropriation**, because Parker's domestic well was drilled prior to Wallentine's irrigation well, Parker has a vested right to use the water for his domestic well. **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.** *See Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933). *See also*, Hutchins, *Protection in Means of Diversion of Ground Water Supplies*, 29 Cal.L.Rev. 1, 15 (1941).

103 Idaho at 512 (emphasis added).

As explained herein, the GWA did not affect any water rights, including senior irrigation ground water rights like A&B's, acquired prior to 1951. For domestic rights, the GWA did not affect those pre-dating 1978. In addition, the Court explained that the "doctrine of prior appropriation", which "arises independent of the Ground Water Act", afforded Parker his right to have "water available at the historic pumping level" or be "compensated for expenses" incurred by changing his method or means of diversion due to a lowered water table caused by a junior appropriator. The prior appropriation doctrine applies equally to irrigation or any other ground water right as it does to a domestic ground water right. Stated another way, the prior appropriation doctrine does not create a set of "rights" set aside solely for "domestic" ground water rights.[5] Accordingly, the Respondents' claim that *Parker* is limited to "domestic" water

[5] Such a theory would create a class of "super" ground water rights as claimed by Pocatello. While pre-1951 ground water rights are afforded certain protections by Idaho law as explained herein, there is no support that a single type of senior ground water right, i.e. a "domestic" right, is entitled to certain protections or rights which other types, i.e. "irrigation", "commercial", "municipal", etc., are not. Although the Idaho Constitution includes a "preference" system for water rights a water user seeking to exercise the preferences provided must still pay for that benefit and compensate a water right holder. *See* IDAHO CONST. Art. XV, § 3 ("But the usage by such subsequent appropriators

rights only is misplaced and fails to completely acknowledge the Supreme Court's basis for its decision.

In addition to *Parker*, this exclusion is further supported by the language of the GWA codified in I. C. § 42-237a, subdivision g, which granted powers to the Director to supervise or control the exercise and administration of all rights under the GWA that are "hereafter acquired" to the use of ground waters.

II. The Plain Language of I.C. § 42-226 Supports A&B's Motion

Finally, exclusion for the irrigation right of A&B with a priority of September 9, 1948 is clearly set forth in the 1987 amendments to I. C. §42-226 (section 1 of the Act) which provides: "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." Statutory interpretation starts with the plain meaning of the statute. *State v. United States*, 134 Idaho 940, 944 (2000). This language is identical to the language in the quote relied upon in section 2 of the GWA to exempt domestic rights, as it should be. It was adopted in 1987 for clarification. If the statutory language is clear and unambiguous, courts should apply the statute without engaging in any statutory interpretation. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732 (1997). In other words, the court does not construe it but simply follows the law as written. *State v. Yzaguirre*, 144 Idaho 471, 163 P.3d 1183, 1187 (2007). The plain meaning of a statute therefore will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *Id.* The Supreme Court in *Musser* squarely addressed the clear and unambiguous language of I.C. § 42-226: "Both the original

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shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution."); *see also, Montpelier Milling Co. v. Montpelier*, 19 Idaho 212, 219 (1911) ("It clearly was the intention of the framers of the constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor.") (emphasis added). This provision is consistent with the requirement for junior appropriators to mitigate for interfering with the ground water level of a senior pre-1951 ground water right.

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 this statute" 125 Idaho at 396 (emphasis added). *See also, Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits* at 27 (Fifth Jud. Dist., Twin Falls County District Court, In Re SRBA: Subcase No. 91-00005, July 2, 2001).

The *Parker* Court also verified the decision in *Baker v. Ore-Idaho Foods, Inc.*, *supra*, and the applicability of *Noh v. Stoner*, *supra*: "Although this court in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 581-83, 513 P.2d 627, 633-35 (1973), held that *Noh* is not applicable to cases determined under the reasonable pumping level provisions of the Ground Water Act, ***Noh* is applicable in circumstances such as these in which I. C. § 42-226 does not apply.**" 103 Idaho at 513, n. 11 (emphasis added). While not specifically identified in the Court's opinion in *Noh*, it is apparent that Noh's ground water right was for irrigation purposes since the district court's decree enjoined Stoner [appellants] from "interfering with the 2 8/10 cubic feet, or 140 inches of water respondents [Noh] should receive".[6] 53 Idaho at 657.

Accordingly, whereas it is fair to assume the facts in *Noh* involved a pre-1951 irrigation ground water right, it is obvious the Court's pronouncement in *Parker* does not just apply to "domestic" water rights. Instead, it applies in any situation where I.C. § 42-226 does not apply. As clearly announced in *Musser*, that situation includes all pre-1951 ground water rights.

Finally, it is significant to note that the IDWR, as a*micus curiae*, argued in *Parker*, 103 Idaho 510, n. 4, that the case should be decided without reference to the original GWA or its subsequent amendments, urging that the case could be decided as a "well interference" case. This was rejected by the Court, noting that the issue in the case was the type of protection to

[6] A typical domestic water right in Idaho is 0.02 cfs, which is but a fraction of the right decreed to Noh, which was 2.8 cfs, or 140 miner's inches.

which Parker's right is entitled, which included analysis of rights provided by the prior appropriation doctrine that "arise independent of the Ground Water Act". 103 Idaho at 510, 512. The Department also contended that the GWA did not apply in that case because the issue of whether a senior ground water appropriator is protected in the maintenance of a certain pumping level 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. This was also rejected by the Court, noting that the Department was suggesting an impossible burden to satisfy. The Department is bound to follow *Parker* and the protections it affords to senior ground water rights.

The issue of exclusion from the GWA was also before the Supreme Court in *Musser v. Higginson*, 125 Idaho 392 (1994). While both IGWA and Pocatello brush off this decision, they cannot escape the plain interpretation that was given I.C. § 42-226. In that case, the Director of IDWR defended his refusal to honor the demands by petitioner Musser that the Director discharge his statutorily mandated obligation to exercise laws relative to the distribution of water in accordance with rights of prior appropriation. The result of *Musser* was that IDWR and the Director required junior ground water users to curtail. However, this was avoided when the juniors mitigated the senior water right holders. In the Director's testimony at the hearing to discern whether or not a writ of mandamus would issue, the Director referred to I. C. § 42-226 and stated: "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 Idaho Supreme Court squarely rejected this argument and stated:

> 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. (emphasis added).

Since the Director and IDWR requested and received a ruling from the *Musser* Court on the applicability of I.C. § 42-226, they, as parties to that case, are bound to follow that decision now. Accordingly, the plain language of the statute exempts A&B's pre-1951 ground water right from the "reasonable ground water pumping level" provisions and entitles A&B to the protections that its senior ground water right is entitled as provided by Idaho law. In summary, A&B is entitled to its historic pumping levels or mitigation and compensation from juniors in being forced to chase its water due to reduced aquifer levels caused by junior appropriators in the ESPA, so long as it is able to divert the ground water as provided by its water right in the rates and volumes therein provided. The case law and principles announced in *Parker* and *Musser* are clear and the Director and IDWR are bound to follow this precedent. IGWA's and Pocatello's arguments do not change this result.

CONCLUSION

A&B seeks a declaratory ruling to protect its diversion of ground water under its pre-1951 senior ground water right no. 36-2080. Although IGWA and Pocatello advocate for no administration and dismiss the injuries to A&B's senior ground water right, the law does not support their position. For the foregoing reasons as well as those included in the Memorandum in Support of A&B's Motion for Declaratory Ruling, A&B respectfully requests the Hearing Officer to grant its motion.

DATED this 25th day of April, 2008.

Roger D. Ling
Attorney at Law

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for A&B Irrigation District

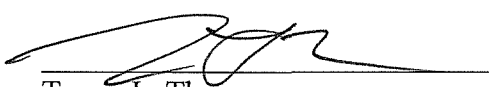
CERTIFICATE OF MAILING

I hereby certify that on this ____ day of April, 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:

Hon. Gerald F. Schroeder c/o Victoria Wigle IDWR P.O. Box 83720 Boise, ID 83720 victoria.wigle@idwr.idaho.gov fcjschroeder@gmail.com	Randall C. Budge Candice M. McHugh Racine Olson PO Box 1391 201 E Center Street Pocatello ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	Sarah A. Klahn White & Jankowski LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com
B.J. Driscoll McGrath Meacham Smith PLLC 414 Shoup PO Box 50731 Idaho Falls ID 83405 bjd@eidaholaw.com	Steve L Stephens Butte Co Prosecuting Attorney 260 Grand Ave PO Box 736 Arco ID 83213	Fred & Phyllis Stewart 300 Sugar Leo Road St George UT 84790
Michael Patterson, President Desert Ridge Farms Inc. PO Box 185 Paul ID 83347	City of Firth PO Box 37 Firth ID 83236	Todd Lowder 2607 W 1200 S Sterling ID 83210
Neil and Julie Morgan 762 W Hwy 39 Blackfoot ID 83221	Charlene Patterson Patterson Farms of Idaho 277 N 725 Lane W Paul ID 83347	William A. Parsons Parsons Smith Stone LLP 137 West 13th St PO Box 910 Burley ID 83318 wparsons@pmt.org
A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 City of Pocatello dtranmer@pocatello.us	Winding Brook Corp c/o Charles W Bryan Jr UBS Agrivest LLC PO Box 53 Nampa ID 83653	James C. Tucker Idaho Power Company 1221 West Idaho Street Boise, ID 83702-5627 jtucker2@idahopower.com

Lary S Larson Hopkins Roden Crockett Hansen & Hoopes PO Box 51219 Idaho Falls ID 83405-1219	Jo Beeman, Esq. Beeman & Associates 409 W Jefferson Boise ID 83702 jo.beeman@beemanlaw.com	City of Basalt PO Box 178 Basalt ID 83218
M. Jay Meyers Myers Law Office 300 N 7th Ave PO Box 4747 Pocatello ID 83205	City of Castleford P.O. Box 626 300 Main Castleford, ID 83321	LaDell and Sherry Anderson 304 N 500 W Paul ID 83347

Denise Glore, Attorney Office of Chief Counsel US Dept of Energy 1955 Fremont Ave MS 1209 Idaho Falls ID 83415-1510 gloredm@id.doe.gov	Mary Ann Plant 480 N 150 W Blackfoot ID 83221	O.E. Feld & Berneta Feld 1470 S 2750 W Aberdeen ID 83210
Jeff Feld 719 Bitterroot Dr Pocatello ID 83201	Eugene Hruza PO Box 66 Minidoka ID 83343	Jerry R. Rigby Rigby Andrus and Moeller 25 N 2nd East Rexburg ID 83440 jrigby@rex-law.com
Robert E. Williams Fredericksen Williams Meservy & Lothspeich LLP 153 E Main St PO Box 168 Jerome ID 83338 rewilliams@cableone.net	Gregory P. Meacham McGrath Meacham & Smith PLLC 414 Shoup Idaho Falls ID 83405	Richard J. Kimmel 867 N. 800 East Shelley, ID 83274
James S. Lochhead Michael A. Gheleta Brownstein Hyatt Farber Schreck P.C. 410 Seventeenth Street Suite 2200 Denver, CO 80202 jlochhead@bhfs.com mgheleta@bhfs.com	F. Randall Kline P.O. Box 397 427 N. Main St. Pocatello, ID 83204	



Travis L. Thompson

Exhibit
A

IN THE SUPREME COURT OF THE STATE OF IDAHO

****

CARL PARKER, Plaintiff-Respondent vs. L. JUNIOR WALLENTINE, Defendant-Appellant.	Supreme Court No. 13482

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BRIEF OF AMICUS CURIAE

****

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bear Lake

THE HONORABLE FRANCIS J. RASMUSSEN, District Judge

Wesley F. Merrill
MERRILL & MERRILL
Spaulding Building
P.O. Box 991
Pocatello, Idaho 83201
Attorneys for Plaintiff-Respondent

Kent W. Foster
HOLDEN, KIDWELL, HAHN & CRAPO
P.O. Box 129
Idaho Falls, Idaho 83401
Attorneys for Defendant-Appellant

DAVID H. LEROY
Attorney General
State of Idaho
Statehouse
Boise, Idaho 83720

DON A. OLOWINSKI
Deputy Attorney General
Chief, Natural Resources Division

PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources
Attorneys for Amicus Curiae Idaho Department of Water Resources

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scarce resource.

In Schodde v. Twin Falls Land & Water Co., 161 Fed. 43 (9th Cir. 1908), aff'd, 224 U.S. 107 (1912), the court stated that the method of diversion employed and the current of the stream were not appurtenances of the appropriation, and further, that the appropriative right must be exercised with some regard for the rights of the public. The public interest, it was stated, would not be served by diverting the current of an entire stream for the lifting of a comparatively small quantity of water over the banks. The 1951 legislature apparently realized that absolute protection of an historic means of diversion would effectively curtail the development of Idaho groundwater. It was arguably realized that stored groundwater is not always used most economically to provide lift for the wells of senior appropriators.

The 1953 legislature also authorized the state reclamation engineer to establish reasonable pump levels. This delegation of authority recognized the complexities and difficulties involved in determining reasonable pump levels. This Court in Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 584, 513 P.2d 627 (1973) stated: "Because of the need for highly technical expertise to accurately measure complex ground water data the legislature has delegated to IDWA the function of ascertaining reasonable pumping levels."

It is evident that the legislature intended to subject domestic wells to reasonable pumping levels. The interrelationship of domestic and irrigation wells is widespread across Idaho. Many

domestic wells have early priority dates. Domestic wells are usually located at shallow depths because of the quantity of water demanded and because of drilling expense. Domestic wells if protected in their historic pumping levels would create a major stumbling block to the achievement of full economic development of Idaho's water resources.

The exemption of domestic wells from the reasonable pumping level requirements would produce results that cannot be reconciled with the objective the legislature was trying to achieve. The goal of the statute was to reach a balance between full economic development and security of investment. The statute was explicitly aimed at preventing shallow wells from commanding the whole groundwater supply. Since many shallow wells are domestic, their exemption from the Act would defeat the purpose and intent of the statute.

The Idaho Legislature also added Sections 16 through 21 to the Ground Water Act in 1953. I.C. §§ 42-237b to 42-237g (1977). These provisions establish an administrative procedure for the determination of adverse claims. Their objective is to resolve groundwater disputes through the use of local groundwater boards. It would appear that the legislature intended this procedure to be available in disputes involving domestic rights. Many groundwater interference cases would involve domestic owners because of the widespread intermingling of domestic wells and irrigation wells. These statutory provisions concerning local groundwater boards present a further strong indication that domestic wells

> would be valid within the inherent powers of the legislative body.

87 Idaho at 52.

The Johnston decision further cites the Kansas case of Smith v. State Highway Comm'n, 346 P.2d 259, 268, 185 Kan. 445, to the following effect:

> Determination of whether damages are compensable under eminent domain or noncompensable under the police power depends on the relative importance of the interests affected. The court must weigh the relative interests of the public and that of the individual, so as to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy of the eminent domain clause of insuring the individual against an unreasonable loss occasioned by the exercise of governmental power. (Emphasis in the original).

52 Idaho at 52-53.

The important governmental interests of the State of Idaho involved in the case at bar have been discussed in this brief. These interests are not unreasonable nor would they be arbitrary in their application to Parker's domestic well. The relative importance of the public's interest in reasonable groundwater development outweighs the competing private interests of domestic well owners to maintain their shallow pumping levels.

V. EVEN UNDER COMMON LAW PRINCIPLES, DOMESTIC WELL OWNERS ARE ONLY PROTECTED IN THE MAINTENANCE OF REASONABLE GROUNDWATER PUMPING LEVELS.

If the provisions of the Ground Water Act regulating reasonable pumping levels are found not to apply to pre-1978 domestic wells then it becomes important to determine the rights appropriators from such wells have at common law. Six pre-Ground