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	)	**ORDER REGARDING MOTION FOR DECLARATORY RULING**

A & B has moved for a declaratory ruling seeking a determination of the law to be applied in the administration of ground water rights diverting from the Eastern Snake Plain Aquifer. There is considerable historical background leading to the question presented and factual issues between the parties. So far as necessary for this decision, the undisputed facts are that A & B is entitled to divert up to 1,100 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 land. This water right has a priority date of September 9, 1948. The ESPA is hydraulically connected and constitutes a common ground water supply. In 1951 the Idaho legislature enacted the Ground Water Act. *1951 Idaho Sess. Laws, ch. 200, pp. 423-29,* codified as Idaho Code sections 42-226 *et seq.* The question presented in this motion is whether provisions of the Ground Water Act are applicable to ground water rights acquired prior to enactment of the Ground Water Act. Unlike earlier proceedings presenting issues between surface water users and ground water pumpers, this proceeding presents issues between ground water pumpers, the effect of priority rights, and the impact, if any, of the Ground Water Act on the rights acquired prior to its enactment.

Section 42-226 of the Ground Water Act validates ground water rights acquired prior to the Act, providing in part that, "All rights to use of ground water acquired before the effective date of this Act are hereby in all respects validated and confirmed." Were one to stop here it

would appear that the provisions of the Ground Water Act would not be applicable to previously acquired rights. However, the issue becomes tangled by section 42-229 which validates processes for appropriation initiated prior to the Ground Water Act. "But the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act." *I.C. Section 42-229.* The legislature set forth specific exceptions in Sections 42-227, relating to the wells for domestic purposes and 42-228, relating to drilling and use of wells for drainage or recovery purposes. The legislature specifically excepted only two ground water activities from administration under the Ground Water Act. Read this way, the provision in Section 226 validating rights acquired prior to the Ground Water Act would mean that those pre-existing rights are valid but subject to administration under the Act.

The primary significance of whether the Ground Water Act is applicable to rights acquired before its enactment comes from an amendment to I.C. Section 42-226 in 1953 providing 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." 1953 Idaho Sess. Laws, ch. 182, sec. 1, pp. 278-279. The authority delegated to the "state reclamation engineer" now resides in the Director of the Idaho Department of Water Resources. The legislature again amended Section 42-226 in 1987. Among the amendments was the provision that, "This Act shall not affect the rights to the use of ground water in this state acquired before its enactment." This language replaced 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." The parties agree that this was a grammatical change, not one of substance to change the meaning of Section 42-226.

A&B maintains that the provision in Section 42-226 granting the Director the authority to establish reasonable ground water pumping levels is inapplicable to their rights acquired prior to the enactment of the Ground Water Act in 1951. They seek a determination that those rights are protected in their historical pumping levels. The consequence would be that if junior pumpers adversely impact those historical pumping levels the burden of remediation would fall on the

juniors. A different result may follow if the Ground Water Act is applied to rights existing before its enactment, allowing the Director to establish reasonable ground water pumping levels.

In *Baker v. Ore-Ida Foods, Inc.,* 95 Idaho 575, 513 P.2d 627 (1973), the Supreme Court addressed the rights relative to irrigation wells drawing from an aquifer recharged primarily by precipitation which was insufficient to satisfy all well owners during the summer irrigation season. The opinion focuses on wells developed during the late 1950's and early 1960's, but a portion of the rights for which protection was sought had priority rights back to 1948 and 1950, preceding the Ground Water Act. Baker and others with senior rights brought an action to enjoin Ore-Ida and others from pumping from their wells until the seniors' wells resumed normal productivity. The Supreme Court accepted the district court's determination that the parties were "mining" the aquifer, that is, perennially withdrawing ground water at rates beyond the recharge rate. In fact "the average annual natural recharge could be pumped entirely by the four senior wells." *Id. 578.* The Court stated the following at page 576:

> This Court must for the first time, interpret our Ground Water Act (I.C. sec. 42-226 *et seq.*) as it relates to withdrawals of water from an underground aquifer in excess of the annual recharge rate. We are also called upon to construe our Ground Water Act's policies of promoting "full economic development" of ground water resources and maintaining "reasonable pumping levels."

The junior right holders who were enjoined in the district court asserted that the Ground Water Act superseded Idaho's common law rules and argued that, though they were junior, they were entitled to a mutual pro rata share of water in the aquifer, maintaining that senior appropriators could only enjoin juniors by showing that the juniors' pumping has exceeded reasonable pumping levels. The Supreme Court engaged in extensive analysis of the development of water law, reviewing the riparian doctrine and the prior appropriation system adopted in Idaho. In discussing *State ex rel. Tappan v. Smith,* 92 Idaho 451, 456, 444 P.2d 412, 417 (1968), the Court commented that, "*Smith* says the state may regulate appropriations of ground water without violating our constitutionally mandated prior appropriation system." Id. 581. This underlines the accepted principle in this case that the State can apply the Ground Water Act to rights preexisting its enactment if that is what the legislature provides.

The Supreme Court addressed *Noh v. Stoner,* 53 Idaho 651, 657, 26 P.2d 1112, 1114 (1933), relied upon by A&B in this case. *Noh* held that if a junior appropriator wanted to pump

below the senior the financial burden for redress would rest on the junior. The Court in *Baker* made this analysis:

> *Noh* suggests that a senior appropriator of ground water is forever protected from any interference with his *method* of diversion. Under *Noh* the only way that a junior can draw on the same aquifer is to hold the senior harmless for any loss incurred as a result of the junior's pumping. If the costs of reimbursing the senior become excessive, junior appropriators could not afford to pump from the aquifer. *See* Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961). *Noh* was inconsistent with the full economic development of our ground water resource. (citations omitted).
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> Apparently our Ground Water Act was intended to eliminate the harsh doctrine of *Noh*.

Baker, pp. 581,582.

The Supreme Court continued: "We hold *Noh* to be inconsistent with our constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the Ground Water Act." Id. p. 583. The Court observed that the Ground Water Act seeks to promote "full economic development" and stated: "We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, sec. 7."

Addressing the question of reasonable pumping levels, the Court stated: "Appellants contend that our Act's use of the phrase 'reasonable pumping levels' means that senior appropriators are not necessarily entitled to maintenance of historic pumping levels. We agree with appellants in this regard." Id. 584. Senior rights dated back before enactment of the Ground Water Act. Consequently, this statement must be read to mean that the Court concluded that the Ground Water Act applied to rights preexisting the Act. The conclusion did not assist the appellants under the facts of the case.

The Supreme Court again addressed the Ground Water Act in *Parker v. Wallentine,* 103 Idaho 506, 659 P.2d 648 (1982), when Parker, the owner of a domestic well, sought an injunction against Wallentine, the owner of property with an irrigation well situated some 125-150 feet from Parker's well. The Parker domestic well had been drilled to 71 feet in 1964. The Wallentine irrigation well was 200 feet deep and was established in 1976. Testing indicated that the Wallentine well would interfere with the Parker well if more than approximately 5% of the right established in the Wallentine well permit were pumped. The Supreme Court affirmed the

decision of the district court restraining use of the Wallentine irrigation well unless Wallentine obtained a determination of the reasonable pumping level for the area and deepened Parker's well at Wallentine's expense: "We affirm the decision of the district court and hold that domestic wells drilled prior to 1978 are exempt from the provisions of I.C. section 42-226." Id. p. 510. The Court held that the exemption for domestic wells was not modified by the amendment to Section 42-226 in 1953 which established the reasonable pumping level limitations on the doctrine of first in time first in right. Further, the 1978 amendment eliminating the broad exemption for domestic wells was not retroactive to deprive Parker of the exemption in place when his domestic well was established: "However, statutes in Idaho are not to be applied retroactively in the absence of clear legislative expression to that effect." Id. p. 511, fn. 7.

In reaching its decision the Court in *Parker* cited *Noh* favorably in determining that under the particular facts of the dispute with Wallentine, Parker was entitled to an injunction. It addressed *Baker v. Ore-Ida* at page 513, footnote 11:

> 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 Act, *Noh* is applicable in circumstances such as these in which I.C sec. 42-226 does not apply.

Justice Shepard, who wrote the opinion in *Baker*, as well as Justices Donaldson, McFadden, and Chief Justice Bakes who all concurred in *Baker*, also concurred in the *Parker* decision without commenting on any perceived inconsistency between the decisions. *Parker*, therefore, cannot be read to undercut the conclusions stated in *Baker*.

The effect of *Parker* is that it is relevant if the Ground Water Act does not operate retroactively to encompass irrigation rights established before its enactment. Parker is not relevant if the Ground Water Act operates retroactively. As noted in *Parker,* statutes in Idaho are not to be applied retroactively in the absence of a clear legislative expression to that effect. The language in I.C. Section 29-229 provides such a clear legislative expression in providing that "the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act." The Act did not expressly delineate pre-existing ground water irrigation rights as excepted in the manner it did for domestic wells and wells for drainage and recharge. Those exceptions are precise, making it clear that the legislature had a format for excepting rights. The Supreme

Court in *Baker* interpreted the Act in a situation involving rights existing before the Act, making clear its thinking that the Ground Water Act extended back to pre-existing ground water irrigation rights. However, A&B points to the following statement in *Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994):

> In his testimony at the hearing to consider whether the writ would issue, the director referred to I.C. sec. 42-226 and stated that "a decision has to be made in the public interest as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource."
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> We note that the original version of what is now I.C. sec. 42-226 was enacted in 1951. 1951 Idaho Sess. Laws, ch. 200, sec. 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. sec. 42-226 in any way affects the director's duty to distribute water to the Mussers, whose priority date is April 1, 1892.

This is broad and compelling language, but there are several problems in accepting it as a final resolution of the issue in this case. It does not address the *Baker v. Ore-Idaho* decision in any respect. It does not address the language of I.C. section 42-229: "But the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act." It does not address Article XV, Section 5 of the Constitution. The most logical conclusion in the context of the issues presented in the case is that the Court's comment can only be read to establish that rights acquired prior to adoption of the Ground Water Act were acknowledged to be valid with whatever benefits their priority dates might confer. The issue before the Court was a claimed failure of departmental action, not analysis of the effect of the Ground Water Act on rights established before enactment of the Act. This is consistent with the Court's own definition of the issues addressed by the opinion:

> This case is a water distribution case. The primary issue presented is whether the trial court properly issued a writ of mandate ordering the director (the director) of the Idaho department of water resources (the department) immediately to comply with I.C. sec. 42-602 and distribute water in accordance with the doctrine of prior appropriation. There are also issues concerning the award of attorney fees and the trial court's order prohibiting the payment of these attorney fees and costs from the Snake River Basin Adjudication account (SRBA account).

Id. 393.

As analyzed in the recommendation in the Spring Users' case, the sum of the administration of water law is not encapsulated in I.C. sec. 42-602. The issue in *Musser* related to a failure to take administrative action, not the applicability or inapplicability of the Ground Water Act to prior irrigation rights. The likelihood that the Supreme Court in *Musser* intended to resolve the issue in this case without the citation or analysis of statutory, case, or constitutional authority is slim. The Mussers made a claim based upon a very old water right for administration to enforce their priority right. The Director denied their claim on the basis that he was "not authorized to direct the watermaster to conjunctively administer ground and surface water within Water District 36A short of a formal hydrologic determination that such conjunctive management is appropriate." Id. The Supreme Court said the Director was wrong. Little more should be read into *Musser*.

CONCLUSION

The Idaho Ground Water Act is applicable to the administration of the water rights involved in this case, including those rights that pre-existed the adoption of the Ground Water Act in 1951, and are subject to administration consistent with subsequent amendments to the Act.

Dated this 26 day of May, 2008.

GERALD F. SCHROEDER
HEARING OFFICER

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following attached document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 20th day of May, 2008.

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