Docket No. 38403-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

A & B IRRIGATION DISTRICT,
Petitioner-Appellant,

v.

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

v.

THE IDAHO GROUND WATER APPROPRIATORS, INC.; THE CITY OF POCATELLO; FREMONT-MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON; SUN-GLO INDUSTRIES; VAL SCHWENDIMAN FARMS, INC.; DAVID SCHWENDIMAN FARMS, INC.; DARRELL C. NEVILLE; SCOTT C. NEVILLE; STAN D. NEVILLE,
Intervenors.

A&B IRRIGATION DISTRICT'S REPLY BRIEF

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

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INTRODUCTION

A&B Irrigation District ("A&B" or "District") has three distinct issues for appeal. First, whether the Ground Water Act's "reasonable pumping level" provision retroactively applies to A&B's 1948 water right. Second, if the provision applies, then whether the Director erred in failing to establish a "reasonable pumping level" to protect A&B's senior right. Third, whether the Director erred in forcing A&B to "interconnect" individual wells or prove why it was infeasible to do so prior to the administration of junior rights. Although separate, each issue reveals the Director's persistent reluctance to properly protect A&B's senior water right in administration.

The Court can resolve the interpretation of the Ground Water Act through a careful review of the 1953 amendment. 1953 Idaho Sess. Laws, ch. 182 (approved March 12, 1953).[1] The amendment contains no express declaration that the legislature intended the "reasonable pumping level" provision to have retroactive effect. Under Idaho law, the amendment cannot be applied retroactively to A&B's 1948 ground water right. *See* I.C. § 73-101; *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614 (1987). The Idaho Department of Water Resources ("IDWR"), Idaho Ground Water Appropriators, Inc. ("IGWA"), and the City of Pocatello ("Pocatello") provide no valid response to this well-established rule of law. Accordingly, the Director erroneously applied the "reasonable pumping level" provision to A&B's water right and the Court should reverse that decision.

[1] A copy of the entire 1953 amendment is attached for the Court's convenience. *See Attachment.*

Assuming the 1953 amendment could be applied retroactively, the Director further erred in not establishing a "reasonable pumping level" to protect A&B's senior right. Instead, the Director arbitrarily concluded that the District's pumping did not exceed a reasonable level without disclosing the actual pumping level depth. Since there is no evidence in the record to support his decision the Director violated Idaho's water administration laws and the Administrative Procedures Act ("APA"), I.C. §§ 67-5201 *et seq*.

Finally, the Director erred by refusing to administer juniors until A&B "interconnected" individual wells across the project, or proved it was infeasible to do so. No Idaho law requires a senior water right holder to "interconnect" separate points of diversion as a condition to administration within an organized water district. IDWR further confuses A&B's "means of diversion," the wells and pumps, with the District's "water conveyance" facilities. IDWR misreads CM Rule 42 by arguing that A&B must drill "new" wells or construct "new" conveyance facilities. Since Rule 42.01.g only concerns a review of A&B's "existing facilities," the Director had no authority to require the construction of new wells, canals, or pipelines under his "interconnection" theory. Consequently, the Director unconstitutionally applied the CM Rules to A&B's senior water right.

In summary, the Director misapplied the law in denying A&B's request for water right administration. The three reasons offered by the Director to justify his failure to properly administer have no legal bases. The Court should reverse and remand the proceeding to IDWR.

ARGUMENT

I. A Statute Enacted in 1951 Does Not Make an Amendment Passed Later in 1953 Retroactive.

IDWR claims the 1951 Ground Water Act applies to all "non excepted" ground water rights, including A&B's 1948 irrigation right #36-2080. *IDWR Br.* 10-12. IDWR argues the language in Section 4 (codified at I.C. § 42-229) evidences the legislature's intent to apply the Act retroactively to pre-1951 ground water rights. *Id.*

Assuming for argument's sake that the Ground Water Act can be retroactively applied, nothing in the 1951 Act changed the common law administration of ground water rights. *See* 1951 Idaho Sess. Laws, ch. 200 (approved March 19, 1951). The prior appropriation doctrine protected senior ground water rights from interference by juniors. IDAHO CONST. Art XV, § 3. Moreover, even after passage of the Ground Water Act in 1951, senior rights were still protected to their historic pumping levels at that time.[2] *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71, 82-83 (2011); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 582 (1973).

The real issue is the effect of the 1953 amendment which added the "reasonable ground water pumping levels" provision. 1953 Idaho Sess. Laws, ch. 182, § 1, p. 278. Regardless of a prior statute's effect, Idaho law requires an express legislative declaration <u>in the amendment</u> if it is to be applied retroactively.[3] *See* I.C. § 73-101 ("<u>no part</u> of these compiled laws is retroactive

[2] The 1953 amendment changed the law to protect senior ground water rights to a "reasonable ground water pumping level." When a statute is amended it is presumed that the legislature intended the statute to have a different meaning accorded the statute before amendment. *See Miller v. State*, 110 Idaho 298, 299 (1986). This Court has acknowledged that the common law protecting seniors to historic pumping levels changed with the 1953 amendment, not the 1951 Ground Water Act. *See Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 582-84 (1973).
[3] *See also, Montgomery v. Montgomery*, 147 Idaho 1, 11 (2009) ("new legislation is not given retroactive effect unless 'expressly so declared.'").

unless expressly declared.") (emphasis added); *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614 (1987); *Stuart v. State*, 149 Idaho 35, 44 (2010) ("Applied to amendments, this means that an amending act applies to the statute as it previously existed with any amendment then being subjected to the statutory prohibition against retroactive effect."). Therefore, the Court must analyze the language of the 1953 amendment, not the 1951 Act, to determine whether the legislature expressly declared the amendment to have retroactive application.

Nothing in the 1953 amendment or the circumstances of its enactment indicates that the legislature intended this amendment to have retroactive effect. *See* 1953 Idaho Sess. Laws, ch. 182. Idaho law prohibits the retroactive application of an amendment without such an express declaration. *Nebeker*, 113 Idaho at 614. Therefore, the Director erred as a matter of law in applying the "reasonable pumping level" provision to A&B's senior water right.

The Supreme Court addressed this exact issue in the context of the 1978 amendment to the Ground Water Act. *Parker v. Wallentine*, 103 Idaho 506, 511, n. 7 (1982). Irrespective of the fact that Parker held a domestic water right, Wallentine argued that the 1978 amendment should be applied retroactively. *Id.* Since domestic water rights were no longer "excepted" from the Ground Water Act after 1978, Wallentine argued that the administration of Parker's right was subject to section 42-226.[4] If the administration of domestic water rights was subject to section 42-229 after 1978, which statute IDWR argues evidences a retroactive application of the entire Ground Water Act, then *Parker* would have been decided differently.

[4] IDWR, participating as *amicus curiae*, supported Wallentine's argument that the 1978 amendment should be applied retroactively and argued section 42-226 governed the administration of Parker's domestic water right. *See Parker*, 103 Idaho at 510, n. 5.

However, the *Parker* Court held that nothing in the 1978 amendment indicates that the legislature intended the amendment to have retroactive application. *See* 103 Idaho at 511, n. 7. Accordingly, the Court found the "reasonable pumping level" did not apply to domestic water rights prior to 1978. *Id.* at 510, n.11.

The *Parker* Court's analysis applies equally to any ground water right that pre-dates the 1953 amendment.[5] There is no express declaration from the legislature that it intended the 1953 amendment to have retroactive effect, hence the "reasonable ground water pumping level" provision does not apply to A&B's water right.[6] 1953 Idaho Sess. Laws, ch. 182. Any retroactive language in section 42-229, which was enacted two years earlier in 1951, does not change this analysis. After all, if the retroactive language in section 42-229 makes the administration of all water rights subject to the "reasonable pumping level" provision in section 42-226, then Wallentine's argument as to Parker's domestic water right would have prevailed. Just as Wallentine's argument was rejected in *Parker*, the Court should reject IDWR's same argument now.

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[5] IDWR agreed with this interpretation from 1982 to 2007, as referenced in the former Director's presentation to the Idaho Water Resource Board, and prior decisions on new applications for permit. *See A&B's Opening Br.* at 19-20. It was only after A&B filed a motion to proceed with its delivery call in March 2007 did IDWR change its long-standing interpretation of the Ground Water Act. *See IDWR Br.* at 9, fn. 9. The final order in the City of Eagle case was issued on February 26, 2008, less than a month after the initial order was issued in A&B's case on January 29, 2008. R. 1105. The preliminary order in the City of Eagle case, issued on July 17, 2007 (by current Interim Director Gary Spackman, then acting as a hearing officer), concluded that pre-1953 water rights were protected to their historic pumping levels. Although section 42-229 remained unchanged between 1982 and 2007, not once did IDWR take the position that the 1951 Act somehow made the 1953 amendment and its "reasonable pumping level" provision retroactive. Idaho law disfavors an agency's changed interpretation such as IDWR's in this case. *See Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 314 (2009) ("It might be observed that, as a general proposition, an agency has a more difficult task arguing for deference to its interpretation of a statute when the agency's interpretation of the statute has changed without a change in the statute.").

[6] Further, there is no language in the 1953 amendment referring to the "past," so the principle set forth in *Peavy v. McCombs*, 26 Idaho 143 (1914), does not apply. Admittedly, IDWR fails to identify any language in the 1953 amendment that would support a *Peavy* analysis.

IDWR fails to respond to this controlling rule of law and instead argues the entire Act must be read together for a proper interpretation. *IDWR Br.* at 14. The canon of statutory construction to construe an entire act together, including its amendments, has no bearing on the rule prohibiting the retroactive application of individual laws. *See* I.C. § 73-101. Idaho law does not allow the declaration of a single legislature to make all future amendments retroactive. Each amendment must be reviewed independently to determine whether that legislature expressed a clear declaration of retroactive application. *Nebeker* and *Stuart* are controlling on this issue.[7] If the Court accepts IDWR's position, then all amendments to the Ground Water Act, regardless of when they are enacted, would have retroactive application. This is not the law in Idaho.

In summary, in order for the "reasonable ground water pumping level" provision to have retroactive application to A&B's water right the Court must find an express declaration in the 1953 amendment. Since no such express declaration exists, the 1953 amendment cannot be applied retroactively. The Director and District Court erred as a matter of law in applying the "reasonable ground water pumping level" provision to A&B's water right. This Court should reverse accordingly.

[7] IDWR unpersuasively attempts to distinguish *Nebeker* because the case concerned statutes other than the Ground Water Act. *IDWR Br.* at 14. The rule requiring an express legislative declaration in order for an amendment to have retroactive effect is not dependent upon a specific section of the Idaho Code, it applies to all laws. *See* I.C. § 73-101. Further, the Court has applied the rule to a variety of statutes. *See Gailey v. Jerome County*, 113 Idaho 430, 433 (1987) (I.C. § 6-906); *State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 105 (2005) (I.C. § 48-101); *Hill v. Am. Family Mut. Ins. Co.*, 150 Idaho 619 (2011) (I.C. § 41-2502).

II. Idaho Law Protects Senior Ground Water Rights to a "Reasonable Pumping Level," The Director Unlawfully Failed to Set a "Reasonable Pumping Level" For A&B.

Assuming the 1953 "reasonable pumping level" provision somehow retroactively applies to A&B's 1948 water right, the Director's failure to identify a specific pumping level was unlawful, arbitrary, and capricious. The legal concept is simple, if A&B's water right is subject to a "reasonable pumping level," then the Director must establish one to implement that administration. Questions about aquifer "mining," geology, or available water do not excuse the Director from complying with this mandatory duty.[8] At a minimum, the Director could not find that A&B's pumping did not exceed a "reasonable pumping level" without identifying the actual aquifer depth to support that decision. Idaho's APA prohibits such arbitrary findings that have no supporting factual basis. *See A&B Opening Br.* at 27-28.

Since IDWR cannot point to an objective pumping level in the record, the agency instead argues the Director's decision is acceptable for three reasons: 1) the establishment of a reasonable pumping level is discretionary; 2) the ESPA is not being "mined"; and 3) the hydrogeology in a limited part of A&B's project justifies not setting a pumping level anywhere on the project. *IDWR Br.* at 25-27. Each of these arguments fails.

[8] These factors may assist in determining at what level a reasonable pumping level should be set, but do not determine whether the Director should even set one in the first place. The Director's duty to administer all water rights under Idaho law answers that question. I.C. §§ 42-226, 42-607; CM Rule 40.

A. Ground Water Right Administration is Not Discretionary.

IDWR claims that setting a "reasonable pumping level" is left to the Director's sole discretion.[9] *IDWR Br.* at 25. IDWR misreads the statutes and prior cases interpreting the Ground Water Act.[10]

Idaho law clearly provides: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided." I.C. § 42-226 (emphasis added). The statute uses mandatory terms "shall be protected."[11] *See Rife v. Long*, 127 Idaho 841, 848 (1995). This unambiguous language must be given its "plain, usual, and ordinary meaning." *See Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 15 (2010). The Director has no discretion to refuse administration. Interpreting the Ground Water Act, this Court recently clarified the protections section 42-226 provides for senior ground water right holders:

> It is the "prior appropriators" of underground water who are protected "in the maintenance of reasonable ground water pumping levels," Idaho Code § 42-226, and in context it is only when there is a conflict between senior and junior appropriators.

Clear Springs, 252 P.3d at 84.

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[9] However, IDWR also states that "all holders of non-excepted ground water rights . . . are protected in the maintenance of reasonable pumping levels. Because A&B holds an irrigation water right, it is protected in the maintenance of its reasonable pumping level." *IDWR Br.* at 19. IDWR contradicts itself. How can A&B be protected to a "reasonable pumping level" if the decision to establish one is discretionary and the Director decides not to set one?

[10] The District Court similarly erred in affirming the Director's decision on this basis. *See A&B's Opening Br.* at 28-31.

[11] The terms "as may be established by the director … as herein provided" refer to the Director's discretion to identify at what depth a reasonable pumping level will be set. Although pumping levels may differ depending upon the factual circumstances for the administration of the ground water rights involved, this does not mean the Director can refuse to set one.

If a senior ground water right requests administration in an organized water district, the watermaster and Director have a mandatory duty to distribute water pursuant to Idaho law. *See Musser v. Higginson*, 125 Idaho 392, 395 (1994); I.C. § 42-607; CM Rule 40. The Ground Water Act applies to protect seniors in the maintenance of a "reasonable pumping level."[12] I.C. § 42-226. Contrary to IDWR's claim, administration under a "reasonable pumping level" is not "curtailment only."[13] *IDWR Br.* at 25. For example, if a reasonable level is 200 feet, and A&B is forced to pump its water right from 300 feet, A&B is entitled to administration (i.e. either curtailment or mitigation through an approved mitigation plan). *See* CM Rules 40, 43. If sufficient water is available, the affected junior water right holders have the ability to compensate A&B for increased costs associated with pumping at depths beyond the "reasonable pumping level."[14] *See Parker*, 103 Idaho at 514.

On the other hand, if the reasonable level is 200 feet and A&B is pumping sufficient water at 180 feet, then no mitigation would be required from junior water users. However, at that point A&B is provided with the certainty that it will be protected if the District is forced to pump at depths beyond 200 feet in the future. R. 3114 ("There should be some predictability as

[12] Assuming water is available to satisfy the senior's right at that pumping level.

[13] IGWA argues that no "reasonable pumping level" is necessary if the Director determines a senior has sufficient water. *IGWA Br.* at 42. IGWA's argument is not supported by Idaho law. Just because a senior may access sufficient water at 1,000 feet, that still does not address the issue of whether it is reasonable to pump at that depth. Even if the senior can access sufficient water at greater depths he is still entitled to protection to a "reasonable pumping level" in administration. *See Clear Springs*, 252 P.3d at 84; *Baker*, 95 Idaho at 585.

[14] This is exactly the type of analysis the Director used *In the Matter of Applications to Appropriate Water Nos. 84-12239 in the Name of J.R. Cascade, Inc. et al.* (dated October 22, 2009). *See* Clerk's Supp. R. *A&B Opening Br.* at 48. In that order the Director found: "the right holder shall mitigate . . . for any reduction in the water supply required to satisfy the approved use of water under water rights senior to this right or for increases in the cost of pumping water under the senior rights resulting from pumping ground water under this right." *See Order* at 10, found at www.idwr.idaho.gov/WaterManagement/Orders.default.htm.

to how far down a pumper must go and when the protection of reasonable pumping levels has been reached.").

Even the Director did not agree with IDWR's present argument. Notably, the Director never claimed that he had the discretion to not set a "reasonable pumping level" in response to A&B's delivery call. R. 1109, 3321-22. Moreover, the Director implicitly set a "reasonable pumping level" to judge A&B's pumping against. Otherwise, how could the Director have determined that A&B's pumping did not exceed a "reasonable pumping level" if he did not identify an actual pumping depth in the aquifer?

Since the Director affirmatively concluded that A&B's pumping did not exceed a "reasonable level" but at the same time failed to disclose the actual depth of that level, he effectively refused to perform the administration required by law. IDAHO CONST. Art XV, § 3; I.C. §§ 42-226, 42-607; CM Rule 40. Further, the Director's failure to support his decision with "substantial evidence," a "reasoned statement," or a "rational basis" violates Idaho's APA. *See Galli v. Idaho County*, 146 Idaho 155, 159 (2008); *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006).

If the Court finds that A&B's senior ground water right is subject to a "reasonable pumping level," then the Director had no legal basis to refuse his mandatory duty to protect A&B's senior right in administration. The Court should reverse the Director's finding on this issue and remand for further proceedings to establish a reasonable pumping level in accordance with Idaho law.

B. Aquifer "Mining" is Not a Condition to Establish a "Reasonable Pumping Level" for the Administration of Ground Water Rights.

IDWR also claims that aquifer "mining" is a condition for the Director to set a "reasonable pumping level." *IDWR Br.* at 26. IDWR concludes that "[b]ecause the ESPA is not being mined, the Director properly exercised his discretion in concluding that reasonable pumping levels were not exceeded." *Id.* at 27. Again, IDWR misinterprets the Ground Water Act and the Director's mandatory administrative duties.

Nothing in section 42-226 requires the Director to find an aquifer is being "mined" before he establishes a "reasonable pumping level." Moreover, nothing in Idaho's constitution, water distribution statutes, or the CM Rules, requires aquifer "mining" to occur before a "reasonable pumping level" can be established for administration in an organized water district.

Even the statute IDWR relies upon does not support its argument.[15] Section 42-237a.g states that the Director is authorized to "establish a ground water pumping level" to assist him in the administration and enforcement of the Act. The statute does not say the Director must find an aquifer is being "mined" before a "reasonable pumping level" can be established. IDWR essentially argues that no administration can occur unless the ESPA is "mined." The Court in *Clear Springs* specifically rejected IDWR's argument:

> [I.C. § 42-237a.g] merely provides that well water cannot be used to fill a ground water right if doing so would either: (a) cause material injury to any prior surface or ground water right or (b) result in withdrawals from the aquifer exceeding recharge. There is absolutely nothing in the statute that could be

[15] IDWR misrepresents the statute's terms by arguing section 42-237a.g allows the Director to establish a reasonable pumping level only "if" ground water is pumped at a rate beyond the reasonably anticipated rate of future natural recharge. *IDWR Br.* at 26. The statute does not include this condition.

> interpreted as providing that ground water users are exempt from the doctrine of prior appropriation as long as they are not mining the aquifer.

252 P.3d at 85.

The *Clear Springs* decision clarifies that the "reasonable pumping level" provision applies even where no groundwater "mining" occurs. Idaho's prior appropriation doctrine provides that junior water users are still subject to water right administration even if junior users are not "mining" the aquifer.[16] Accepting IDWR's argument would completely preclude any administration in the ESPA since the total discharge from pumping (2.0 million acre-feet) would likely never exceed total recharge (approximately 7.5 million acre-feet).[17] *See IDWR Br.* at 26. IDWR would have to authorize new ground water rights to irrigate nearly 3.0 million additional acres (i.e. about 6.0 million acre-feet additional annual depletion) before pumping withdrawals would exceed total annual recharge to the aquifer. Until that day arrived, no existing senior ground water right would be entitled to administration under a "reasonable pumping level."[18] Certainly that is not the result for ground water administration required by Idaho law.

[16] IDWR's generalized claim that the ESPA is not being "mined" does not accurately describe the aquifer's condition around A&B. It is undisputed that A&B's annual well measurements show a persisting declining trend in ground water levels since the mid 1980s. R. 3087; Ex. 225; Ex. 200 at 5-3 to 5-5. IDWR's expert witness testified that these continued declines show that less water is recharged than discharged in the aquifer around A&B. Tr. Vol. VII, p. 1520-21 ("That's correct. The clear indication that there's less water coming in A&B than there is leaving the area around A&B.").

[17] This example assumes for argument's sake that IDWR's definition of "average annual rate of natural recharge" is correct. IDWR wrongly relies upon the definition in CM Rule 10.19 which includes man-induced "incidental recharge" from surface water delivery operations. The Ground Water Act only contemplates "natural" recharge (i.e. precipitation, tributary inflow). *See* I.C. § 42-237a.g.

[18] Since the ESPA is currently subject to a moratorium on new consumptive ground water rights IDWR's "mining" condition would likely never be realized. The Director issued the moratorium to "protect existing water rights." *See Order* at 4 (available at http://www.idwr.idaho.gov/WaterManagement/Orders/Moratorium/orders_moratorium.htm)

Finally, IDWR's argument ignores the holding in *Baker* where the Court explained:

> In the case at bar it is apparent under our Ground Water Act that the senior appropriators may enjoin pumping by the junior appropriators to the extent that the additional pumping of the junior wells' will exceed the "reasonably anticipated average rate of future recharge." The seniors ***may also enjoin such pumping to the extent that pumping by the juniors may force seniors to go below the "reasonable pumping levels" set by the IDWA***.

95 Idaho at 585 (emphasis added).

The Court found that junior ground water users could be curtailed if either: 1) their pumping resulted in "mining"; or 2) their pumping forced seniors to pump below a reasonable level. The Court did not say "mining" was a condition to establishing a "reasonable pumping level" in the first place.[19] The junior water users in *Baker* were curtailed because their pumping resulted in unlawful "mining" of the aquifer, therefore a "reasonable pumping level" was not at issue.[20] 95 Idaho at 584.

In sum, aquifer "mining" does not control whether the Director establishes a "reasonable pumping level" for administration in an organized water district. If a senior requests administration the Ground Water Act protects the senior's pumping to a reasonable level. The prior appropriation doctrine does not require an aquifer to suffer "mining" conditions before administration begins. The Court should therefore reject IDWR's argument.

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[19] IDWR's own actions in other cases do not support its present argument. For example, *In the Matter of Applications to Appropriate Water Nos. 84-12239 in the Name of J.R. Cascade, Inc. et al.*, the Director established a "reasonable pumping level" for surrounding senior ground water users at 190 feet (plus pump submergence), but he did not conclude that the aquifer would be "mined" as a result of the new appropriation in the aquifer. *See* Clerk's Supp. R. *A&B's Opening Brief on Appeal* at 48 (www.idwr.idaho.gov/WaterManagement/Orders.default.htm).

[20] IDWR wrongly argues that a "reasonable pumping level" was at issue in *Baker*. *IDWR Br.* at 17. No pumping level was established in *Baker* because the most junior rights were curtailed to prevent "mining." In 1985, IDWR reduced the total annual volume authorized to be pumped from the aquifer from 5,500 acre-feet to 4,000 acre-feet. The Director affirmed this reduced volume again in 2004, and the three most junior ground water rights were still partially or completely curtailed at that time. R. 1572-73. Reviewing the Director's 2004 Order there is no question that a "reasonable pumping level" was not addressed in the *Baker* case proceedings. R. 1569-71.

C. Hydrogeologic Conditions in Part of an Aquifer Do Not Excuse the Director from Establishing a "Reasonable Pumping Level."

Lastly, IDWR claims that the hydrogeologic conditions in the southern third of A&B's project justify the Director's finding that A&B's pumping did not exceed a "reasonable pumping level."[21] *IDWR Br.* 27-35. IDWR fails to cite a single statute or rule to support its theory. In a nutshell, IDWR argues that the difficult geologic environment in a limited part of A&B's project excused the Director from establishing a "reasonable pumping level" anywhere. This theory has no legal basis and should also be rejected.

Idaho law protects senior ground water rights regardless of the geologic characteristics in the aquifer. *See* I.C. §§ 42-226, 607; CM Rule 40. IDWR's duty to administer water rights in an organized water district is not conditioned upon geology. The statutory definition of "ground water" is instructive since it is not dependent upon particular geology.[22] *See* I.C. § 42-230(a) ("all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.") (emphasis added).

Contrary to IDWR's claim, the hydrogeologic setting of an aquifer does not excuse the Director from protecting seniors to a "reasonable pumping level." Although the conditions of an aquifer may vary, as evidenced by IDWR's description of the ESPA around the A&B project, that does not excuse the Director from establishing a "reasonable pumping level" to implement administration.

[21] Apparently this argument does not apply to the other two thirds of the A&B project which is located in a different "hydrogeologic environment." *IDWR Br.* at 29-30. IDWR fails to explain this apparent contradiction.
[22] The Ground Water Act does not limit administration to particular geologic formations found in the state's aquifers (i.e. sand, clay, basalt, granite, limestone, etc.). *See* I.C. §§ 42-226 *et seq.*

IDWR goes to great lengths to describe its view of the "inherent hydrogeologic setting" and how those facts are important for the "Director's determination that reasonable pumping levels have not been exceeded." *IDWR Br.* at 27. However, IDWR fails to point to a single finding or conclusion by the Director, in any order, that shows "hydrogeology" explains why A&B is not exceeding a "reasonable pumping level." Even IDWR's own expert, Dr. Dale Ralston, testified this issue has no relationship to defining a reasonable pumping level. Tr. Vol. I, p. 156 ("I cannot define reasonable from a hydrologic viewpoint.").

Regardless, IDWR relies upon its employee's testimony and exhibits created at hearing to support this theory. *IDWR Br.* at 28-32. IDWR's witness, Sean Vincent, was specifically questioned about his role in the Director's initial "reasonable pumping level" finding since IDWR designated him as the sole employee that participated in the preparation of that finding.[23] Mr. Vincent unequivocally admitted he had no knowledge of a "reasonable pumping level," or of any other employee who worked on the finding (R. 1109; Finding of Fact 18):

> Q. [BY MR. THOMPSON]: So it's your testimony that as far as any factual basis or support for this finding, no Department staff was assigned to work on that; is that true?
>
> A. [BY MR. VINCENT]: As far as I know --

Tr. Vol. IX, p.1846-47.

[23] In order to discover the basis for findings in the Director's initial order, A&B formally requested IDWR to identify "employees and any persons" who participated in its preparation. R. 1219. IDWR disclosed Sean Vincent as the sole employee who participated in preparing findings for paragraph 18 in the January 29, 2008 Order. R. 1383. Mr. Vincent testified that he did not author the sentence regarding the "reasonable ground water pumping levels." Tr. Vol. IX, p. 1845; R. 2405-08, 3239-41,

Since no IDWR employee, including Mr. Vincent, could provide information to substantiate the Director's finding, it was impossible to review the factual basis supporting the Director's decision. Instead, the Director arbitrarily concluded that A&B's pumping did not exceed a "reasonable pumping level" without disclosing the pumping level's defined depth. Nothing in the description of the hydrogeologic setting in the southern third of A&B's project explains why the Director did not reveal the pumping level he claimed was not exceeded.

Contrary to IDWR's theory, A&B's abandoned wells, and the fact certain wells were drilled to depths up to 1,000 feet, demonstrate why a "reasonable pumping level" is necessary. Senior water users like A&B should not be required to drill endlessly into the aquifer without knowing at what level their pumping will be protected in administration. Even now IDWR continues to argue that A&B must "drill wells deeper" without identifying how far A&B must go before its pumping will be protected. *IDWR Br.* at 38. This "race to the bottom" type of administration is contrary to Idaho law. I.C. § 42-226; R. 3114 ("the establishment of reasonable pumping levels should not be dependent upon extracting the last drop of that recharge.").

Finally, IDWR confuses the issue by alleging "A&B seeks to return to 1950s aquifer levels" and that the Court should prevent "monopolization of the ESPA by a single ground water user with unreasonable means of diversion." *IDWR Br.* at 35. Administering to a "reasonable pumping level" to protect A&B's senior water right would not "monopolize" the ESPA. Just the opposite, that is the "full economic development" of the aquifer expressly provided for by the Ground Water Act.

This Court recently reaffirmed this principle in *Clear Springs*:

> Likewise, we equated "optimum development" with "full economic development" when we 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. Full economic development of Idaho's ground water resources can and will benefit all of our citizens." . . .
>
> "We conclude that our legislature attempted to protect historic water rights while at the same time promoting full development of ground water. *Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels*. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected."

252 P.3d at 83 (citing *Baker*, 95 Idaho at 584) (emphasis in original).

Despite this holding, IDWR claims that A&B's wells in the southwest area do not constitute a "reasonable means of diversion" because of the "inherent hydrogeolgic setting." *IDWR Br.* at 33-34. Therefore, as a result of geology IDWR claims no "reasonable pumping level" is justified for administration. *Id.* at 35.

IDWR's logic is without merit. For example, under IDWR's theory if a person parks his car in the wrong neighborhood then that action would justify the police not protecting the victim and apprehending the thief. However, if that person parks his car in a gated community then the good location requires the police to arrest the thief and recover the car. Location does not excuse an agency's failure to perform a mandatory duty. Similarly, the Director cannot refuse to set a "reasonable pumping level" just because part of the aquifer underlying A&B may not be as productive as other parts.

In sum, IDWR's "hydrogeologic setting" argument misses the point. If the Director is going to administer A&B's water right to a "reasonable pumping level," then the law requires the Director to establish an objective pumping depth. The Director's duty is not conditioned upon an aquifer's geology. The failure to set a reasonable pumping level in A&B's case is inexcusable under the law. The Court should reject IDWR's argument accordingly.

III. A&B's Means of Diversion are Reasonable, Idaho Law Does Not Require A&B to Drill New Wells or Redesign, Enlarge, or Interconnect its Conveyance Facilities Prior to Administration.

In support of the Director's new "interconnection" condition for A&B's water right, IDWR argues that the District must "take reasonable steps to drill wells deeper, drill additional wells, and interconnect its system by extending its diversion works laterally across the project."[24] *IDWR Br.* at 38 (emphasis added). IDWR's argument fails since it misinterprets what constitutes A&B's "means of diversion."

Instead of analyzing A&B's "means of diversion," the wells and pumps used to divert and lift groundwater to the surface, IDWR wrongly attempts to include A&B's water conveyance facilities as part of the inquiry. Moreover, IDWR's argument contradicts the Director's separate findings regarding A&B's drilling techniques and conveyance efficiency.

In addition, IDWR misreads the CM Rules that limit the Director's authority to review A&B's "existing facilities" in an injury analysis. CM Rule 42.01.g. The "additional wells" and

[24] IDWR also wrongly alleges the "face" of A&B's partial decree allows the District to move "water freely within its boundaries." *IDWR Br.* at 36. Although the water right does not tie a specific diversion rate to specific acres, the project was not developed with a single water delivery system. A&B was developed and still operates individual wells and well systems that provide water to specific lands. *A&B Opening Br.* at 32-33. As described in this section of the brief, Idaho law does not allow A&B to simply move or enlarge existing right-of-ways to pump more water in one area of the project and deliver it to others. Accordingly, the so-called "flexibility" identified in A&B's water right does not support the Director's arbitrary "interconnection" condition for administration.

"new" interconnecting laterals or pipelines that IDWR claims A&B must develop are not part of A&B's "existing facilities." Hence, the Director misapplied the CM Rules to A&B's decreed water right and its existing irrigation project.

A. The District's "Means of Diversion."

A&B diverts groundwater from 177 individual wells.[25] R. 3098. The "means of diversion" are the individual wells and pumps. *See Bower v. Moorman*, 27 Idaho 162, 183 (1915) ("The necessity for changing the 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 unappopriated subterranean water."); *see also*, Wells A. Hutchins, *The Idaho Law of Water Rights*, at 48-49, 107-08 (1956) (describing "means of diversion" for surface and ground water sources). Mr. Hutchins further clarified a "means of diversion" for groundwater in an early law review article:

> An element of the right to use ground water is the extent to which the holder of the right is afforded protection in his ***means of diversion, which in most cases is a pumping plant.*** Such water must be brought to the surface from the available water table, which may involve a pumping lift of a few feet or perhaps hundreds of feet.

Wells A. Hutchins, *Protection in Means of Diversion of Ground-Water Supplies*, 29 Cal. L. Rev. 1, at 2 (1940) (emphasis added).

[25] IDWR mischaracterizes A&B's authorized points of diversion for water right #36-2080 and wrongly insinuates that A&B has 11 active production wells that are purposely sitting idle on the project. *IDWR Br.* at 39. Of those 11 wells, A&B was forced to abandon 6 and the other 5 are former "injection wells" that have not all been modified for production. R. 3081; Tr. Vol. III, p. 467. A&B's manager Dan Temple testified at hearing that only one of the former injection wells had been converted to a production well and that converting the well into production required new drilling and the development of new infrastructure. Tr. Vol. III, p. 610-11. Each new well costs A&B approximately $64,000. Tr. Vol. III, p. 563.

Former University of Idaho law professor, Doug Grant, also confirmed the definition of a groundwater user's "means of diversion":

> Interference with an appropriator's ***means of diversion*** because of a decrease in water level or pressure may be a localized matter involving only a few wells with overlapping cones of depression or pressure relief. Conversely, the interference may involve hundreds of wells and widespread overdraft of an entire basin. Individual cases may, of course, fall anywhere between these two extremes.

Douglas L. Grant, *Reasonable Groundwater Pumping Levels Under the Appropriation Doctrine: The Law and Underlying Economic Goals*, 21 Nat. Resources J. 1, 4 (1981).

It is undisputed that the A&B uses appropriate and reasonable drilling techniques to divert groundwater from the ESPA. The Hearing Officer and Director specifically accepted A&B's means of diversion:

> **3. A&B utilizes acceptable drilling techniques**. A&B is aware of the various methods of drilling for new wells and the rectification of existing wells. Depending on availability and cost, it utilizes appropriate drilling techniques for the conditions that exist.

R. 3098-99, 3322-23 (emphasis in original).

Since the Director found A&B's wells and pumping equipment to be acceptable, IDWR cannot now argue that the District's "means of diversion" are unreasonable.

B. The District's Conveyance Facilities.

A&B's wells, or its "means of diversion," are distinguished from the method of conveying or delivering the water to the landowners. After the water reaches the surface A&B delivers it through the District's "conveyance facilities," which consist of open canals, laterals,

and pipelines.[26] R. 3092-93, 3098-99; Tr. Vol. III, p. 467, 473-74. A&B cannot use its conveyance facilities located on the surface to "divert" water from the underground aquifer.

The conveyance facilities constitute irrigation right-of-ways operated and maintained by the District pursuant to state law. *See* I.C. §§ 42-1101 *et seq.*, 42-1201 *et seq.* A&B's right-of-ways are property rights separate and apart from its water rights. *See Ramseyer v. Jameson*, 78 Idaho 504, 511 (1957) ("A ditch right in the State of Idaho for the conveyance of water is recognized as a property right apart from and independent of the right to the use of the water conveyed therein."); *Zingiber Inv., LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 249 P.3d 868, 873 (2011). Further, this Court has clarified that a ditch easement "concerns the ***conveyance of water***," not the diversion of water from the source. *See Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 605 (2006) (emphasis added).

Similar to the finding for the District's "means of diversion," the record also shows that A&B's "conveyance facilities" are efficient and reasonable:

> **1. The system in Unit B was designed as an open delivery discharge system in which water from the aquifer is discharged into a large pool where it is measured.** Water then flows across cipolletti weirs out of the pond down an open conveyance lateral system to the individual farm gates. . . .
>
> **2. The closed delivery system exists now.** An alternative system in use today is a closed system in which water users have hooked their pumps directly to the district pumps and move the water through their sprinkler systems to the farm units, eliminating the open conveyance facility.
>
> **3. Another alternative that has developed is the installation of pipelines in the open conveyance facilities, injecting the water into the pipeline where it flows to the farm units where it is pumped onto the fields by the farmers.**

[26] A few conveyance facilities receive water from more than one well. *See A&B Opening Br.* at 32.

> **4. The alternative systems that have been developed by A&B over the years are more efficient than the open conveyance system, eliminating ditch loss and evaporation. The current system wide conveyance loss of water is between three and five percent.**
>
> *** * ***
>
> **6. There has been a significant reduction in the laterals and drains since the project was developed.** According to exhibit 200L the original conveyance system included 109.71 miles of laterals and 333 miles of drains. Exhibit 200K, which shows the current system, indicates 51 miles of laterals, 138 miles of drains and 27 miles of distribution piping.

R. 3098-99, 3322-23 (emphasis in original).

In total, A&B's average conveyance loss is only about three percent. R. 3088. The highly efficient conveyance system allows the District to successfully deliver nearly all of the water it is capable of pumping from the individual wells in the aquifer.

Despite the Director's separate findings for A&B's wells and conveyance system, IDWR now argues that A&B has a duty to drill new wells, redesign its conveyance system, and interconnect wells as a condition for the administration of junior water rights. IDWR wrongly claims that a "[r]easonable diversion requires A&B to drill deeper ***and/or extend its diversion works laterally within project boundaries*** in pursuit of additional yield." *IDWR Br.* at 38 (emphasis added). As explained above, A&B's conveyance system is not part of its "means of diversion." Accordingly, A&B cannot extend its wells "laterally" across the project. Moreover, redesigning, adding, or enlarging canals and pipelines between existing wells implicates A&B's water "conveyance" facilities, not the District's "means of diversion."

IDWR's argument wrongly blurs the concepts of a "means of diversion" (the wells) with the water conveyance system (the canals, laterals, and pipelines). CM Rule 42 clarifies that a

water right holder's "means of diversion" and "conveyance" system are two different factors to review in an injury analysis:

> g. The extent to which the requirements of a holder of a senior-priority water right could be met with the user's ***existing facilities*** and water supplies by employing reasonable diversion ***and*** conveyance efficiency ***and*** conservation practices . . .

CM Rule 42.01.g (emphasis added).

In *Clear Springs* this Court confirmed that the evaluation of a senior's "means of diversion," "conveyance efficiency," and "conservation practices" are separate factors to evaluate under the Rules:

> Based upon a field investigation of the Spring Users' facilities by a registered professional civil engineer, the Director found that they were employing reasonable diversions, conveyance efficiency, and conservation practices, with the exception of one pipeline at the Clear Springs's facility that was found to be in disrepair and leaking water.

252 P.3d at 90.[27]

Since the Director concluded that A&B's means of diversion (i.e. drilling and pumping methods) and water conveyance methods were acceptable in his *Final Order*, IDWR cannot argue otherwise now. *IDWR Br.* at 37-38. Stated another way, the Director cannot find these separate factors to be "reasonable" own their own and then turn around and claim they are "unreasonable" when reviewed together. Such an irrational finding is arbitrary and capricious and cannot be upheld. *See American Lung Assoc.*, 142 Idaho at 547.

[27] *Clear Springs* further confirmed that "[t]he issue in *Schodde* was whether the senior appropriator was protected in his means of diversion, not in his priority of water rights." 252 P.3d at 90 (emphasis added). The Court in *Schodde* concluded that by using a waterwheel the water user was not employing a reasonable "means of diversion" at the Snake River. *See Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912). There was no issue with Schodde's method to deliver the water to his farm by "flumes," only his diversion works at the river. *Id.* at 115.

While there is no substantial evidence in the record to support IDWR's "interconnection" theory, the agency claims A&B must prove whether it is feasible prior to administration.[28] Nothing in Idaho's water distribution statutes or CM Rules require a senior ground water user to drill "new" wells or "interconnect" separate points of diversion as a condition for water right administration. The Director cannot refuse administration to A&B's senior right on the "theory" that more water could be pumped at certain wells and moved to different locations on the A&B project. Placing the burden on A&B to prove why interconnection is infeasible violates the presumptive weight afforded to A&B's decreed water right. *See AFRD #2 v. IDWR*, 143 Idaho 862, 878 (2007). The Director's decision further results in an unconstitutional application of the CM Rules. *See Opening Br.* at 35-38.

Finally, IDWR's theory disregards existing Idaho law regarding A&B's conveyance facilities. As described above, A&B's existing conveyance facilities represent independent property rights, or right-of-ways. The District cannot unilaterally expand these right-of-ways and place a greater burden on the existing servient estate owners.[29] *See Linford v. G.H. Hall & Son*, 78 Idaho 49, 55 (1956). Furthermore, A&B's existing conveyance facilities do not allow A&B to deliver any amount of water to any acre on the project. R. 3095-96. As such, IDWR misinterprets the CM Rules regarding the review of A&B's "existing facilities," by alleging that A&B must drill "additional wells" or construct "new" water delivery facilities. *See* CM Rule

[28] IDWR references a partial interconnection example offered by IGWA's witness. *IDWR Br.* at 39. No evidence was submitted to support any engineering analysis or feasibility study for this concept. R. 3096. In addition, A&B's manager Dan Temple explained that it would not be practical or feasible to only move 0.02 cfs (water to supply a garden hose) several miles across a large irrigation project like A&B. Tr. Vol. IV, p. 715, 719.

[29] A&B's manager Dan Temple testified about the District's limitations in securing new easements or right-of-ways and the additional costs to develop new conveyance facilities. Tr. Vol. III, p. 481-84, Vol. IV, p. 707-08.

42.01.g.; *see also*, Clerk's Supp. R. *A&B Opening Br.* at 25-26. Therefore, IDWR wrongly claims that A&B could simply "interconnect higher producing wells with lower produced wells." *IDWR Br.* at 39.

In sum, IDWR's argument is contrary to law and disregards A&B's existing project facilities that the Director found to be reasonable. The Director had no authority to impose an "interconnection" condition on A&B's water right, and the District is not required to construct "new" wells or conveyance facilities prior to the administration of juniors. The Director's decision violates Idaho law and should be reversed accordingly.

RESPONSE TO CROSS-APPELLANTS' APPEAL

The District Court held the Director erred by failing to apply the correct presumptions and burdens of proof in reducing A&B's decreed water right. Clerk's R. at 82. The court further held that in order to give proper presumptive weight to A&B's senior right, any agency finding that the quantity decreed exceeds the amount being put to beneficial use must be supported by clear and convincing evidence. *Id.* Consequently, the court remanded the Director's no-injury determination to IDWR for further proceedings.[30] *Id.* at 93.

IGWA and Pocatello (hereinafter "Ground Water Users") appealed this issue. *See* Clerk's R. 148-49, 153. Disputing well-established Idaho precedent, the Ground Water Users allege two general theories in support of their appeal: 1) the *AFRD #2* decision did not identify an evidentiary standard to apply in administration; and 2) the cases cited by the District Court only address water right adjudications not administration. Each of these arguments fails.

[30] The District Court also denied IGWA's and the City of Pocatello's petitions for rehearing. Clerk's R. at 106-124.

I. *AFRD #2* Holds the CM Rules Incorporate the Burdens of Proof and Evidentiary Standards Established by Idaho Law.

The Ground Water Users claim that since the *AFRD #2* decision did not identify the evidentiary standards that IDWR must apply in water right administration the issue was "left open" for future determination. *IGWA Br.* at 19; *Poc. Br.* at 28. They further misapply *AFRD #2* by alleging the decision supports a lesser evidentiary standard for water right administration. *IGWA Br.* at 19-20; *Poc. Br.* at 41. Contrary to their argument, however, *AFRD #2* plainly held that the CM Rules incorporate the burdens of proof and evidentiary standards previously established by Idaho law.

The District Court recognized this key holding in *AFRD #2*:

> On appeal, the Idaho Supreme Court held that the CMR were not facially defective for failure to include the applicable burdens of proof and evidentiary standards based on the application of principles unique to facial challenges. Integral to the Supreme Court's determination as the recognition that:
>
> > 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 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 part of the CM Rules.'
>
> *Id.* at 873, 154 P.3d at 444. Accordingly, even though the CMR do not expressly address the burdens and presumptions the Director could still apply the CMR in a constitutional manner by including the constitutional burdens and presumptions. The Court then held that "**the Rules do not permit or direct the shifting of the burden of proof . . [r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules**." *Id.* at 874, 154 P.3d at 445 (emphasis added).

Clerk's R. at 71 (citing *AFRD #2*, 143 Idaho at 873-74) (emphasis in original).

The Court did not disturb the established burdens of proof and evidentiary standards for administration in *AFRD #2*. Indeed, the Supreme Court specifically noted that the CM Rules, as written, "do not unconstitutionally force a senior water rights holder to re-adjudicate a right, nor do the Rules fail to give adequate consideration to a partial decree." *AFRD#2*,143 Idaho at 878.

Since the Court in *AFRD #2* expressly recognized that the burdens of proof and evidentiary standards that had been developed over the years were incorporated into the CM Rules, the entire foundation for the Ground Water Users' argument is flawed. The District Court properly interpreted *AFRD #2* and applied prior precedent in A&B's case. Therefore, the Court should deny the Ground Water Users' cross-appeal.

II. Idaho Law Requires Clear and Convincing Evidence to Reduce a Senior's Decreed Water Right in Administration.

The Ground Water Users next claim that no Idaho case has addressed the standards to apply in water right administration. *IGWA Br.* at 20; *Poc. Br.* at 41. Unable to dispute Idaho's precedent, the Ground Water Users instead attempt to create a false distinction that the clear and convincing evidence standard has only been applied in water right adjudication or permanent deprivation cases. Such a distinction, however, does not exist. Even if a distinction did exist, a careful reading of the seminal case law on this issue shows the Idaho Supreme Court has affirmed the heightened standard in implementing, or administering, the terms of water right decrees.[31] Consequently, the Ground Water Users' second argument fails as well.

[31] The District Court performed an extensive review of the cases addressing the evidentiary standards and burdens of proof established by Idaho law in its *Memorandum Decision and Order on Petitions for Rehearing*. *See* Clerk's R. at 114-18.

A. Moe v. Harger

First, in *Moe v. Harger*, the Idaho Supreme Court specifically held that the burden to prove a defense by clear and convincing evidence applied "***in any given case***" where a junior appropriator seeks to take water before the senior appropriator. *Moe*, 10 Idaho 302, 305-307 (1904) (emphasis added). The Court's language is clear and unambiguous, the standard applies in "any given case." The Court did not limit the holding to water right adjudications only. Moreover, the Supreme Court upheld the district court's order that resulted in continuing administration of the decree:

> Appellants complain of the action of the trial court in incorporating in the decree in this case an order perpetually enjoining them from in any manner interfering with or diverting or using the waters of Lost river except in accordance with the terms of the decree. By the decree the time was fixed from which each appropriator and claimant was entitled to have his right date and the number of inches to which he was entitled. It is the usual and approved practice in this state in all water cases where a decree is entered establishing the rights and priorities of the parties litigant to incorporate in the decree an order in the nature of cross-injunctions restraining each and every party thereto from in any wise interfering with the use of water by any other party thereto as fixed and established by the decree. That is what was done in this case, and we think it was proper to incorporate such order in the decree.

10 Idaho at 306.

The juniors in *Moe* were enjoined from using their water rights "except in accordance with the terms of the decree." *Id.* *Moe* squarely addressed administration of the water rights.[32] Therefore, the Ground Water Users' assertion that the standard applies solely to the

[32] Additional cases applied the clear and convincing evidence standard set forth in *Moe*, further recognizing that the standard applies "in any given case" where a junior appropriator seeks to take water before the senior appropriator. *See Josslyn v. Daly*, 15 Idaho 137 (1908); *Neil v. Hyde*, 32 Idaho 576 (1920); *Jackson v. Cowan*, 33 Idaho 525 (1921). The District Court reviewed these cases in its *Memorandum Decision and Order on Petitions for Rehearing*. Clerk's R. at 114-15. *See also*, *Cantlin v. Carter*, 88 Idaho 179 (1964).

establishment or permanent deprivation of a water right is wrong. Moreover, as set forth below, the Court later applied the standard specifically in the context of continuing administration of ground water rights.

B. Silkey v. Tiegs

The rule set forth in *Moe* was also applied in the context of ground water administration in an artesian basin. *See Silkey v. Tiegs*, 51 Idaho 344 (1931) ("*Silkey I*") and *Silkey v. Tiegs*, 54 Idaho 126 (1934) ("*Silkey II*").[33] In *Silkey I*, the trial court entered a decree for the following water rights:

Mrs. Silkey (respondent)	7 inches 33 inches	July 1, 1921 July 1, 1922
Mr. Edwards (appellant)	42 inches	November 22, 1926
Mr. Tiegs (appellant)	40 inches	March 23, 1927
Mr. Ryan (appellant)	40 inches	September 24, 1927

51 Idaho at 347-48.

Although the court decreed a total of 162 inches, only 60 inches was found to be the normal flow in the basin. *Id.* at 355. Consequently, Mrs. Silkey, the senior water user, was entitled to use 40 inches for irrigation, domestic, and heating purposes on her lands and Mr. Edwards, the next appropriator in priority, was only entitled to use 15 inches (Oct. 1 – Apr. 1) and 20 inches (Apr. 1 – Oct. 1), provided his use "will not deplete the flow of [Mrs. Silkey's]

[33] The appellant in *Silkey* filed an action to modify the prior decree and change administration of the affected water rights. 54 Idaho at 128. The Court described the administrative provisions of the decree in the earlier case. *Silkey I*, 51 Idaho at 357.

wells below forty miner's inches." *Id.* at 348. The court then completely curtailed the two most junior rights held by Mr. Tiegs and Mr. Ryan. *Id.*

Contrary to the Ground Water Users' characterization, the *Silkey* proceedings did not just concern an adjudication. *IGWA Br.* at 31; *Poc. Br.* at 39. In addition to the above administrative provisions, the trial court ordered the parties to install adequate control valves and measuring devices "to entirely shut off said water when required under the terms of this decree" and "to accurately measure the amount of water diverted or flowing." 51 Idaho at 348. The trial court further ordered the Director,[34] pending the creation of a water district, to enforce the terms of the decree:

> 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 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 appellants challenged the trial court's decree and attacked the partial curtailment of Mr. Edwards' water right (from 40 inches down to 15-20 inches). *Id.* at 355. The Idaho Supreme Court rejected their appeal and specifically upheld the <u>administrative</u> provisions included in the decree:

> The purpose of the decree is to provisionally fix the total amount of water to be taken from respondent's [Silkey] and appellant Edwards' wells. Sixty miner's inches is the amount found by the court to be the normal flow from said basin. ***In any event this provision is not final and is in effect an administrative one***, subject to change by the trial court in case it should later develop that said appellant is entitled to more or less than the amounts so permitted to flow from

[34] At the time the Director was designated as the "Commissioner" and IDWR was the state "Reclamation" agency. 51 Idaho at 349.

> his well. There is no force in the objection that the decree does not permit appellant Edwards to have any supervision, control over, or right of measurement over respondent's wells. That is a matter to be supervised and controlled by the commissioner of reclamation appointed, as a commissioner to enforce the operation of the decree, by the trial court.

51 Idaho at 355 (emphasis added).

Clearly, the facts in *Silkey I* concerned the on-going administration of all the ground water rights. Indeed, in *Silkey II*, the appellants petitioned the trial court to allow them to divert available ground water "without depleting the flow from [Silkey's] wells below 21 miners inches." *Silkey II*, 54 Idaho at 127. The appellants argued 140 inches was available for use in the basin and that Mrs. Silkey "never has been able to obtain more than 21 inches from her wells."[35] *Id.* The trial court denied the appellants' motion and held that they were not entitled to more water without interfering with Mrs. Silkey's senior right to 40 inches. *Id.* at 128. The Idaho Supreme Court affirmed, relying upon the rule set forth in *Moe*:

> The burden was on appellants herein to sustain their motion by direct and convincing testimony, this language in *Moe v. Harger*, 10 Idaho 302, 77 Pac. 645 being particularly apt:
>
> > "This Court has uniformly adhered to the principle announced both in the constitution and by the statute that the first appropriator has the first right; and it would take more than a theory, and, in fact, clear and convincing evidence in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we could depart from a rule so just and equitable in its application and so generally and uniformly applied by the courts . . ."

54 Idaho at 128-29.

[35] Similar to the appellants' arguments that were rejected in *Silkey II*, the Ground Water Users in this case wrongly allege A&B never diverted the amount of water decreed by the SRBA Court in 2003. *IGWA Br.* at 12.

The Court further stated that "[n]o engineer enlightens us, and adherence to the rule requiring protection of the prior appropriator, precludes relief to the appellants on the showing presented." *Id.* (emphasis added). In other words, in denying the appellants' requested relief, the Court specifically applied the clear and convincing evidence standard to protect Mrs. Silkey's senior decreed water right in ongoing administration.

Contrary to Ground Water Users' claims, there is no question that the Supreme Court has applied the established burdens of proof and evidentiary standards in the context of a ground water administration case, not just an adjudication. The attempted distinction created by the Ground Water Users therefore does not exist. The District Court properly rejected the Ground Water Users' efforts to distinguish *Moe*, *Silkey II*, and other decisions from this Court, and confirmed the proper burdens and standards established by prior precedent. Clerk's R. at 116. The Court should deny the Ground Water Users' cross-appeal accordingly.

III. The District Court Properly Described the Presumptive Weight Provided a Decree in Administration and how the Established Burdens and Evidentiary Standards Protect Senior Water Rights.

In addition to following well-established precedent, the District Court further explained the significance of a decree entered in a general adjudication (i.e. SRBA) and how the applicable burdens of proof and evidentiary standards protect the senior's right in administration. Clerks R. at 118-124. The presumptive weight of a decree required the Director to comply with the established burdens and evidentiary standards in his decision. The District Court refused to allow the Director to reduce A&B's decreed water right without applying the proper burdens and

standards incorporated in the CM Rules and remanded the case for that purpose. *Id.* at 93. Notably, IDWR and the Director agree with the District Court's decision. *IDWR Br.* at 41-43.

The Ground Water Users unpersuasively attempt to justify a diminution of the evidentiary standard to a preponderance of the evidence. They assert the lesser standard is necessary to allow the Director to properly exercise his discretion in administration. *IGWA Br.* at 20-21, 26-27; *Poc. Br.* at 41. Again, like the District Court, IDWR disagrees with the Ground Water Users' argument. *IDWR Br.* at 41-43.

Although the Director may exercise some discretion in administering water rights, *AFRD#2*, *supra* at 875 ("there must be some exercise of discretion by the Director"), that discretion is not unfettered and must be properly exercised within the requirements of established Idaho law. Since the CM Rules incorporate these established burdens of proof and evidentiary standards, the Director's material injury analysis is guided by the presumptive effect of the decree and the clear and convincing evidence standard if less water is to be distributed to the senior right. *See AFRD#2, supra; Moe, supra; Josslyn, supra*.

Idaho law provides that "the decree entered in a general adjudication ***shall be conclusive*** as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42-1420 (emphasis added); *Head v. Merrick*, 69 Idaho 106, 109 (1949) ("Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount of water actually diverted and applied"); Clerk's R. at 119

("Clearly, Idaho law contemplates certainty and finality of water right decrees for effective administration").

The District Court's reasoning is supported by this Court's precedent. In *AFRD #2* the Court confirmed that a decree provides certainty and protection for a senior in water right administration. *See AFRD#2*,143 Idaho at 877 ("the presumption under Idaho law is that the senior is entitled to his decreed water right"). Consequently, administrative proceedings cannot be used as a means to re-adjudicate the senior water right:

> [T]he ***burden is not on the senior water rights holder to re-prove an adjudicated right***. The ***presumption under Idaho law*** is that the senior is ***entitled to his decreed water right*** … 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.

143 Idaho at 877-78 (emphasis added).

The rule was also recently confirmed in *Clear Springs*. In that case, the Ground Water Users alleged the Spring Users could not beneficially use the decreed quantities of their water rights. The Court rejected the Ground Water Users' argument:

> The amounts of the Spring Users' water rights had already been decreed based upon the amounts of water that they had diverted and applied to the beneficial use of fish propagation. ***Subject to the rights of senior appropriators***, ***they are entitled to the full amount of water that they have been decreed for that use.***

252 P.3d at 92 (emphasis added).

Giving presumptive weight to a decree does not equate to a presumption of material injury. *See Poc. Br*. at 26 (applying a heightened standard is "aimed at protecting the senior from bearing *any* burden of proof in advancing its claims … and at the same time tying the

Department's hands"). Requiring clear and convincing evidence to support any deviation from the decreed or licensed elements of a water right does not presuppose material injury as the Ground Water Users argue. The District Court confirmed as much when, relying on *AFRD#2*, it recognized that "post-adjudication" factors may be "relevant to the determination of how much water is actually needed." Clerk's R. at 81; *see AFRD#2*, *supra* at 878 ("there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed"); Clerk's R. at 75 ("the quantity reflected in a license or decree is not conclusive as to whether or not all of the water diverted is being put to beneficial use in any given irrigation season"). Indeed, a water right, or a portion thereof, may be lost due to forfeiture or abandonment. Clerk's R. at 74 (citing *Hagerman Water Right Owners v. State of Idaho*, 130 Idaho 736, 741 (1997)).

That notwithstanding, a decree must be given presumptive weight and anything less than clear and convincing evidence turns an administrative proceeding into a prohibited re-adjudication. This is exactly what happened in *Silkey II* when the appellants attempted reduce Mrs. Silkey's water right less than two years after her right was decreed.[36] *See* 54 Idaho at 128. The Idaho Supreme Court rejected the appellants' efforts since they failed to prove, by clear and convincing evidence, that Mrs. Silkey did not need her decreed quantity. *Id.* This example shows that a water right decree is more than a "catalog" of rights reflecting water use only in perfect conditions. As the District Court succinctly summarized, a decree is a binding

[36] In A&B's case it was IDWR attempting to unlawfully reduce A&B's water right just five years after it was decreed by the SRBA Court. Ex. 139. IDWR now recognizes that any decision by the Director that reduces A&B's decreed water right in administration must be supported by clear and convincing evidence. *IDWR Br.* at 43.

determination of what a senior is entitled to use in times of shortage and provides the foundation for efficient administration:

> The [clear and convincing evidence] standard reconciles giving the proper presumptive weight to the quantity decreed while at the same time allowing the Director to take into account such considerations as post-decree factors and in particular waste under the CMR. The standard avoids putting the senior right holder in the position of re-defending or re-litigating that which was already established in the adjudication. It avoids the risk that an erroneous determination will leave the senior short of water to which he was otherwise entitled, thereby promoting certainty and stability of water rights. The standard provides for effective timely administration by reducing contests to the sufficiency of the Director's findings.

Clerk's R. at 124.

Accordingly, whenever the Director seeks to distribute less than the decreed quantity or authorize a junior water user to divert out-of-priority pursuant to a permissible defense to the call (i.e. futile call, forfeiture, etc.), Idaho law requires more than a preponderance of the evidence to support that decision. After all, a senior's decree is conclusive as to the nature and extent of a water right and it is entitled to certainty and protection in administration. *See* I.C. § 42-1420; *State v. Nelson*, 131 Idaho 12, 16 (1998) ("Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.'"). The District Court properly acknowledged this rule of law and protection afforded A&B's decreed water right. Clerk's R. 73-74, 118-124.

The question here is *not* whether the Director may consider "post-adjudication" factors in determining whether or not there is material injury. The question is *not* whether the Director can determine that a senior appropriator should receive less than the decreed quantity of water in administration. This Court has already recognized that the Director can take such actions.

AFRD#2, *supra*. Rather, the question here is the extent of the presumptive weight that is afforded a decreed water right. If the Director is permitted to alter the elements of a water right – even temporarily – based on a preponderance of the evidence, then the presumptive weight of the decree is undermined and the senior appropriator is forced to re-prove that the amount previously decreed is necessary for his current beneficial use. The law prohibits such a result. *AFRD#2*, *supra*.

Ignoring Idaho precedent, the Ground Water Users also claim that IDWR can reduce a senior's water right in administration through a lesser evidentiary standard because the action does not "permanently" affect the senior's water right. They claim that since administration does not cause permanent changes to the elements of a water right, no heightened standard is necessary. *IGWA Br*. at 18; *Poc. Br*. at 31-33, 37-40. In essence, the Ground Water Users argue that junior appropriators should be permitted to continue their injurious diversions based on a minimal evidentiary standard. This is so, they claim, because the impacts are only temporary, only addressing "the current need for water" rather than permanently altering the elements of the water rights.

A permanent change to a water right is not required based upon the law in *Moe* and *Silkey II*. Moreover, the Ground Water Users' argument fails to appreciate how improper administration, even if only performed temporarily for a single irrigation season, can unlawfully diminish a senior's property right. *See Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982).

The District Court properly rejected the Ground Water Users' alleged "permanent deprivation" condition:

> It is apparent that a water quantity can be reduced based on a waste analysis without resulting in a permanent reduction of the water right through partial forfeiture. Only if waste occurs for the statutory period can forfeiture be asserted. However, whether a senior's right is permanently reduced through partial forfeiture or is only temporarily reduced through administration in times of shortage and the reduction leaves the senior with an insufficient water supply to satisfy present needs, the property right is nonetheless diminished.
>
> * * *
>
> Clearly Idaho law contemplates certainty and finality of water right decrees for effective administration. Absent a higher evidentiary standard, any certainty and finality in the decree is undermined.
>
> The position advocated by the Ground Water Users would significantly minimize the purpose and utility of the decree in times of shortage and any reliance on the decree for effective administration, particularly in a water district, is undermined. If the sole purpose of the decreed quantity is to identify the maximum quantity when sufficient water is available, the result is that the decreed quantity has little probative or presumptive weight and litigation over the senior's present needs would be a virtual necessity in every delivery call.

Clerk's R. at 113-14, 119 (emphasis in original). [37]

[37] Judge Melanson, the former SRBA Presiding Judge, also rejected the Ground Water Users' argument in the context of the Surface Water Coalition delivery call case:

> For purposes of applying the respective burdens and presumptions, this Court has difficulty distinguishing between a circumstance where a senior's water right is permanently reduced, based on a determination of partial forfeiture as a result of waste or non-use, or temporarily reduces within the confines of an irrigation season incident to a delivery call based on essentially the same reasons. The property interest in a water right is more than what is simply reflected on paper; rather, it's the right to have the water delivered if available. Accordingly, whether the right is reduced on a permanent basis or on a temporary basis incident to a delivery call, the property interest is nonetheless reduced. Accordingly, the same burdens and presumptions should apply, prior to redacting the senior's right below the quantity supplied in the decree or recommendation.

See Amended Order on Petitions for Rehearing; Order Denying Surface Water Coalition's Motion for Clarification, A&B Irr. Dist. et al. v. Spackman, et al., Gooding County Case No. 2008-551, at 10, n.5 (Sept. 9, 2010). Judge Melanson also applied the same standard in his order on judicial review in the Spring Users' case. *See* Clerk's Supp. R. *A&B's Response to IGWA's and Pocatello's Opening Br. on Rehearing* at 13-14.

Finally, requiring clear and convincing evidence before reducing a senior's water right contrary to the terms of the decree does not leave junior water users without an opportunity to present defenses prior to curtailment. As this Court recently held in *Clear Springs*, in certain circumstances the Director may hold a hearing prior to curtailment to afford the junior water users due process. 252 P.3d at 96. As such, the law provides the juniors with the ability to present and prove their defenses before the Director will administer their water rights. However, that does not change the rule that prevents taking water away from the senior without supporting clear and convincing evidence.

In summary, the District Court held that "clear and convincing" evidence is the proper evidentiary standard and is necessary to protect the "certainty and finality of water rights decrees for effective administration." Clerk's R. at 119. IDWR agrees with the court that the "clear and convincing" evidence standard is necessary to protect the senior right in administration. *IDWR Resp*. at 43 (requiring a lesser standard would "devalue priority of right"). The District Court followed existing Idaho law and properly applied it in this case.

CONCLUSION

Idaho law provides specific protection for A&B's 1948 ground water right. The Director has a mandatory duty to properly apply the law in the administration of connected junior ground water rights. The Director failed in this duty and, as evidenced by IDWR's response, has no legal bases to justify his actions. A&B respectfully requests the Court to reverse the Director's *Final Order* accordingly.

With respect to the Ground Water Users' cross appeal, the District Court properly applied well-established law defining the respective burdens and standards that apply in water right administration. The Ground Water Users provide no meritorious position to overturn this precedent. A&B respectfully requests the Court to affirm the District Court and deny the Ground Water Users' cross-appeal.

DATED this 16th day of September, 2011.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson
Paul L. Arrington

Attorneys for A&B Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of September, 2011, I served true and correct copies of the foregoing A&B Irrigation District's *Opening Brief on Appeal* upon the following by the method indicated:

Clerk of the Court Idaho Supreme Court 451 W. State St. P.O. Box 83720 Boise, Idaho 83720-0101	____ U.S. Mail, Postage Prepaid __✓__ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Garrick Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098 garrick.baxter@idwr.idaho.gov chris.bromley@idwr.idaho.gov	____ U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile __✓__ Email
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Travis L. Thompson

Attachment

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect from and after its passage and approval.

Approved March 12, 1953.

CHAPTER 181
(S. B. No. 75)

AN ACT

APPROPRIATING MONEYS FROM THE GENERAL FUND OF THE STATE OF IDAHO FOR THE STATE SCHOOL FOR THE DEAF AND BLIND, FOR SALARIES, WAGES AND OTHER EXPENSES, FOR THE PERIOD COMMENCING JULY 1, 1953, AND ENDING JUNE 30, 1955; AND SUBJECT TO THE PROVISIONS OF THE STANDARD APPROPRIATIONS ACT OF 1945.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. There is hereby appropriated out of the General Fund of the State of Idaho to the State School for the Deaf and Blind, for the purpose of paying salaries, wages and other expenses of said institution, for the period commencing July 1, 1953, and ending June 30, 1955, the sum of $565,444.00, or so much thereof as may be necessary.

SECTION 2. The appropriations herein made are subject to the provisions of the Standard Appropriations Act of 1945.

Approved March 12, 1953.

CHAPTER 182
(S. B. No. 141)

AN ACT

RELATING TO THE UNDERGROUND WATER RESOURCES OF THE STATE OF IDAHO; AMENDING SECTIONS 1 to 16, INCLUSIVE, OF CHAPTER 200 OF THE 1951 SESSION LAWS OF THE STATE OF IDAHO, REGULAR SESSION, AND ADDING NEW SECTIONS THERETO NUMBERED AS FOLLOWS: SECTION 9, 10, 15, 16, 17, 18, 19, 20, 21, 23, AND 27

AND CHANGING THE NUMBERS OF SECTIONS AS FOLLOWS: 9 TO 11, 10 TO 12, 11 TO 13, 12 TO 14, 13 TO 22, 14 TO 24, 15 TO 25, AND 16 TO 26; DECLARING THE POLICY OF THIS ACT; PROVIDING FOR THE ISSUING AND PUBLISHING OF NOTICE OF APPLICATION TO APPROPRIATE GROUND WATER, AND FOR PROTEST AND HEARING THEREON IN CRITICAL GROUND WATER AREAS; PRESCRIBING DUTIES AND POWERS OF THE STATE RECLAMATION ENGINEER WITH RESPECT TO GROUND WATERS; PROVIDING A PROCEDURE FOR THE ADMINISTRATIVE DETERMINATION OF ADVERSE CLAIMS BY THE CREATION OF LOCAL GROUND WATER BOARDS, FOR A HEARING AND DETERMINATION OF SUCH BOARDS, AND GIVING SUCH BOARDS AUTHORITY TO MAKE APPROPRIATE ORDERS ON SUCH ADVERSE CLAIMS, AND MAKING VIOLATIONS OF SUCH ORDERS MISDEMEANORS; PROVIDING FOR APPEALS TO DISTRICT COURT FROM DECISIONS OF STATE RECLAMATION ENGINEER AND LOCAL GROUND WATER BOARDS AND APPEALS FROM DECISIONS OF THE DISTRICT COURT TO THE SUPREME COURT; PROVIDING THAT PROVISIONS OF CHAPTER 14 OF TITLE 42, RELATIVE TO ADJUDICATION OF WATER RIGHTS SHALL BE APPLICABLE TO WATER RIGHTS ACQUIRED UNDER THIS ACT; PROVIDING VIOLATIONS OF THIS ACT SHALL CONSTITUTE MISDEMEANORS, AND CREATING A GROUND WATER ADMINISTRATION FUND.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 1, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended to read as follows:

Section 1. GROUND WATERS ARE PUBLIC WATERS.—It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined * *: and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided.* All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the

same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

SECTION 2. That Section 6, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended to read as follows:

Section 6. DUTIES OF THE STATE RECLAMATION ENGINEER.—In addition to other duties prescribed by law, it shall be the duty of the state reclamation engineer to conduct investigations, surveys and studies relative to the extent, nature and location of the ground water resources of this state; and to this end, the state reclamation engineer may, on behalf of the state of Idaho enter into cooperative investigations, researches, and studies with any agency or department of the government of the United States, or any other state or public authority of this state, or private agencies or individuals. *It shall likewise be the duty of the state reclamation engineer to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of groundwater resources contrary to the public policy expressed in this act.*

SECTION 3. That Section 7, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended to read as follows:

Section 7. APPLICATION TO APPROPRIATE GROUND WATER.—For the purpose of establishing by direct means the priority right to withdrawal and use of ground water, any person desiring to acquire the right to the beneficial use of ground water pursuant to this act may make application to the department of reclamation for a permit to make such appropriation. Such application shall set forth:

1. The name and postoffice address of the applicant.

2. The source, location and description of the water supply in so far as the same is known to the applicant.

3. The nature of the proposed use.

4. The location and description of the proposed well and ditch or other work, if any, and the amount or flow of water to be diverted and used.

5. The estimated time within which such well and ditch, or other work, if any, will be completed and the water withdrawn and applied to use.

6. In case the proposed right of use is for agricultural purposes, the application shall give the legal subdivisions of land proposed to be irrigated, with the total acreage to be reclaimed as near as may be ascertained.

When any such application is made, the department of reclamation shall charge and collect from the applicant the fee provided for in section 42-202 * * *.

SECTION 4. That Section 8, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended to read as follows:

Section 8. EXAMINATION OF APPLICATION.—On receipt of application for permit to appropriate groundwaters, it shall be the duty of the state reclamation engineer to make endorsement thereon of the date and hour of its receipt and to make a record of such receipt in some suitable book in his office. It shall be the duty of the state reclamation engineer to examine said application and ascertain if it is in due form, as above required. If, upon such examination the application is found defective, it shall be the duty of the state reclamation engineer to return the same for correction within thirty days from receipt of the application, and the date of such return with the reason therefor shall be endorsed on the application and a record made thereof in a book kept for recording the receipt of such applications. A like record shall be kept of the date of the return of corrected applications, but such corrected application shall be returned to the state reclamation engineer within a period of sixty days from the date endorsed thereon by the state reclamation engineer; and if such application be returned after such period of sixty days, such corrected application shall be treated in all respects as an original application. All applications which shall comply with the provisions of this act and with the regulations of the department of reclamation shall be numbered consecutively and shall be recorded in a suitable book kept for that purpose. *After an application has been duly filed with the state reclamation engineer, as in this act provided, it shall be the duty of the state reclamation engineer to make such further investigation as he may deem necessary to determine whether ground water subject to appropration exists in the location or locations described in the application; and the state reclamation engineer may also require from the appli-*

cant such additional information as he, the state reclamation engineer, deems reasonably necessary to enable him to act upon the application.

SECTION 5. That Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by adding two new sections, numbered 9 and 10 to read as follows:

Section 9. NOTICE OF APPLICATION.—Within a period of ten days after the filing of any application for permit with the state reclamation engineer, as herein provided, the state reclamation engineer in a critical ground water area, as hereinafter defined in this section, shall issue a notice of such application stating the name of the applicant, the location of the well or wells, the amount of the flow of water proposed to be used, and the description of the premises upon which the water is proposed to be used. Such notice shall also state that all persons having an interest in the critical ground water area desiring to oppose the issuance of a permit pursuant to such application, must within a period of thirty days from the first publication of such notice file in the office of the state reclamation engineer a protest to such application. A copy of the notice shall be furnished to the applicant, who shall cause the same to be published in a newspaper published in the county where the well described in said application is proposed to be located; or if no newspaper is published in such county, then in a newspaper of general circulation in such county. Publication of such notice shall be made two times, once each week for two consecutive weeks, and proof of such publication shall be furnished by the applicant to the state reclamation engineer. "Critical ground water area" means any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands in the basin at the then current rates of withdrawal, as may be determined, from time to time, by the State Reclamation Engineer.

In the event the application for permit is made with respect to an area that has not been designated as a critical ground water area the State Reclamation Engineer shall forthwith issue a permit in accordance with the provisions of Section 11 without requiring compliance with the provisions of the preceding paragraph of this section or the provisions of Section 10.

Section 10. PROTEST AND HEARING.—All persons desiring to be heard in protest of the granting of a permit

pursuant to an application made under this act must file with the state reclamation engineer within thirty days after the first publication of the notice of such application as hereinabove provided, a protest against such application; provided, that for good cause shown, the state reclamation engineer may permit protests to be filed any time prior to the completion of the hearing on such application. After the lapse of thirty days following the first publication as hereinabove provided, the state reclamation engineer shall, if any protests against the application have been filed, fix a time and place for the hearing of such application. The time for holding such hearing shall not be more than fifty days from the first publication of said notice. Notice of the hearing shall be given by registered mail to the applicant and to all protestants.

The hearing shall be conducted before the state reclamation engineer under reasonable rules and regulations of procedure promulgated by him. Technical rules of pleading and evidence need not be applied. The state reclamation engineer may adjourn said hearing from time to time and place to place within the reasonable exercise of his discretion. All parties to the hearing as well as the state reclamation engineer shall have the right to subpoena witnesses, who shall testify under oath at such hearing. The state reclamation engineer shall have authority to administer oath to such witnesses as appear before him to give testimony. A full and complete record of all proceedings had before the state reclamation engineer on any hearing had and all testimony shall be taken down by a reporter appointed by the state reclamation engineer and all parties to the hearing shall be entitled to be heard in person or by attorney.

If no person protests an application within the period of thirty days following the first publication of notice thereof as hereinabove provided, and if the state reclamation engineer has determined from investigation that there probably is ground water subject to appropriation at the location of the proposed well, the state reclamation engineer may issue a permit pursuant to such application forthwith and for an amount of water not to exceed the amount of water determined to be there subject to appropriation; but if the state reclamation engineer, from the investigation made by him on said application as herein provided or from other information that has come officially to his attention has reason to believe that said application is not made in good faith, is made for delay, or that there is not water subject to appropriation at the location of the proposed well in said appli-

cation described, then the state reclamation engineer shall issue a citation to the applicant to appear and show cause, if any there be, why such application should not be denied for any of those reasons. The hearing on said citation shall be fixed, noticed and conducted in the same manner as hearings on protest of application as in this section hereinabove provided.

If, at the conclusion of any hearing held pursuant to this section the state reclamation engineer finds that there is ground water available for appropriation at the location of the proposed well described in the application, and that said application is made in good faith and not for delay, then the state reclamation engineer shall issue a permit pursuant to such application; otherwise, the application shall be denied; provided, however, that if ground water at such location is available in a lesser amount than that applied for, the state reclamation engineer may issue a permit for the use of such water to the extent that such water is available for appropriation.

SECTION 6. That Section 9, Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by changing the section number from 9 to 11, and to read as follows:

Section * *11.* TIME FOR COMPLETION OF WORK — PERMIT — CANCELLATION OF PERMIT.—* * *

Whenever the state reclamation engineer determines that a permit shall issue pursuant to an application to appropriate ground water as made in this act, he shall determine the time reasonably required to complete the proposed well and other works and apply such water to such proposed use which time, however, shall not be less than two years nor more than five years from the date of the permit; he shall then issue a permit pursuant to such application. The permit so issued by the state reclamation engineer shall be in a form prescribed by him and shall contain (1) the name and postoffice address of the applicant; (2) the location and description of the proposed well; (3) the amount of flow or water to be diverted and used; (4) a description of the premises on which such water shall be used; and (5) the period of time within which such well shall be completed and such water applied to such use; provided that upon application by the permittee the state reclamation engineer may for good cause shown extend the time for such completion and application to use, but no such extension shall be for a period longer than five years.

If the work is not completed or the water applied to beneficial use as contemplated in the permit, the state reclamation engineer shall, thirty (30) days after the time limited therefor in the permit has expired, give notice by registered mail to the permittee at the address shown on his application, that unless the permittee appears within sixty (60) days after the mailing of such notice and shows the state reclamation engineer good cause why such permit shall not be canceled, then such permit will be canceled. Upon default of the permittee after such notice, or upon failure of the permittee to show good cause in accordance with said notice, the state reclamation engineer shall cancel such permit.

SECTION 7. That Sections 10, 11 and 12 of Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same are hereby amended by changing said section numbers from 10, 11, and 12, to 12, 13, and 14, respectively.

SECTION 8. That Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by adding new sections, numbered 15, 16, 17, 18, 19, 20, and 21 as follows:

Section 15. POWERS OF THE STATE RECLAMATION ENGINEER.—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 state reclamation engineer is empowered:

a. To require all flowing wells to be so capped or equipped with valves that the flow of water can be completely stopped when the wells are not in use.

b. To require both flowing and non-flowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves or pumps either above or above or below the land surface.

c. To prescribe uniform standard measuring devices for the scientific measurement of water levels in and waters withdrawn from wells.

d. To go upon all lands, both public and private, for the purpose of inspecting wells, pumps, casings, pipes, fittings and measuring devices, including wells used or claimed to be used for domestic purposes.

e. To order the cessation of use of a well pending the correction of any defect that the state reclamation engineer has ordered corrected.

f. To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears to the state reclamation engineer that the determination of such action or proceeding might result in depletion of the ground water resources of the state contrary to the public policy expressed in this act.

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 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. To assist the state reclamation engineer in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if 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.

In connection with his supervision and control of the exercise of ground water rights the state reclamation engineer shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream in an organized water district, to incorporate such area in a separate water district to be created in the same manner provided for in Section 42-604 of Title 42, Idaho Code. The administration of the water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of Title 42, Idaho

Code, as the same have been or may hereafter be amended, except that in the administration of ground water rights either the state reclamation engineer or the watermaster in a water district or the state reclamation engineer outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

Section 16. ADMINISTRATIVE DETERMINATION OF ADVERSE CLAIMS.—Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user of ground water rights of later priority, or whenever any person owning or having the right to use a ground water right believes that the use of such right is being adversely affected by another's use of any other water right which is of later priority, such person, as claimant, may make a written statement under oath of such claim to the state reclamation engineer.

Such statement shall include:

1. The name and post office address of the claimant.

2. A description of the water right claimed by the claimant, with amount of water, date of priority, mode of acquisition, and place of use of said right. If said right is for irrigation, a legal description of the lands to which such right is appurtenant.

3. A similar description of the respondent's water right so far as is known to the claimant.

4. A detailed statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected.

Upon receipt of such statement, if the state reclamation engineer deems the statement sufficient and meets the above requirements, the state reclamation engineer shall issue a notice setting the matter for hearing before a local ground water board, constituted and formed as in this act provided. The person or persons against whom such claim is directed and who are asserted to be interfering with the claimant's rights shall in such proceedings be known as respondents.

The notice shall be returned to the claimant who shall cause the same to be served upon the respondent together with a copy of the statement. Such service shall be made at least five days before the time fixed for hearing and in the same manner that service of summons is made in a civil action. Proof of service of notice shall be made to the state reclamation engineer by the claimant at least two days before the hearing.

Section 17. HEARING AND ORDER.—Hearing on the statement and any answer filed by the respondent shall be had in the county for which such local ground water board was appointed. The hearing shall be conducted before the board under reasonable rules and regulations of procedure prescribed by the state reclamation engineer. All parties to the hearing as well as the board itself shall have the right to subpoena witnesses who shall be sworn by the board and testify under oath at the hearing. All parties to the hearing shall be entitled to be heard in person or by attorney. Upon such hearing the board shall have authority to determine the existence and nature of the respective water rights claimed by the parties and whether the use of the junior right affects, contrary to the declared policy of this act, the use of the senior right. If the board finds that the use of any junior right or rights so affect the use of senior rights, it may order the holders of the junior right or rights to cease using their right during such period or periods as the board may determine and may provide such cessation shall be either in whole or in part or under such conditions for the repayment of water to senior right holders as the board may determine. Any person violating such an order made hereunder shall be guilty of a misdemeanor.

Section 18. LOCAL GROUND WATER BOARDS.—Whenever a written statement of claim as provided in Section 16 hereof is filed with the state reclamation engineer, if the statement of the claimant is deemed sufficient by the state reclamation engineer and meets the requirements of Section 16 of this act, the said state reclamation engineer shall forthwith proceed to form a local ground water board for the purpose of hearing such claim. The said local ground water board shall consist of the state reclamation engineer, and a person who is a qualified engineer or geologist, appointed by the District Judge of the judicial district which includes the county in which the well of respondent, or one of the respondents if there be more than one, is located, and a third member to be appointed by the other two, who shall be a resident irrigation farmer of the county in which the well of respondent, or one of the respondents if there

more than one, is located. None of such members shall be persons owning or claiming water right which may be affected by such claim, nor members of the board of directors of any irrigation district or canal company owning or claiming water rights affected by such claims. No employee of the state of Idaho other than said state reclamation engineer is eligible for appointment to a ground water board. Members of the board shall hold office until the board has finally disposed of the claim which it was appointed to hear. Such members shall serve without pay except that members other than the state reclamation engineer shall receive per diem of $25.00 together with reimbursement of expenses actually incurred during the time actually spent in the performance of official duties, such per diem and expenses to be paid from the ground water administration fund hereinafter created. Whenever such a local ground water board is needed to be formed in any county, the state reclamation engineer shall give notice of that fact to the District Judge of the judicial district which includes the county in which the well of respondents, or one of the respondents if there be more than one, is located, and thereupon such judge shall appoint a person to be a member of such board. Upon qualification by such member, the third member shall be selected. The state reclamation engineer shall be the chairman of the board and custodian of all its records. He may be represented at any board meeting by a duly appointed, qualified and acting deputy state reclamation engineer.

Section 19. APPEALS FROM ACTIONS OF THE STATE RECLAMATION ENGINEER.—Any person dissatisfied with any decision, determination, order or action of the state reclamation engineer, water master, or of any local ground water board made pursuant to this act may within sixty (60) days notice thereof take an appeal therefrom to the District Court for any county in which the ground water concerned therein may be situated. Appeal shall be taken by serving a notice of appeal upon the state reclamation engineer, together with a statement describing the decision, determination, order or action appealed from and setting forth the reasons why the same was erroneous. An appeal as referred to in this section stays the execution of, or any proceeding to enforce, the order, decision, determination, or action of the state reclamation engineer, water master, or local ground water board. Whenever the decision, determination, order or action of the state reclamation engineer appealed from was made pursuant to a hearing before the state reclamation engineer to which the appellant was a party or at which the appellant had a right to be

heard, the state reclamation engineer shall, upon receipt of service of notice of appeal, transmit to the District Court a certified transcript of the proceedings and the evidence received at such hearing and the evidence taken at such hearing may be considered by the District Court. The District Court shall try the same anew at the hearing on the appeal. Appeal to the Supreme Court from the final judgment rendered by the District Court pursuant to this Section may be taken within the same time and in the same manner as appeals from final judgments in cases commenced in the District Court are taken to the Supreme Court.

Section 20. ADJUDICATION OF WATER RIGHT.—The provisions of Chapter 14 of Title 42, Idaho Code, relative to adjudication of water rights shall be applicable to all water rights acquired under this Act.

Section 21. PENALTIES.—Any person violating any provision of this act shall be guilty of a misdemeanor and any continuing violation shall constitute a separate offense for each day during which such violation occurs, but nothing in this section or in the pendency or completion of any criminal action for enforcement hereof shall be construed to prevent the institution of any civil action for injunctive or other relief for the enforcement of this act or the protection of rights to the lawful use of water.

SECTION 9. That Section 13 of Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by changing the section number from 13 to 22 and to read as follows:

Section * *22.* LOGS OF WELL DRILLERS.—The business and activity of opening and excavating wells is hereby declared to be a business and activity affecting the public interest in the ground water resources of the state, and *in order to enable a survey of the extent thereof* every well driller is hereby required to keep a log of each well that may hereafter be excavated or opened by him *in Idaho including wells excepted under Sections 42-227 and 42-228, Idaho Code,* and to furnish a copy of such log, duly * * * *signed,* to the state reclamation engineer within thirty days following the completion of such well. Said logs shall become a permanent record in the office of the state reclamation engineer *for geological analysis and research* and be there available for public inspection. Said logs shall be upon forms *furnished* by the state reclamation engineer and shall show:

(a) The location of a well with reference to legal subdivisions;

(b) The kind and nature of material in each stratum penetrated, and each change of formation with at least one entry for each ten foot vertical interval, and the time required to penetrate such interval;

(c) The name and address of the well driller and date of commencing drilling and date completed;

(d) The size and depth of the well and location of water bearing aquifers;

(e) The size and type of casing and where placed in the well including number and location of perforations;

(f) The flow in cubic feet per second or gallons per minute in flowing well, and the shut in pressure in pounds per square inch;

(g) The static water level with reference to the land surface, and the drawdown with respect to the amount of water pumped per minute, when a pump test is made;

(h) The temperature of waters encountered, and other information as may be requested by the state reclamation engineer *;

(i) As a part of said log the well driller upon request of the state reclamation engineer shall furnish samples of each change of formation below the surface, and containers and cartage therefor shall be furnished by said state reclamation engineer.

Every well driller before lawful drilling of a well for development of water, shall, from and after July 1, 1953, under penalty of misdemeanor for failure to so comply obtain a license from the state reclamation engineer which shall be issued by and in the form prescribed by the said state reclamation engineer upon payment of $10.00 license fee, which license expires each year on June 30th, and is renewable by payment of a $5.00 renewal fee. Said licenses are not transferrable and may be revoked or renewal refused by said state reclamation engineer if it appears that the requirements of this section have not been complied with. Revocation or refusal to renew a well driller's license shall be determined by said state reclamation engineer only after fifteen days' notice setting forth reasons therefor, has been sent by registered mail to the licensed well driller.

SECTION 10. That Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by adding a new section numbered 23 and to read as follows:

Section 23. GROUND WATER ADMINISTRATION FUND.—There is hereby created in the State Treasury a special fund known as the Ground Water Administration Fund. All fees collected by the state reclamation engineer pursuant to Sections 7 and 22 of this act shall be placed in said special fund. All moneys received by said special fund are hereby appropriated for the purpose of the administration of this Act, and no moneys received in said special fund shall be disbursed by the State Treasurer unless the voucher for such disbursement contains the certificate of the state reclamation engineer that such voucher is for an expense incurred in the administration of this Act.

SECTION 11. That Sections 14, 15, and 16 of Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same are hereby amended by changing the section numbers from 14, 15, and 16 to 24, 25, and 26, respectively.

SECTION 12. That Chapter 200 of the 1951 Session Laws of the State of Idaho, Regular Session, be and the same is hereby amended by adding a new section numbered 27 to read as follows:

Section 27. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water may be so commenced and such rights may be acquired and perfected under Chapter 2 of Title 42, Idaho Code, unaffected by this act or by Chapter 200, Laws of 1951.

Approved March 12, 1953.

CHAPTER 183

(S. B. No. 157)

S.L. '53 Ch. 183 Repealed L. '55, Sec. 7 p. 7 Dredge Initiative

AN ACT

DECLARING IDAHO POLICY TO PROTECT ITS LANDS, STREAMS AND WATER COURSES; DEFINING DREDGE MINING; REQUIRING THE GROUND DISTURBED BY DREDGE MINING BE LEVELLED OVER AND WATER COURSES RESTORED; REQUIRING THAT SETTLING PONDS BE CONSTRUCTED; PROVIDING FOR THE INSPECTOR OF MINES FOR THE STATE OF IDAHO AS THE ADMINIS-