**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

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| **A&B IRRIGATION DISTRICT,**<br><br>Petitioner,<br><br>vs.<br><br>**THE IDAHO DEPARTMENT OF WATER RESOURCES** and **GARY SPACKMAN** in his official capacity as Interim Director of the Idaho Department of Water Resources,<br><br>Respondents.<br><br>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 | **CASE NO. CV-2009-647** |

# PETITIONER A&B IRRIGATION DISTRICT'S REPLY BRIEF

On Appeal from the Idaho Department of Water Resources

Before Honorable Eric J. Wildman

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## INTRODUCTION

The importance of this Court's decision in this case cannot be overstated. The Court has been asked to review a final order from the Director of the Idaho Department of Water Resources ("Department" or "IDWR") that is based on significant legal and factual errors that must be reversed. The arguments in the response briefs emphasize the slender reed upon which the Director's faulty analysis is premised. For example, while the plain language of the Idaho Ground Water Act ("GWA") provides that the Act "***shall not effect*** the rights to the use of ground water in this state acquired ***before its enactment***," Idaho Code § 42-226, the Respondents continue to urge the Court to ignore this language and wrest its opinion on a different section. A&B's interpretation of the GWA is not erroneous. In fact, until just recently, the Department interpreted the GWA and the same case law discussed here as protecting pre-1953 groundwater rights, including A&B's water right, to their historic pumping levels.

Similarly, the Respondents arguments do not support the Director's erroneous treatment of A&B's decreed senior water right. Whereas the Director failed to honor A&B's decree, created new injury standards, and relied upon an unsupported "reasonable pumping level" to deny administration, it is clear the Director has erred and misapplied relevant Idaho law. Since A&B is afforded a presumption of its decreed rate of diversion at its indiviudal points of diversion, the Director had no authority to unilaterally reduce that amount so that junior appropriators could continue their out-of-priority diversions.

Finally, the remainder of the Respondents' argument are similary flawed in that they rely on pre-decree information, post hoc justifications by counsel or a misreading of the applicable statutory and/or case law. In the end, they fail to substantiate the Director's unlawful actions. Accordingly, the *Final Order* should be reversed.

## ARGUMENT

### I. A&B's 1948 Ground Water Right is Not Subject to the 1951 Ground Water Act or the 1953 Amendment Incorporating the "Reasonable Ground Water Pumping Level" Provisions.

Similar to the Director in his *Final Order*, the Respondents fail to acknowledge the plain language of the Ground Water Act ("GWA") and controlling Supreme Court precedent regarding its scope – namely, *Parker v. Wallentine*, 103 Idaho 506 (1982), and *Musser v. Higginson*, 125 Idaho 392 (1995).[1] Those decisions clearly establish that the GWA does not apply here because (1) all-pre-1951 ground water rights are not subject to the GWA, and (2) even if they are subject to the GWA, all pre-1953 ground water rights and all pre-1978 domestic ground water rights, are not subject to a "reasonable pumping level" condition incorporated in the 1953 amendment to the GWA.

The language of the GWA is unmistakable: the Ground Water Act does not apply to water rights acquired before its enactment. Similar to the decisions in *Parker* and *Musser*, this Court should apply the clear and unambiguous statute as written without engaging in any statutory construction. *Wheeler v. Idaho Dept. of Health & Welfare*, 207 P.3d 988, 994 (Idaho 2009).

The Department and Director cannot avoid the decisions in *Parker* and *Musser*. As parties to those cases they raised the same arguments and asked the Supreme Court to preclude administration to senior water rights on the basis of the GWA. Each time the Court rejected the theory advanced by the Department and found that the statute and its amendments did not apply

[1] The Director wrongly refused to follow established Supreme Court precedent on the applicability of the Ground Water Act. *See J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 853 (1991) ("It is a fundamental tent that the judiciary has the ultimate responsibility to construe legislative language to determine the law."); *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77 (1990) ("When there is controlling precedent on questions of Idaho law 'the rule of stare decisis dictates that we follow it'"); *see also*, 73 C.J.S. Public Admin. Law & Proc. § 55 ("An administrative agency is without power to render a judgment differing from a court's prior judgment or judicial precedent").

to rights acquired before its enactment. *See Parker,* 103 Idaho at 510-11; *Musser,* 125 Idaho at 396. The same result applies to the facts in this case, A&B's 1948 ground water right is not affected by or subject to the "reasonable pumping level" provision in the Ground Water Act.

This Court can find that the GWA's "reasonable pumping level" does not apply to A&B's water right for at least two reasons: (1) the plain language of the GWA, as originally enacted and amended, confirms that the GWA "shall not affect" A&B's pre-existing water right; and (2) even if the GWA applies to A&B's pre-existing water right, there is no language in the 1953 amendment to the GWA (incorporating the reasonable pumping level provision) that makes the amendment retroactive and applicable here.

### A. The Responses Provide Inconsistent Argument in a Failed Attempt to Refute the Plain Language of the GWA.

Despite the statute's plain language and controlling precedent, the Respondents seek to convince the Court that the 1951 GWA and its subsequent amendments are retroactive by presenting an array of inconsistent arguments. First, they assert that *Noh v. Stoner*, 55 Idaho 651 (1933), was overruled by *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575 (1973). IDWR Br. at 17; IGWA Br. at 14-15; Pocatello at 8-9. Yet, they admit that the *Noh* rule still applies to ground water rights that are not subject to the GWA. IDWR Br. at 20; IGWA Br. at 15, n.3; Poc. Br. at 10-11 & n.5. They assert that this Court must overlook the Supreme Court's confirmation that the plain language of the GWA "makes it clear" that the GWA "***does not affect the use of ground water acquired before the enactment of the statute***," *Musser*, 125 Idaho at 396 (emphasis added), in part because the issue was not briefed before the Court in that case. IGWA Br. at 16. Yet, at the same time, they demand that this Court interpret *Baker* as dispositive on an issue that was never briefed in that case. *See Baker, supra* at 576.

The Respondents malign A&B's reliance on the *Musser* Court's finding because there is no discussion of section 42-229 in that case. IDWR Br. at 21. Yet, *Baker* did not discuss section 42-229 either and they still argue that *Baker* is dispositive. IDWR Br. at 15-18; IGWA Br. at 14-15. They demand that the Court review the plain language of Idaho Code section 42-229, IDWR Br. at 8-9; IGWA Br. at 14 & 18; Poc. Br. at 8-9, yet ignore the definition of the terms "validated and confirmed" as used in the original section 42-226 and insist that the current language cannot be interpreted to mean what it plainly says. Idaho Code § 42-226 ("This act ***shall not effect*** the rights to the use of ground water in this state acquired ***before its enactment***") (emphasis added); *see* IDWR Br. at 14-15; IGWA Br. at 20-21.[2] Moreover, the Respondents fail to acknowledge the Idaho Supreme Court rejected these same arguments in *Parker, supra*, 103 Idaho at 510-11.

The Respondents interpret the "validated and confirmed" language to have sweeping application – merely recognizing the existence of all pre-GWA groundwater rights. IDWR Br. at 9-10. Yet, they insist that the 1987 amendment to section 42-226, adding the "shall not affect" language, only applies to geothermal ground water rights. IDWR Br. at 14-15, IGWA Br. at 21.[3] In sum, the Respondents fail to acknowledge the plain language of the statute and the prior interpretations of that language set forth by Idaho Supreme Court in *Parker* and *Musser*.

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[2] The Department's reliance upon remarks by R.P. Parry, IDWR Br. at 9, does not refute this point as they refer to a completely different issue. In particular, Mr. Parry states that "existing rights should be confirmed and validated" and specifically stated that "a simple and easy procedure should be set up whereby every man claiming underground water rights ***could go in and make a filing and have the right made a matter of record***." *Id.* at 9-10 (emphasis added). Nothing in the original GWA requires such a reporting to the Department. In fact, this goal was not accomplished until the Legislature enacted section 42-243 in 1967 (and as changed and amended in 1978) – requiring all holders of constitutionally appropriated water rights to file a claim with the Department.

[3] The assertion that the 1987 amendment to section 42-226 "was to make the new restriction on the use of geothermal rights prospective only" is confusing. IDWR Br. at 15; *see also* IGWA Br. at 21 (same). There is nothing in the 1987 amendment that indicates the applicability of the last phrase would now have such a limited scope. The Respondents cannot have it both ways. Either the phrase applies to all water rights or it doesn't. The Court should dismiss these contradictory arguments.

### B. The Plain Language of the GWA Excludes All Pre-Enactment Ground Water Rights from Coverage under the Act.

The plain language of the GWA should be dispositive of this issue. Indeed, while pre-GWA rights were originally "validated and confirmed" in all respects, the GWA now states that "This Act ***shall not affect*** the rights to the use of ground water in this state ***acquired before its enactment***." Idaho Code § 42-226 (emphasis added). The Supreme Court confirmed that the GWA, as originally drafted and amended, "makes it clear that ***this statute does not affect the use of ground water acquired before the enactment of the statute***." *Musser*, 125 Idaho at 396 (emphasis added); *see also*, *Parker*, 103 Idaho at 510-11. Nothing more should be required to demonstrate the intended scope of the GWA.

The Department alleges that section 42-226, as originally drafted, and 42-229 are read "in harmony" *only* when one reads the original section 42-226 language to merely confirm the *existence* of pre-GWA water rights – leaving them subject to administration pursuant to the GWA. IDWR Br. at 10-12. This argument fails for several reasons.

First, this argument ignores the current language of section 42-226, which provides that the GWA "shall not affect" pre-existing water rights.[4] Second, the Respondents cannot point to anything in the GWA, either as enacted or amended, that jeopardizes the existence of pre-GWA ground water rights – which would require special recognition by the Legislature. In other words, there was no need to authenticate the existence of pre-GWA water rights as property rights. Prior to 1963, ground water rights could be appropriated either through the statutory method (i.e. permitting and licensing process) or the constitutional method (i.e. diverting water

[4] It is not disputed that this amendment from the "validated and confirmed" language to the "shall not affect" language was grammatical. *See* IGWA Br. at 21. The implication of this admission is that the phrase had the same meaning before ***and after*** the amendment. In light of the "shall not affect" language of the amendment, the only logical interpretation of the original language is that all pre-GWA water rights were "validated and confirmed" in all respects – not merely as to their existence, as argued by the Respondents.

and putting it to a beneficial use). *Baker, supra* at 581; *Nielson v. Parker*, 19 Idaho 727, 731 (1911) ("A person desiring to appropriate the waters of a stream may do so, either by actually diverting the water and applying it to beneficial use, or he may pursue the statutory method").

The right to appropriate water is guaranteed by Idaho's Constitution. IDAHO CONST. art. XV, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied"). Water rights acquired under the constitutional method are afforded the same priority protection as water rights acquired under the statutory method. *Fremont-Madison Irr. Dist. & Mitigation Group v. IGWA*, 129 Idaho 454, 456 (1996) ("An appropriator whose right was based upon a valid, although unadjudicated, constitutional method of appropriation retained a senior claim in relation to a person holding a later issued permit"). It was not until 1963 that the law was amended to require statutory appropriation (permitting and licensing) for all subsequent appropriations of ground water.[5] Idaho Code § 42-229. However, there is nothing in the GWA, as enacted or amended, that threatens the Constitutional right to pre-GWA water rights. Stated another way, there was no reason for the Legislature to simply acknowledge the "existence" of property rights guaranteed and perfected under the Constitution. Pre-GWA water rights "existed" regardless of the Legislature's actions in 1951.

In short, the argument that the GWA merely confirmed the "existence" of pre-existing water rights is without merit and should be rejected. The language of the statute is clear and must be given effect as written, all water rights acquired before enactment of the GWA are not affected.

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[5] The Department cites to this 1963 amendment to the GWA as support for its constricted reading of the "validated and confirmed" language. *IDWR Br.* at 9. According to the Department, when read "in the context" of the GWA, and in particular the 1963 amendment, the "validated and confirmed" language simply acknowledged the existence of pre-GWA water rights. *Id.* This attempt to extrapolate a meaning from the 1951 Act based upon a 1963 amendment is without merit. In fact, the 1971 statutory amendment creating an identical statutory appropriation limitation for surface water rights does not have any language attempting to verify the existence of pre-amendment surface water rights. Idaho Code § 42-103.

### C. The 1953 Amendment Incorporating the "Reasonable Pumping Level" Provision into the GWA is Not Retroactive.

Even if, *arguendo*, the GWA does apply to pre-1951 ground water rights, there is *no language* in the 1953 amendment causing the "reasonable pumping level" requirement to have retroactive effect. Importantly, the Respondents can only cite to the pre-existing section 42-229 to support this theory, IDWR Br. at 10-11; IGWA Br. at 19-20 – they cannot point the Court or parties to any language in the 1953 amendment making it retroactive.[6] Absent such language in the amendment, however, any retroactive application would contradict the Supreme Court's decision in *Parker, supra* (rejecting the assertion that the 1978 amendment had retroactive application and caused all pre-1978 domestic rights to be subject to reasonable pumping levels and holding that "nothing in the 1978 amendment or the circumstances of its enactment indicates that the legislature intended this amendment to have retroactive effect").

Just like the 1978 amendment addressed in *Parker*, the 1953 amendment was enacted after section 42-229 was adopted and there is no language in the 1953 amendment that "indicates that the legislature intended this amendment to have retroactive effect."[7] Furthermore, just like the 1978 amendment addressed in *Parker*, the previously enacted section 42-229 is insufficient to warrant retroactive application of the 1953 amendment. Indeed, IDWR points to no language in the amendment to justify a contrary finding.[8]

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[6] IGWA quotes extensively from the District Court decision in *Moyle v. IDWR*, Case No. 08-014978 (4th Jud. Dist., July 13, 2009). The District Court decision in *Moyle* cannot be relied on as it is an unauthorized advisory opinion. An "advisory opinion" is a "nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose. Federal courts are constitutionally prohibited from issuing advisory opinions by the case-or-controversy requirement." Black's Law Dict. (8th Ed. 2004); *see, e.g., Preiser v. Newark*, 422 U.S. 395, 401(1975) (a court "has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them'"). Idaho has adopted the federal judiciary requirement. *Noh v. Cenarrusa*, 137 Idaho 798, 801 (2002).

[7] The Department misunderstands A&B's argument on this issue. IDWR Br. at 19, n.8. A&B asserts that the *1953 amendment* is not retroactive.

[8] Instead, the Department can only rely upon a bar convention presentation from 1949 to justify its expansive view of the GWA. Regardless, there is nothing from Mr. Parry's remarks that justify the conclusion that the 1953 amendment has retroactive application. *See* IDWR Br. at 9-10. Indeed, Mr. Parry further testified that:

The Supreme Court has plainly held that "in Idaho, a statute is not applied retroactively unless there is 'clear legislative intent to that effect.'" *Wheeler*, 207 P.3d at 993. The case cited by IDWR to support a retroactive application of the GWA does not apply. Contrary to the facts in *Peavy*, which concerned a statute enacted to carry out a prior constitutional mandate (Art. 7, § 15) that the Court found "should have been enacted long before it was, in fact, at the first session of the legislature", there is no "clear legislative intent" of retroactive application of the GWA.

Instead, section 42-229 simply provides that administration of water rights subject to the GWA would be governed by the GWA – regardless of whether they were acquired by the constitutional or statutory method. Indeed, between 1951 and 1963, water users could still appropriate ground water pursuant to the constitutional method. In no way does section 42-229 evidence a clear legislative intent to retroactively apply the GWA. Just the opposite, the Legislature has plainly stated that "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." Idaho Code § 42-226.

Contrary to its present arguments, IDWR previously implemented the statute as written for over 25 years. After the *Parker* decision, the Director informed the Idaho Water Resource Board of the scope of the decision:

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> It is expensive to develop underground water. There are some wells that have actually been drilled in Idaho 20 and 22 iches in diameter down five and six hundred feet. By the time such a well is drilled and equipped with pumps and pipe and that sort of things, there is a large investment. ***It would be too bad from <u>any angle</u> if a chap who develops such a water right and has gone to that expense is vulnerable to subsequent attack.***
>
> ...
>
> However, it was agreed that we should have some definite rule of property to protect the man who is there first with his investment. In other words, ***under that set-up the gamble would always be taken by the late comer.***
>
> It all gets down to this: ***If you are going to have interference between wells, who is going to take the gamble? The man who is already there with his investment? Or the late comer who comes last onto the scene?***

*An Underground Water Code*, 23 Idaho State Bar Proceedings 23 & 24-25 (1949) (emphasis added) (attached to the Department's Brief).

> A. Kenneth Dunn, Director, reported that the department had made available for the Board a copy of the Idaho Supreme Court decision on Parker v. Wallentine. This decision will be one of the items discussed at the groundwater seminar and it is extremely important in terms of future groundwater development in Idaho. In essence, ***the decision states that a domestic well drilled prior to 1978 and irrigation well drilled prior to 1953 as part of its water rights has a guaranteed water level.*** If a water right holder with a subsequent filing interferes with the water levels, he may be subject to damages.

Minutes of September 22, 1982 Idaho Water Resource Board Meeting (Emphasis added); Attachment A.

Thereafter, the Department, including the current Interim Director, followed this precedent for over 25 years with respect to decisions concerning the effect of new appropriations on water rights not affected by the Ground Water Act. *See Amended Preliminary Order* at 25-26 (*In the Matter of Applications to Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle*) (Attachment B); *see also, Final Order* at 27-28 (*In the Matter of Application for Amendment of Permit No. 63-12488 in the Name of the City of Eagle*) (Attachment C).[9] As recently as October 2007, the Interim Director, then acting as a Hearing Officer, concluded:

> 7. Under *Parker*, if (1) pumping of ground water by junior ground water appropriators causes declines in pumping water levels in wells of the senior water right holders because of local well interference, and (2) ***the water rights held by the senior water right holders bear priority dates earlier than 1953, or 1978 for domestic water rights, the holders of the senior water rights are, at a minimum, entitled to compensation for the increased costs of diverting ground water caused by the declines in ground water levels.***

*Amended Preliminary Order* at 26 (emphasis added); Attachment B.

Notably, IDWR issued these decisions affirming the scope of *Parker* well after A&B filed its delivery call back in 1994. However, just five months after the above-referenced decision in October 2007, the agency performed an about-face and refused to follow its prior decisions. *See Final Order* (*In the Matter of Applications to Appropriate Water Nos. 63-32089*

[9] For the Court's convenience excerpts of the administrative decisions are provided as attachments to this brief.

*and 63-32090 in the Name of the City of Eagle*) (Feb. 26, 2008) (Attachment D). Rather than continue to follow the Supreme Court's precedent, the Director took it upon himself to conclude that the *Musser* Court "was incorrect" to hold that the GWA does not affect pre-enactment ground water rights. *See Final Order* at 31 (Attachment D). Although IDWR had argued and lost this argument before the Supreme Court in both *Parker* and *Musser*, that apparently was of no consequence for the Director in making an administrative decision on the City of Eagle's new water right permit. While IDWR adopted the Supreme Court's precedent on this issue up until February 2008 (coincidentally right after the Director issued his initial order responding to A&B's call), the Court should reject its contrary position now.

In summary, the 1953 amendment did not include a "clear legislative intent" to make the "reasonable pumping level" have retroactive application. Therefore, Respondents' arguments fail as a matter of law.

### D. The Respondents' Other Argument Fail to Justify Any Retroactive Application of the GWA.

The Respondents' interpretation of the applicable case law, and assertion that *Baker* is dispositive here, does not justify a contrary result. IDWR Br. at 15-18; IGWA Br. at 14-16; Poc. Br. at 8-14. The Respondents assert that the *Baker* Court overruled the "historical pumping level" protections afforded under *Noh*, finding that the *Noh* rule was inconsistent with GWA and Constitution. IDWR Br. at 16-17; IGWA Br. at 14-16; Poc. Br. at 8-10. Pocatello argues that *Baker* is the only case "interpreting Section 226 of the GWA in the context of a dispute involving water rights senior to the Act's enactment." Poc. Br. at 9. Yet, they admit, IDWR Br. at 20; Poc. Br. at 12, that a nearly identical panel of judges subsequently confirmed that the *Noh* rule *still applied* to ground water rights not subject to the GWA in a decision where the Court

confirmed that the *Noh* rule "effectuate[d] the policy of maximum development of the water resources of this state." *Parker*, 103 Idaho at 514.

The Department asserts that the mere fact that one of the *Baker* parties had a pre-GWA water right compels the conclusion that the GWA applies to all ground water rights regardless of priority. IDWR Br. at 15. Yet, the Department overlooks the fact that the Court focused its decision on water rights acquired in the late 1950's and 1960's, and that the senior water right holder in *Baker* was entitled to and received his water prior to the juniors. *Baker*, *supra* at 576. Importantly, none of the Respondents allege that the *Baker* parties ever briefed, or that the Court ever considered, the scope of the "validated and confirmed" language in relation to section 42-229 or the applicability of the 1953 amendment.[10]

Pocatello asserts that A&B's argument must fail because it has not shown injury to its water right. Poc. Br. at 6-8. Regardless of Pocatello's misinterpretation of the appropriate burden of proof in a delivery call proceeding, as discussed in A&B's *Opening Brief*, Part II-IV, and confirmed below, Part II & III, A&B has suffered material injury to its senior water right. Like in *Noh*, depletions to the aquifer caused by junior diversions have left A&B unable to access sufficient water in several wells across the project. R. 835 & 3090.

In addition, Pocatello's reliance upon *Nampa & Meridian Irr. Dist. v. Petrie*, 37 Idaho 45 (1923), is misplaced as that case is inapplicable. That case concerned a surface water irrigation district and an invalid claim to waste water by an individual landowner, not competing established ground water rights. In *Nampa & Meridian Irr. Dist.*, the Court determined there was no "proof" that the Appellant (Blucher) had "secured water from a natural subterranean

[10] As to *Musser, supra*, the Department confuses A&B's argument. A&B does not allege that *Musser* overruled *Baker*. IDWR Br. at 20; *see also* IGWA Br. at 15-16; Poc. Br. at 12-13. No such assertion was ever made, or implied, in A&B's briefing. Rather, when considered in light of the "validated and confirmed" original language, the "shall not affect" amendment language and the *Parker* decision, the *Musser* Court's confirmation that the GWA, as enacted and amended, does not apply to pre-GWA water rights, 125 Idaho at 326, is very telling.

stream". 37 Idaho at 532. In other words, Blucher did not have a valid water right to public waters of the State. The first assignment of error makes it clear that "in the case of appellant Blucher, [the court] did not make sufficient allowance for damages to ***his waste water right*** caused by respondent's irrigation and drainage system." *Id.* (emphasis added). The case merely involved the drainage of lands that were saturated by the seepage and percolation from an irrigation district's canals. The Court refused to award damages to Blucher and his "waste water" right due to the interference caused by the drainage operations of the district. In other words, Pocatello's claim that the case applies to pre-1951 valid ground water rights and held that those rights have no "entitlement to water levels" is wrong.

The Department also accuses A&B of "ignoring" sections 42-227 and 42-228. IDWR Br. at 9 & 13. According to the Department, these phrases establish the only method of exclusion from the GWA and that "irrigation wells, like the right held by A&B, 36-2080, were not excepted from the Act." *Id.* at 9-12; *see also* IGWA Br. at 18-19 (same). It argues that this is the only way to read the statute. IDWR Br. at 9-12. The Department is wrong. A&B does not argue that "irrigation wells, like the right held by A&B" were excepted from the GWA. IDWR Br. at 9. Rather, A&B argues that the plain language of 42-226, both as originally enacted and amended, makes it clear that that GWA does not apply to any water rights acquired before its enactment. This conclusion was confirmed in *Parker* and again in *Musser*. There is no reason to "except" water rights not affected by the Act.

Finally, the Respondents argue that their expansive interpretation is consistent with the policy objectives of the GWA. IDWR Br. at 21-24, IGWA Br. at 22-23. The Department accuses A&B of seeking "to undo the efforts of its predecessor." IDWR Br. at 23. Yet, the only support for this indictment is a quotation from Mr. Howard R. Stinson, from the Bureau of

Reclamation in 1949, wherein Mr. Stinson challenged a proposed provision that would make it unlawful to drill any additional wells should there be "any possible interference" with the use of other wells. *Id.* at 22-23. Contrary to the Department's claim, there was no discussion of the *Noh* doctrine, as the offending interference provision was removed from the draft legislation. *Id.* (the proposed interference provision "has been completely eliminated from any proposed bill).[11]

IGWA asserts that A&B is seeking to "set the reasonable pumping level in the ESPA at a 1948 level" and to "block the full economic development of the state's underground water resources." IGWA Br. at 22-23. Conveniently missing from its argument is any reference to *Parker*, 103 Idaho at 514, which held that the historical pumping level doctrine of *Noh* "effectuate[d] the policy of maximum development of the water resources of this state." As a representative of junior appropriators, IGWA is free to "maximize development" of the aquifer provided it makes those not subject to the Act, like A&B, whole from its members' out-of-priority diversions. This is exactly what the *Parker* Court decided.

For these reasons, the Court should find that the GWA does not apply to A&B's pre-GWA water right and should reverse the Director's *Final Order* on this issue accordingly.

## II. Since A&B Can Beneficially Use its Decreed Diversion Rate (0.88 miner's inch per acre), the Director Wrongly Reduced that Rate to 0.75 miner's inch per acre and Wrongly Justified it through a "Total Project Failure" and "Minimum Amount Needed" Standard.

A&B's decreed water right authorizes a diversion rate of 0.88 miner's inch per acre. Ex. 139.[12] The SRBA Court's partial decree confirms that A&B can beneficially use that amount of water. *See* Idaho Code § 42-1420; *Reno v. Richards*, 32 Idaho 1, 15 (1918) ("a claimant seeking a decree of a court to confirm his right to the use of water by appropriation ***must present to the***

[11] Furthermore, as originally drafted, the GWA did not protect ground water rights to a reasonable pumping level. That provision was not added until 1953. It is misleading, therefore, to argue that these pre-enactment discussions were focused on eliminating the *Noh* doctrine.

[12] The Hearing Officer recognized this fact. R. 3102.

***court sufficient evidence to enable it to make definite and certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed***") (emphasis added); *Head v. Merrick*, 69 Idaho 106, 109 (1949); *see also, The Cottonwood Water & Light Co. v. St. Michael's Monastery*, 29 Idaho 761, 769 (1916) (prior appropriator is "entitled to the full amount appropriated").[13] The Idaho Supreme Court recently confirmed that a "senior is entitled to his decreed water right." *AFRD#2*, 143 Idaho at 877. Accordingly, for purposes of administration, A&B does not have to re-establish a "need" for its decreed diversion rate. In short, the Director had no authority to ignore A&B's decreed water right or the presumption it carries as against junior water rights. Furthermore, the Director was obligated to recognize all of A&B's individual wells, or decreed points of diversion, for purposes of his analysis. By disregarding the plain elements of A&B's decreed right, the Director unlawfully "averaged" water use across the project to justify his no-injury decision.

### A. The Director Erred in Refusing to Recognize A&B's Decreed Diversion Rate.

Notwithstanding the law, the Director concluded A&B was not entitled to its decreed right – reducing it to a rate of 0.75 miner's inch per acre. R. 3110, 3322. Even with this reduced rate, the Director refused to find injury to part of A&B's right served by well systems delivering less than that amount. *See* A&B *Opening Br.* 33-34. While IDWR claims A&B can still "exercise the full extent of its right" by drilling "wells deeper" (albeit to an unknown "reasonable pumping level" to be protected), IDWR fails to justify the reduction in A&B's water right for purposes of administration.

[13] Pocatello challenges A&B's reliance on *The Cottonwood Water & Light Co.* decision, arguing that it is "inapposite to the matter before the Court." Poc. Br. at 19. Yet, in that decision, the Court affirmed that a senior water user is "entitled" to his water and that a junior water user cannot injure the senior appropriator. 29 Idaho at 769. The Supreme Court recently affirmed that principle. *AFRD #2, supra.* Likewise, Pocatello's attempt to discredit A&B's reliance on *Stevenson v. Steele*, 93 Idaho 4 (1969), misses the point. Here, the Director cut A&B's decreed diversion rate by 15%, arguing that A&B did not "need" more water. R. 3110. As with *Steele*, the Director's decision runs contrary to A&B's decree and the evidence presented at hearing.

As long as a senior, like A&B, can beneficially use its decreed water right, that right must be protected against interfering juniors. Moreover, Idaho law places the burden on juniors to prove non-interference. *Moe v. Harger*, 10 Idaho 302, 303-04 (1904); *Jossyln v. Daly*, 15 Idaho 137, 149 (1908); *AFRD#2*, 143 Idaho at 873 ("Requirements 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"). Pocatello argues that A&B "must show that it requires the entire decreed amount". Poc. Br. at 18, 20. Yet, A&B did that twice – once when it proved up the water right license and again when the SRBA Court issued a decree for water right 36-2080. A&B does not carry that burden again in administration, and A&B's decreed water right is not subject to collateral attack. Idaho Code §§ 42-219, 1420(1). Any argument to the contrary equates to an unauthorized "re-adjudication" of the right. *AFRD #2*, 143 Idaho at 877.

In support of this plain legal error, the Respondents claim that A&B is misrepresenting the Director's *Final Order* because "[n]othing in the Director's Order prohibits A&B from delivering or diverting the full quantity on its water right." IGWA Br. at 23; IDWR Br. at 26. They argue that nothing in the *Final Order* prevents A&B from drilling wells deeper or otherwise chasing its decreed quantity of water. *Id.* Such declarations offer cold comfort to A&B, who has been forced to abandon wells because they no longer produce adequate water and whose call was rejected because its average diversions have fallen below a threshold that is 15% ***less than*** its decreed diversion rate.[14] Ex. 208 (summary of information of abandoned A&B wells).

The Respondents miss the point when they assert that the Director must make a "threshold" injury determination that must be established by "prima facie evidence" before the

[14] A&B's water right authorizes a diversion rate of 0.88 inches per acre. Ex. 139. The Director concluded that A&B was not materially injured because its average diversions had not dropped below 0.75 inches per acre (or 85% of the decreed diversion rate). R. 3110.

burden shifts to the junior water users to establish a defense. IDWR Br. at 25-27; IGWA Br. at 24-25. Although the phrase in the order may have been intended to explain the Director's duty, *id.*, the burden was impermissibly shifted to A&B when the Director *sua sponte* cut A&B's decreed diversion rate to 0.75 miner's inch per acre in his material injury analysis applying the CM Rules.

The Respondents argue that the Director must have discretion to review the facts and inquire as to whether there is material injury. IDWR Br. at 23-27; IGWA Br. at 27-29; Poc. Br. at 14-15. This discretion, however, is not unlimited. The *AFRD #2* Court affirmed that "there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call" and that "there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." 143 Idaho at 877 (emphasis added). The CM Rules "give the Director the tools" to respond to a delivery call. *Id.* However, the Director cannot use the CM Rules to "force the senior to demonstrate an entitled to the water in the first place." *Id.*

Importantly, the Director cannot gloss over the decreed elements of a water right, or go behind a decree to justify reduced water deliveries to the senior.[15] *AFRD#2*, 143 Idaho at 877-78; *see also*, Idaho Code §§ 42-220; 42-1420(1). Yet that is exactly what the Director did in this case. Rather than providing A&B the "presumption" of "entitlement" that is required by the law, *AFRD#2, supra*; R. 3102 ("A&B is entitled to the higher rate of delivery if its delivery system can produce the higher rate and that amount can be applied to a beneficial use"), A&B was

[15] In quoting *AFRD#2*, IGWA skips over all references to the deference owed to a decree. IGWA Br. at 24. According to IGWA, the Director must have free reign to review a water right – whether decreed, licensed or not. IGWA's assertion that failure to grant such unfettered discretion will result in a "presumption of injury" that will topple the administrative scheme is inconsistent with the law. IGWA Br. at 24-25. While the Director has discretion, the CM Rules cannot be used to "force the senior to demonstrate an entitled to the water in the first place." *AFRD#2*, 143 Idaho at 877. That determination was made by the SRBA Court when the right was decreed.

unlawfully forced to "demonstrate an entitlement to the water in the first place." For example, the Respondents wrongly argue that A&B has never diverted 1,100 cfs at one time or provided 0.88 miner's inches to every acre within its project. IGWA Br. at 29; Poc. Br. at 15. Importantly, they erroneously rely upon "pre-decree" information to support this argument.

Even though no "post adjudication factors" were presented to justify reducing A&B's decreed diversion rate per acre, the Respondents wrongly assert it was A&B's burden to prove injury in the first place. Poc. Br. at 17-18.[16] A&B did not have an obligation to "show that it requires the entire decreed amount," instead it was the juniors' burden to provide a defense that A&B cannot beneficially use that amount.[17] *Moe, supra; Josslyn, supra.*

Despite the erroneous standard advocated by the Respondents, A&B did show that its landowners can beneficially use the decreed quantity of water (0.88 miner's inch per acre).[18] Contrary to the arguments about surrounding water users, A&B's decreed rate of diversion compares favorably to the average well pumping capacity for private wells in Water District 130, 0.89 miner's inch per acre (40% with a capacity over 0.85 miner's inch per acre). R. 1963 & 1970. Moreover, the standard rate of diversion for irrigation under Idaho law is 1 miner's inch per acre. *See* Idaho Code § 42-202(6). Accordingly, even under the flipped standard advocated

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[16] The Respondents' citations to CM Rules 20.03 and 40.03 discuss "reasonable use" are misplaced. IGWA Br. at 25; Poc. Br. at 23-24. Based upon the evidence in the record, A&B's diversions are reasonable. R. 3102. Therefore, the Director cannot rely on these "hortatory" provisions to reduce A&B's diversion rate in administration. Likewise, this case is not about A&B trying to avoid paying to improve its system. Poc. Br. at 23-24. A&B has spent millions of dollars in rectification efforts. R. 835-35. IGWA's assertion that this is only about money, is wrong. IGWA Br. at 10 (citing testimony of Department employee Tim Luke).

[17] Moreover, Idaho law does not hold seniors to a bare minimum while juniors are free to use their full decreed rights. Such an argument flips the well-established burdens and presumptions under the prior appropriation doctrine and should be rejected by the Court.

[18] *See, e.g.*, Tr. Vol. IV, pp. 815-16 (Mr. Eames testifying that he can beneficially use more than 0.75 miner's inches per acre and that the delivery rate is critical for his irrigation operations and water-sensitive crops); Tr. Vol. V, pp. 888-89 & 893, lns. 2-13 (Mr. Adamms testifying that he needs the decreed rate of delivery and can beneficially use even more than what is decreed under A&B's water right #36-2080); Tr. Vol. V, p. 956; lns. 9-14, p. 957, lns. 5-13; p. 960, lns. 13-25; p. 961, lns. 1-6, 13-16 (Mr. Kostka testifying that he could use the decreed rate of delivery per acre). Mr. Temple also explained that when A&B rectifies a well system, the District seeks to provide between .85 and .90 miner's inch per acre because "that is what they [A&B's landowners] need to meet their crop requirements." Tr. Vol. III, p. 552, ln. 20 – p. 553, ln. 9.

by the Respondents, A&B demonstrated a need to beneficially use 0.88 miner's inches per acre.

In attempting to justify the Director's actions, it is quite telling that the Respondents focus their arguments away from A&B's decree. The Respondents rely upon A&B's internal standard of 0.75 inches as the "well rectification criteria". IDWR Br. at 37-38; Poc. Br. at 17.[19] According to the Hearing Officer, "0.75 is consistent with the policy of rectification adopted by A&B. It is unlikely rectification would be promoted at a level below the amount necessary for crop production." R. 3110. The Hearing Officer recognized that this "is not a desirable amount," but affirmed the Director's decision that quantity was "adequate." R. 3110. The Department further claims that A&B is not water short due to a "post-hoc" MERTIC analysis performed by its staff.[20] IDWR Br. at 39-40. Finally, the Respondents argue that the so-called "adequate" water supply is sufficient because other ground water users in the area of A&B use less water to raise their crops. IDWR Br. at 40; IGWA Br. at 29-31; R. 3110.

These arguments miss the point. The Director was asked to determine the extent of material injury to *A&B's* senior water right. That *decreed* water right authorizes a diversion rate of 0.88 inches per acre, a quantity that A&B's landowners need and can beneficially use, *supra*,

[19] Pocatello accuses A&B of altering its injury theory at hearing to demand 0.88 inches instead of 0.75 inches. Poc. Br. at 17, n.11. The Hearing Officer properly saw through this baseless argument. R. 3102.

[20] The use of an "after-the-fact" evaluation like METRIC does not substitute for water right administration necessary prior to and during the irrigation season. At hearing, Mr. Kramber admitted that his analysis is not something that can be used in advance of or as real-time basis during an irrigation season. *See* Tr. Vol. VI, pp. 1128-29. Mr. Kramber further admitted that his analysis only looked at three days during the irrigation season and that it did not evaluate the amount of water delivered under A&B's water right or the amount of water available in each well. *See id.*; pp. 1130-31.

n.18.[21] In fact, A&B was able to divert more than 0.75 inches per acre for 30 years (with some wells producing more than the decreed 0.88 inches per acre). R. 3102 & 3108; Ex. 200 at 3-8.[22]

Until 1993, the year before A&B initially made its call, A&B was able to divert approximately 25,000 acre-feet more per year under its water right. Ex. 409. Since the 1960's, A&B's diversions have dropped from a high of 225,000 acre-feet to a low of 150,000 acre feet. As explained to the Hearing Officer, a portion of this decline is caused by out-of-priority ground water diversions. Ex. 200 at 5-3 to 5-4. Importantly, none of the Respondents addressed this testimony. Rather, they spend much of their briefing discussing other factors, not related to the decree, that contribute to the declining water supply – i.e. less than optimal conditions in the southwest area and increased efficiencies across the plain, IDWR Br. at 28-37; IGWA Br. at 29-31 & 33-36. A&B does not demand administration based on these other factors.[23] The Respondents cannot hide behind these other factors to avoid administration for the depletions caused by out-of-priority diversions. R. 3088-89 (CMR 10.14 defines "material injury" as the "hindrance to or impact upon the exercise of a water right caused by the use of water by another person").

The fact that A&B does not place wells on its rectification list until their production falls to 0.75 inches per acre does not diminish the validity or binding nature of its decree. As explained by A&B's Manager Dan Temple at hearing, A&B does not have the capability or time

[21] Pocatello tries to downplay A&B's landowner testimony by asserting that the 0.88 inch per acre is simply a preference, but that 0.75 is "adequate." Poc. Br. at 19. Yet, A&B diverted more than 0.75 inches for more than 30 years, R. 3103, that average diversions have reduced by more than 25,000 acre feet per year, Ex.409, and that junior ground water diversions contribute to these depletions, Ex. 200 at 5-3 to 5-4. A&B's landowners have testified that they need and can beneficially use the water. *Supra*, n.18.

[22] A&B is not physically limited to only delivering 0.75 miner's inch per acre across the project. Tr. Vol. III, p. 540, lns. 16-25, p. 541, lns. 1-4. The Department agrees. Tr. Vol. IX, p. 1843, lns. 12-25 (Sean Vincent); Tr. Vol. VI, p. 1264, lns. 14-25, p. 1265, lns. 1-7 (Tim Luke). The Hearing Officer agreed. R. 3103 & 3108. Pocatello's citation to its own witnesses' testimony does not refute this fact. Poc. Br. at 5.

[23] As such, IGWA's and Pocatello's attempts to twist A&B's position to a "depletion equals injury" argument are wholly without merit. IGWA Br. at 24; Poc. Br. at 17. This "catch phrase" defensive scheme to A&B's appeal does nothing to respond to the unchallenged testimony that junior ground water depletions contribute to the depletions in the aquifer affecting A&B's senior water right. Ex. 200 at 5-3 to 5-4.

on an annual basis to rectify every well that falls below a 0.88 miner's inch per acre criteria. *See* Tr. Vol. III, pp. 558-59; Vol. IV, pp. 755-56. Finally, when a well is rectified, A&B seeks to bring the well back to a diversion capacity of 0.85 to 0.90 inches per acre, further evidence of the need for the decreed diversion rate. Tr. Vol. III, p. 552, ln. 20 – p. 553, ln. 9.

Notably, the evidence demonstrates that there are water short wells throughout A&B's system, not just in one particular area. Ex. 415 & 416. Furthermore, the fact that a crop has been or can be grown with 0.75 miner's inches per acre (obviously depending upon crop type, climatic conditions, and other factors) does not define a new standard to replace that provided by a water user's *decree*. Idaho water law does not hold a senior water user to the "bare minimum" for purposes of administration, particularly where junior users are not held to the same standard. *Caldwell v. Twin Falls Salmon River Land & Water Co.*, 225 F. 584, 596 (D. Idaho 1915).[24] Furthermore, the claim that other water users can raise a crop with less water does not mean that A&B's decreed amount is not needed or cannot be beneficially used. The Director has no authority to reduce A&B's water right so that others may use water under their junior rights. Such a "riparian doctrine" method of administration, or "minimum amount necessary", violates Idaho's law of prior appropriation and has been rejected by the Idaho Supreme Court on several occasions. *See Drake v. Earhart*, 2 Idaho 750 (1890); *Kirk v. Bartholomew*, 3 Idaho 367, 370-71 (1892); *Silkey v. Tiegs*, 51 Idaho 344, 353 (1931).

The Respondents argue that since other water users have developed smaller water rights the Director was justified in imposing a 15% reduction in A&B's *decreed* diversion rate for administrative purposes. This argument is not compelling. Indeed, there is no end to such an

[24] Pocatello asks the Court to disregard this holding, arguing that the case is about appropriation and not administration. Poc. Br. at 25. Yet, the Court specifically recognized that at times, "the settler may not ... be able to use the maximum of his available right" and that there is "no consideration of public policy opposed to the exercise of prudence which is expected of men in other vocations in providing a margin of safety to cover contingencies." 225 F. at 95. As such, "economy of use is not synonymous with minimum use." *Id.* at 596.

argument, as there will always be another farmer who may be able to use less water. *See* Tr. P. Vol. V at 1067, ln. 20 (Mr. Deeg testifying that "utilize(s) about .41 inches per acre"). The question, therefore, is what *A&B's* decree allows and what *A&B's* landowners need and can beneficially use. *Supra* n.18.[25]

Unable to refute this evidence, the Respondents claim that the irrigation of enlargement acres has contributed to A&B's lack of water. IGWA Br. at 32. This argument is misleading. First, there are separate water rights appurtenant to the enlargement acres.[26] R. 1112. Second, an individual landowner's irrigation of enlargement acres does not affect A&B's obligation to deliver the decreed quantity of water to the decreed number of acres under A&B's original water right 36-2080. *See* Ex. 139. Moreover, A&B does not deliver extra water to cover the enlargement acres when enlargement rights are curtailed during the irrigation season. *See* Tr. Vol. III, p. 526.

### B. The Director's "Failure of the Project" Standard of Administration Must be Rejected.

The Respondents argue that the Director did not create a "failure of the project" standard. IDWR Br. at 43-44; Poc. Br. at 20-21. Yet, when viewed in light of the fact that the Director denied A&B's call because A&B's *average* diversions have not fallen below 0.75 inches per acre, the Respondents' claims prove false.[27] Indeed, the evidence demonstrates that there are a

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[25] Pocatello argues that "the farmer witnesses," including A&B's witnesses, testified that "0.75 miner's inches/acre was adequate." Poc. Br. at 16, n.10. However, the cited testimony confirms that the available water is "generally not enough," Tr. P. Vol. V, at 1018, lns. 18-21, and that landowners have suffered reduced production due to short water supplies, Tr. P. Vol. V, at 907, lns. 1-5; *see also supra* n.18.

[26] A&B cannot prevent a landowner from irrigating "enlargement acres" that are covered by sprinkler systems such as a pivot on "high spots" in the middle of a field. *See* Tr. Vol. II, p. 325-28. As explained at hearing, A&B does not deliver anymore water to those acres. *See* Tr. Vol. III, pp. 525-26; Vol. IV, pp. 741-42.

[27] A&B does not desire to argue semantics on this issue. It does not matter if the Director calls his standard "failure of the project" or "inability to maintain average diversions across the project." *See* Poc. Br. at 24 (calling the Director's standard a "project-wide analysis"). In the end, the Director denied A&B's call because A&B's ***average*** diversions across the *entire project* had not fall below 0.75 inches per acre. The end result of this faulty analysis is the same regardless of the name applied.

significant number of wells throughout the A&B project that cannot divert 0.88 inches per acre (as decreed) and many that cannot even divert the Director's reduce quantity of 0.75 inches per acre. Exs. 415 & 416. This evidence was ignored because the *average* diversions have not fallen below 0.75 inches per acre.

By cutting A&B's decreed diversion rate to 0.75 miner's inch per acre, the Director failed to give the decree the proper presumptions and improperly shifted the burden contrary to Idaho law. Although the Respondents argue no "failure of the project" standard was used, the Director's failure to find injury, even to the wells that produce less than 0.75 miner's inch per acre demonstrates otherwise.

## III. A&B's Water Right was Developed, Licensed and Decreed with 177 Separate Wells (Points of Diversion) – Interconnection is not a Prerequisite for Administration.

It is undisputed that the A&B project and its senior water right was designed, developed, licensed and decreed with *separate* points of diversion, R. 3092-93, comprising 130 *separate* well systems throughout the project, Vol. III, p. 467, lns. 3-7; p. 473, ln. 14 – p. 474, ln. 7; R. 3092-93. A&B cannot divert water from any well that it chooses and deliver that water to any location several miles across the project. The Hearing Officer properly observed that the "theoretical right to apply water from any pump to any land must be tempered by the reality of the system as it was designed and utilized and partially decreed." R. 3095. Despite this reality, the Director conditioned administration of junior ground water rights upon A&B's "obligation" to take additional steps to "move water within" the project. R. 3096. Despite the fact that A&B employs an efficient means of diversion and has used appropriate methods to drill wells throughout the project, R.3088, 3097-98, the Director refused administration on the theory A&B should interconnect wells and go to the expense of moving water around on the project.

Ironically, the Respondents, who ignore the decree in arguing that A&B is not entitled to 0.88 miner's inch per acre, now urge the Court to accept the elements of the decree in support of their "interconnection" theory. *See* IDWR Br. at 41, Poc. Br. at 21 (accusing A&B of objecting "to analyzing the injury claims by reference to its decree"). They argue that since the decree authorizes a total of 188 points of diversion A&B must interconnect its well systems before administration of juniors is permitted.[28] IDWR Br. at 41-43; IGWA Br. at 23, 26-27 & 30; Poc. Br. at 27-28.[29] They argue that, since the decree does not limit the quantity of water that can be diverted from any particular well, A&B should just divert additional water from the more productive wells to make up for shortages at the underachieving or abandoned wells. *Id.* Finally, they argue that A&B must "employ hydrogeologic consultants."[30] IGWA Br. at 34. Importantly, none of the Respondents identify any condition on A&B's decree that prevents administration unless the system is interconnected. Ex. 139. Indeed, there is no such requirement in the law.

Rather, the water right was developed, then reviewed and licensed *by the Department*, then recommended to the SRBA Court *by the Department* and subsequently decreed with separate well systems that provided more than 0.75 inches per acre for 30 years. R. 3101. The Department cannot now change its position and demand that A&B interconnect the system it found to be "reasonable" at the time of licensing and when the right was recommended to the SRBA District Court.

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[28] The Respondents also misrepresent the record on existing "interconnected" wells, by suggesting A&B performed this work. Poc. Br. 27. The few interconnected well systems on the A&B project were part of the original construction by Reclamation. Tr. Vol. III, pp. 477-78, 629-30.

[29] Pocatello accuses A&B of misrepresenting the Director's Order because "the Hearing Officer did not find that A&B must interconnect its 177 wells." Poc. Br. at 28. Yet, the Hearing Officer concluded that A&B has "an obligation" to "move water within the system before it can seek curtailment or compensation." R. 3096.

[30] Contrary to this assertion the facts show that A&B has extensive experience with the aquifer around the project. A&B reviews well logs, has hired consultants, and employs experienced well drillers in siting and locating wells across the project. Tr. Vol. III, p. 545-548.

In an about-face from the Department's prior position, the Respondents assert that A&B should "extend its diversion works laterally within its project boundaries," "move its wells"[31] and "drill additional lower yield wells." IDWR Br. at 42-43; IGWA Br. at 30 (A&B must "add additional points of diversion," and "replace abandoned or low yielding wells"). They cling to a few selected phrases from historic letters between the Department and Bureau of Reclamation and assert that "flexibility," IDWR Br. at 42 & 43; IGWA Br. at 27-28; Poc. Br. at 28-29, demands that A&B spend more money, abandon more wells and continue to suffer shortages until some future point that the Department decides a call is appropriate. They overlook the fact that moving water between presently disconnected well systems would only reduce the amount of water provided to all landowners served by those wells during allotment. Tr. Vol. IV, p. 703, ln. 16 – p. 704, ln. 7. At hearing A&B's manager testified that more productive wells today are likely to be on the list of underachieving wells the next year due to continued ground water level declines. *Id.*, p. 794-95. In other words, pumping a well harder to move it miles across the project to a water short well does not solve the overall water shortage to the District.[32] The Respondents' demand that A&B further injure its own landowners in an attempt to make up for the shortfall until the Department decides administration will be allowed cannot be tolerated.[33] This is not the proper standard for administration of injured senior water rights in Idaho.

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[31] As another example of the impact of this Court's decision on the scope of the GWA, *supra* Part I, the Department asserts that the GWA "requires that A&B not only drill its wells deeper, but also move its wells within its place of use in pursuit of additional yield." IDWR Br. at 43. In other words, the Department admits that it will require a senior ground water user to spend significant amounts of money moving wells and reconfiguring its diversion structure before it will entertain a call for administration. Fortunately, the GWA does not apply to A&B's senior water right, *supra* Part I, and therefore, such an onerous result will not occur here.

[32] *See* R. 1911.

[33] IGWA's argument regarding "partial interconnection" is similarly unpersuasive. No evidence was submitted to support any engineering analysis or feasibility study for this proposed concept. R. 3096. In addition, in response to IGWA's proposal A&B's manager Dan Temple explained that it would not be practical or feasible to move only 0.02 cfs (water to supply a garden hose) miles across a large irrigation project like A&B. Tr. Vol. IV, pp. 715, 719, lns. 5-18 (

To support its "flexibility" argument, the Department cites to CM Rule 42.01.g, which grants the Director authority to determine the "extent to which the requirements ... could be met with the user's ***existing facilities*** and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices." IDWR Br. at 42 (emphasis added). Yet, the Department ignores the inability of the "existing facilities" to meet A&B's demands within the decree and asserts that A&B must "move its wells" or drill additional wells. *Id.* at 43. Drilling new wells or constructing new infrastructure to interconnect wells does not qualify as "existing facilities" within the plain terms of the CM Rules.[34] Moreover, this argument contradicts the Department's own expert Dr. Ralston's conclusion that the original design, siting, and construction of the wells on the A&B project was reasonable. R. 3091. The Department's reliance on this provision is erroneous and therefore should be rejected.[35]

Pocatello wrongly analogizes the facts in this case to *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), wherein the Supreme Court held that a water user was not entitled to the "current" of the Snake River as part of his water right. Poc. Br. at 29. The facts in *Schodde* are inapplicable here. This case is not about an alleged right to the "current" of a river to turn a waterwheel, it involves injury and shortage to A&B's decreed water right. Moreover, A&B has invested millions in its diversion system to access water – deepening, rectifying and abandoning wells – despite the interference caused by junior rights. R. 834-35. *Schodde* does not refute the fact that A&B employs a reasonable means of diversion to divert and convey water to its landowners as found by the Hearing Officer. R. 3088, 3091, 3098. It is simply inapplicable here.

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[34] A&B's manager testified at hearing that drilling a new well recently cost the District approximately $64,000. Tr. Vol. III, p. 563, lns. 19-23.

[35] Likewise, there is not basis in the record to imply that fulfilling A&B's call will result in A&B commanding "the entirety of large volumes of water." IDWR Br. at 42.

Finally, the Respondents wrongly assert that A&B cannot be materially injured because it only uses 177 of the 188 authorized points of diversion under its water right. IDWR Br. at 43; IGWA Br. at 26; Poc. Br. at 21. The Respondents ignore the evidence in the record that of those 11 unused wells A&B was forced to abandon 6 and that the other 5 are former "injection wells" that have not been modified for production. R. 3081; Tr. Vol. III, p. 467. Dan Temple explained that only one of the former injection wells had been converted to a production well and that the process of converting these wells involved new drilling and the development of new infrastructure. R. Vol. III, p. 610-11. In other words, the 11 unused wells are not currently capable of producing water as suggested by the Respondents. Although they are included as authorized "points of diversion" on the water right, the former "injection wells" have never been used or determined to be capable as production wells and the abandoned wells do not contain sufficient water.

In summary, the Respondents provide no justification for the Director's conclusion that A&B must interconnect additional wells as a condition to administration of junior rights. There is no substantial evidence to support the finding that even a "partial interconnection" would alleviate water shortage on the A&B project without causing further injury to other landowners. Since Idaho's prior appropriation doctrine does not require a senior water right holder to reconstruct a diversion or distribution system that has been found to be "reasonable," the Director's finding on this issue should be set aside.

## IV. There is No Substantial Evidence to Support the Director's Finding that A&B Has Not Exceeded a "Reasonable Ground Water Pumping Level."

Since the Ground Water Act does not apply here, A&B's senior water right should be protected to its historical pumping levels. *See, supra* Part I. However, should the Court decide that the GWA is more expansive that its plain language indicates, then it is clear the Director

erred in concluding A&B has not exceeded a "reasonable pumping level" since no pumping level was ever set by the Director in this case.

Despite no evidence in the record to support the Director's conclusion, IDWR desperately attempts to justify the conclusion now by relying upon a description of the hydrogeology of the aquifer under the A&B Project. IDWR Br. 28-37. IDWR claims the "importance of the hydrogeologic environment cannot be overstated in the Director's determination that reasonable pumping levels have not been exceeded," yet neither the Hearing Officer's recommended order nor the Director's *Final Order* on this issue rely upon the "hydrogeologic setting." Instead, the Hearing Officer claimed A&B had not been required to exceed "reasonable pumping levels" because its "efforts at rectification have been largely successful." R. 3113. Despite the finding, even the Hearing Officer recommended that no objective level had been set and that a "process to establish reasonable pumping levels should be undertaken."[36] R. 3114. The Director claimed that "A&B's poorest performing wells cannot *per se* be the measure of whether reasonable pumping levels have been exceeded; that the ESPA is not being mined; and that A&B has not been required to exceed reasonable pumping levels." R. 3321-22. Again, no objective "reasonable pumping level" was identified to judge this conclusion, and the Director did not rely upon the hydrogeology of the aquifer under the A&B Project to justify this decision.

Despite the unsupported conclusions in the *Final Order*, IDWR argues that the hydrogeology of the southwestern area of the A&B project is the reason A&B has not exceeded a

[36] Despite this recommendation made nearly a year ago IDWR has failed to establish any reasonable pumping levels for the ESPA. IDWR's own expert admitted at hearing that more water is leaving the aquifer around A&B (through pumping and underground movement) than is entering the aquifer through recharge. Tr. Vol. VII, p. 1520, ln. 18 – p. 1521, ln. 19. Both Dr. Ralston and Dr. Wylie also confirmed that ground water levels would likely continue to decline in the future. Tr. Vol. I, p. 127, lns. 14-20; Vol. VII, p. 1420, lns. 7-25, p. 1421, lns. 1-5, 17-25, p. 1422, lns. 1-6. Despite these predicted declines IDWR refuses to set a reasonable pumping level to protect the aquifer and senior water rights.

"reasonable pumping level". The problem here, however, is that no such justification was ever provided by the Director or Department staff during the hearing. *See A&B Opening Br.* at Part V. The attorney general's post hoc rationalizations on appeal cannot take the place of the "reasoned statement" that was never provided by the Director in his *Final Order*. *Galli v. Idaho County*, 146 Idaho 155, 159 (2008); *see also*, Idaho Code § 67-5248(1)(a); *cf. Plummer v. City of Fruitland*, 140 Idaho 1, 7 (2003) ("Such after the fact rationalization fails to provide the justification required before a city can avoid the competitive bidding requirements").

Moreover, it is in the southwest area of the project where A&B has drilled to depths over 700 feet without accessing additional water supplies which forced the District to abandon further deepening.[37] Tr. Vol. III, p. 566; *see also*, Ex. 200 at 3-10, 3-12, Ex. 208. Declining ground water levels in the southwest area has forced A&B to deepen 27 wells and abandon seven wells. Ex. 200 at 3-6; Ex. 200N. Ground water levels have dropped so significantly that these wells no longer function effectively and the water level is now in an unproductive low-permeability zone of the aquifer. Ex. 200 at 3-7; Tr. Vol. III, p. 543-44, 565-66.

Despite IDWR's argument that A&B must "extend its diversion works" to some unknown "reasonable" depth, its own experts and the Hearing Officer concluded that it was unlikely A&B could access additional water in the southwest area by drilling deeper. R. 1098, Tr. Vol. I, p. 155, ln. 21 – p. 156, ln. 2. Accordingly, IDWR's arguments about the hydrogeology in the southwest area actually support a finding that A&B has exceeded "reasonable pumping levels" and that the Director's conclusion on this issue is in error.

In addition, the Department's assertion that the ESPA is not being "mined" does not support the Director's unidentified "reasonable pumping level." IDWR Br. at 28. Notably, the

[37] Prior to the effects of junior ground water pumping, all wells in the southwest area of Unit B could produce sufficient water and had 5 to 10 feet of ground water over the top of the pump bowls during operation, and most of the wells had 20 feet of water. R. 1802; Ex. 200 3-16 to 3-23.

Director ignored the testimony of his own expert on this issue where Dr. Wylie recognized that less water is entering the aquifer around A&B than is leaving it, by pumping or otherwise.[38] Tr. Vol. VII, p. 1520, ln. 18 – p. 1521, ln. 19. In addition, the facts plainly show that ground water levels are declining at A&B and across the ESPA. R. 1803; Ex. 200 at 5-3 to 5-5 & Fig. 5-7 & 5-8; Exs. 225 & 200N. If, as the Department suggests, recharge was exceeding discharge from the aquifer then ground water levels would be increasing, not in a state of continued decline. This is simply not the case on the ESPA, particularly around A&B.

Finally, the Department misrepresents the recent order where the Director established a "reasonable pumping level." IDWR Br. at 37. Contrary to the Department's argument, the reason the "reasonable pumping level" was established in the *J.R. Cascade, Inc.* case was because the wells could not be deepened beyond 190 feet to obtain more water. *See Final Order in J.R. Cascade Inc.* at 5 (10/22/09) ("it is unlikely that Moore can drill his well deeper to find additional water").[39] The same situation exists in the southwest area of A&B, as recognized by even IDWR's own experts, drilling deeper will not produce more water.

Recognizing the lack of substantial evidence to support the Director's decision on this issue, Pocatello attempts to divert the Court away from the record and the facts in this case by arguing a "reasonable pumping level" is unnecessary until "injury" is found. Poc. Br. 29-31. Assuming for argument's sake that the GWA does apply to A&B's senior water right, then A&B is protected from interference by juniors at a "reasonable pumping level". In other words, once that level is established, the costs and obligation to drill deeper to access water under a senior water right rests with junior water users, not A&B. Under the plain language of the statute the

[38] The Hearing Officer confirmed Dr. Wylie's finding in the recommended order. R. 3087.
[39] The decision can be found at IDWR's website at www.idwer.idaho.gov/WaterManagement/Orders.default.htm.

Director's obligation to define a "reasonable pumping level" is not predicated upon a finding of injury to a particular water right, or a finding of "no water." Instead, the law provides:

> Prior appropriators of ground 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.

Idaho Code § 42-226.

The conditions advocated by Pocatello are not included in the statute. In fact, the circular reasoning offered by Pocatello would defeat administration of ground water rights altogether where a Director could always avoid setting a "reasonable pumping level" just by refusing to find injury to a calling senior right. While the law protects seniors to a "reasonable pumping level," if no level is ever set then how could the Director ever find injury to the senior in order to protect a certain ground water level? Even the Hearing Officer rejected this theory by noting "[t]here should be some predictability as to how far down a pumper must go and when the protection of reasonable pumping levels has been reached." R. 3114. Under Pocatello's misguided logic, there will never be any certainty or predictability in defining a "reasonable pumping level" to protect senior rights. Again, the law does not support this theory.

The Respondents cannot have it both ways with respect to a "reasonable pumping level" in this case. If the GWA applies to A&B's senior water right, as the Respondents argue it does, then the Director must set a defined "reasonable pumping level" in the aquifer and protect A&B's right to that level. The Director cannot, as was done in this case, refuse to set a level and then simultaneously conclude A&B has not exceeded a "reasonable pumping level" without any supporting evidence. *Galli v. Idaho County*, 146 Idaho at 159 ("A decision is clearly erroneous when it is not supported by substantial and competent evidence"). Such a decision avoids meaningful judicial review and violates Idaho's APA. *See Evans v. Board of Comm. of Cassia*

*Cty.*, 137 Idaho 428, 431 (2002) (A court is not required to defer to an agency's decision that is not supported by the record).

Finally, contrary to the Director's finding, the burden to establish a "reasonable pumping level," or prove that one has been exceeded, is not A&B's. R. 3321. Such a finding clearly violates the well-established burdens of proof and the presumptions afforded a decreed senior water right. *See AFRD #2*, 143 Idaho 877-78. As the holder of a senior ground water right, it is not A&B's duty to prove a "reasonable pumping level." While the Director has a duty to establish a pumping level under the law, he cannot shift that burden to A&B and then claim, without any basis, that A&B has not exceeded that pumping level without disclosing that that level is. Such a position violates Idaho's prior appropriation doctrine for the benefit of affected junior water right holders. In summary, the Director clearly erred by concluding that A&B had not exceeded a "reasonable pumping level" in this case. The decision should be set aside accordingly.

## V. The Director Erred in Refusing to Designate the ESPA as a Ground Water Management Area.

Ground water levels continue to decline both around A&B and throughout the ESPA.[40] Ex. 200 at 5-3 to 5-5, Figures 5-7 & 5-8; Ex. 225 & Ex. 200N. These declines have resulted in reduced spring flows and tributary reach gains to the Snake River, injuring senior surface water rights. Ex. 200 at 5-5 to 5-6. Continuing ground water declines around A&B have also forced other water right holders to deepen their wells (about 160 private wells deepened after 1970 in the vicinity of A&B). Ex. 200 at 3-18. As to the southwest area of A&B, IDWR's own expert and the Hearing Officer both found that "there is less water coming into A&B than there is leaving the area around A&B." R. 3087, Tr. Vol. VII, p. 1520, ln. 18 – p. 1521, ln. 19.

[40] Despite the argument, the 1992 ESPA moratorium has not halted ground water level declines. IDWR Br. at 44.

Despite the above facts and the state of the aquifer, the Respondents continue to argue that a statutory scheme established to govern the *administration* of water rights is synonymous with the separate and unique statutory scheme established to *protect* declining aquifers. IDWR Br. at 44-45; IGWA Br. at 40-42;[41] *yet compare* Idaho Code § 42-604 *with* Idaho Code § 42-223b. The Department doesn't even address the fact that these statutory schemes are separate and demand individual attention. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 208 P.3d 289, 292 (2009) (An agency must give effect to all words and provisions of a statute so that none will be void, superfluous, or redundant). Instead, the Department makes brief and unsupported conclusory statements about the perceived effects of applying the GMWA statutes. IDWR Br. at 44-45.

The Department argues that a GWMA would add "an unnecessary administrative layer" and would "limit the Director's authority to protect A&B's senior-priority ground water right." *Id.* at 45. IDWR misconstrues the statutes and the purposes served by the administration scheme and the ground water management provision. Just because an aquifer or a portion thereof is designated as a GWMA that designation does not prevent the Director or the Watermasters from fulfilling their duties to administer water rights within organized water districts. Idaho Code § 42-607. Moreover, the September 1st notice provision for certain junior ground water rights in a GWMA does not replace the administration of rights in a water district. Instead, it provides a separate mechanism to protect a declining aquifer where:

> The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1

[41] The Ground Water Users admit as much when they assert that "the Director can manage water ***distribution*** through a water district as well as he could through a GWMA." IGWA Br. at 41 (emphasis added). As stated above and in A&B's *Opening Brief*, a GWMA does more than just address administration – it protects the source.

> and shall be effective for the growing season during the year following the date the order is given.

Idaho Code § 42-233b.

By its plain terms the above provision does not apply to the administration of particular water rights, i.e. a calling senior right. Instead, the Director is authorized to protect an aquifer by ordering certain right holders, "on time priority basis," to "cease or reduce withdrawal of water" until the Director determines there is "sufficient ground water." The statute does not require complete curtailment of a right, as is the case in administration, since the Director can order right holders to "reduce" their withdrawals. In light of the undisputed continued declines in ground water levels, the shortages experienced by A&B, and the fact that more water is discharged and leaving the aquifer than is entering it in the area around A&B, the Director erred in not designating a GWMA.

Similar to IDWR, IGWA's arguments do not justify the Director's failure to designate a GWMA in this case. IGWA asserts that the statutory criteria for a GWMA were not met in this case, yet the facts show otherwise. Again, the continued trend of declining aquifer levels, the fact A&B has been forced to abandon several irrigation wells, and the fact less water is entering the aquifer around A&B than is leaving it, all show that the ESPA does not have a "reasonably safe supply for irrigation."

IGWA further asserts that a Ground Water District can protect the aquifer just like a GWMA. IGWA Br. at 41-42. Yet, the statutes cited only give Ground Water Districts the authority to protect "the interests of the ***district's members***" and does not give it any authority to protect the health of the aquifer as a whole. *Id. quoting* Idaho Code § 42-5224(11) & (17) (emphasis added). Moreover, the powers and authorities granted to a Ground Water District do not replace the obligations and duties of the Director to protect the resource. Finally, contrary to

IGWA's claim, it is clear the existing districts have not taken any steps to protect the ESPA or portions of the aquifer around A&B since the facts show that about 50% of the members of the Magic Valley Ground Water District exceed their authorized diversion rate. R. 1967.

In summary, the Director's refusal to designate a GWMA in this case is not supported by substantial evidence in this case. The role of a water district or a ground water district does not replace the Director's duty to protect ground water resources including the ESPA and his decision should be set aside accordingly.

## VI. Conclusions in the Director's Final Order Violate Idaho Code § 67-5248(1)(a).

Although the Director rejected A&B's exceptions to the recommended order and refused to adopt his prior interpretations of the "State Constitution, Idaho statutes and the Conjunctive Management Rules" made in other water right administration cases, he provided no "reasoned statement" to justify these conclusions. R. 3322. Such an unsupported decision plainly violates Idaho's APA. Idaho Code § 67-5248(1)(a).

The Respondents offer no persuasive justification for the Director's error. Instead, IDWR argues the Director's failure was to "promote economy" and that "many of the legal principles established by the Hearing Officer in the prior delivery calls were directly 'repeated' and accepted by the Director." IDWR Br. at 46. IDWR fails to identify specific references to the record that would explain why the Director denied A&B's exceptions. Moreover, IDWR's argument that the Director accepted the Hearing Officer's legal conclusions runs counter to the Director's own statement in his *Final Order*. R. 3321-22.

IGWA argues the various orders in the record contain "sufficient reasoned statements and references to the underlying facts and evidence" without identifying the reasons why the Director denied A&B's exceptions or why his legal conclusions in other cases should not apply for

purposes of A&B's call. IGWA Br. at 43. Again, the Director's bare conclusions on these matters do not provide the "reasoned statement" required by Idaho's APA. A blanket reference to the record is insufficient and the Court should reject the argument accordingly.

## CONCLUSION

The Director's *Final Order* is not supported by the law or facts and should be reversed. Rather than protecting A&B's senior water right from interfering junior diversions, the Director has forced A&B to continue to self-mitigate by rectifying, deepening and abandoning wells until the Director decides that administration is appropriate. The law does not allow for such administration. As such, the *Final Order* should be reversed.

**DATED** this 22nd day of February, 2010.

**BARKER ROSHOLT & SIMPSON LLP**

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*Attorneys for Petitioner A&B Irrigation District*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of February, 2010, I served true and correct copies of *A&B Irrigation District's Reply Brief* upon the following by U.S. Mail, postage prepaid, and electronic mail:

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Paul L. Arrington

# Attachment
# A

improve its domestic water supply. The association does not have its application complete, but the request was put on the agenda to raise the question to the Board if this is the type of loan the Board would be interested in approving.

The Board felt that once the department determined an application to be complete and meet the criteria of the rules and regulations, the Board would consider each application individually and on its own merit.

Agenda Item No. 13. Director's Report.

A. Kenneth Dunn, Director, reported that the department had made available for the Board a copy of the Idaho Supreme Court decision on Parker v. Wallentine. This decision will be one of the items discussed at the groundwater seminar and it is extremely important in terms of future groundwater development in Idaho. In essence, the decision states that a domestic well drilled prior to 1978 and an irrigation well drilled prior to 1953 as part of its water right has a guaranteed water level. If a water right holder with a subsequent filing interferes with the water levels, he may be subject to damages. Prior to this decision, it was an accepted definition of interference by the engineers and attorneys in the water area that interference was talking about the cone of depression. The results of this decision have a potential for being disasterous for groundwater development in the state. Department staff will draft some language for legislation to bring to the Board for approval that will address the problem of retroactive provisions for reasonable pumping levels for all groundwater development.

The department has been trying to obtain primacy from Environmental Protection Agency (EPA) for the Underground Injection Control Program for the past three years. The department had submitted an application and had a general agreement with Region 10, Seattle and Washington D.C. On September 13, 1982, the department received a letter from the assistant administrator of EPA saying there were still some problems. The main problem is that Idaho's penalty provision for the waste disposal and injection program needs to be increased to comply with the federal government. The federal government charges $10,000 per day for any violation. Three years ago when the state started working on the program, the state established the penalty provisions as an unchangeable. The legislature said it would not pass an increased penalty provision and Mr. Dunn will not ask them to change it. The department is sending a letter to EPA stating that the department has been working three years on the program and thought an agreement had been made, but is accepting the September 13 letter as a lack of approval of the state's application. This gives EPA 90 days to implement its own program in the State of Idaho. Hopefully, this letter will give EPA an incentive to approve the state's program.

The department has received a letter from the Seattle Corps of Engineers notifying the state the Corps is in the process of initiating a feasibility study at the request of the Benewah County Commissioners, St. Maries Chamber of Commerce and Washington Water Power Company for a 385 foot high dam on the St. Maries River. The department provided a copy of the letter to the Board members

# Attachment B

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

| | | |
|---|---|---|
| IN THE MATTER OF APPLICATIONS TO APPROPRIATE WATER NOS. 63-32089 AND 63-32090 IN THE NAME OF THE CITY OF EAGLE | ) ) ) ) ) | **AMENDED PRELIMINARY ORDER** |

On January 19, 2005, the City of Eagle ("Eagle") filed two applications for permit to appropriate water, numbered in the files of the Idaho Department of Water Resources ("IDWR" or "Department") as 63-32089 and 63-32090. IDWR published notice of the applications in the Idaho Statesman on April 21 and 28, 2005. The applications were protested by the following individuals: Roy Barnett, Tim Cheney, City of Star, Dean and Jan Combe, Michael Dixon/Hoot Nanney Farms, Bill Flack, Bob and Elsie Hanson, Michael Heath, Charles Howarth, Corrin Hutton, Norma Mares, Michael McCollum, Charles Meissner, Jr., LeRoy and Billie Mellies, Robyn and Del Morton, Frank and Elaine Mosman, Joseph, Lynn, and Mike Moyle, Eugene Muller, Tony and Brenda O'Neil, Bryan and Marie Pecht, Dana and Viki Purdy, Sam and Kari Rosti, Ronald Schreiner, Star Sewer and Water District, Jerry and Mary Taylor, United Water Idaho, and Ralph and Barbara Wilder.

IDWR conducted a prehearing conference on July 28, 2005. At the prehearing conference, Scott Reeser hand-delivered a letter to IDWR. In the letter, Scott Reeser asked to intervene in the contested case.

On September 13, 2005, IDWR issued an order granting Scott Reeser's petition to intervene.

Several protestants failed to appear at the prehearing conference. IDWR mailed a notice of default to the non-appearing protestants. The following non-appearing protestants who failed to show good cause for non-appearance were dismissed as parties: Roy Barnett, Bryan and Marie Pecht, Del and Robin Morton, Tony and Brenda O'Neil, and Frank and Elaine Mosman.

The hearing officer conducted a second prehearing conference on October 18, 2005. At the prehearing conference, Eagle proposed to drill two wells for conducting a pump test. Eagle proposed to pump water from one of the wells and measure water levels in other wells in the vicinity of the pumped well to determine the impacts of pumping.

On December 22, 2005, IDWR approved two drilling permits to construct wells for the pump test.

On January 17, 2006, IDWR received a "notice of protest" from Bud R. Roundtree. IDWR interpreted the document as a petition to intervene.

## CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

> In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. Idaho Code § 42-111 defines the phrase "domestic purposes." Stockwater use of up to 13,000 gallons a day is recognized as use of water for domestic purposes.

4. In 1951, the Idaho Legislature enacted legislation known as the Ground Water Act. In 1953, the Idaho Legislature amended the Ground Water Act. The 1953 amendment recognized that ground water rights would be administered according to the prior appropriation doctrine, but that prior water rights should not prevent the full economic development of the ground water resources of the State of Idaho, and that ground water appropriators would be required to pump from a "reasonable pumping level" established by the Department. In 1978, the Idaho Legislature amended the Ground Water Act again. The 1978 amendment expressly stated that domestic water rights are subject to the reasonable economic pumping level standard.

5. In *Parker v Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Idaho Supreme Court determined that a later in time appropriator should be enjoined from pumping ground water for irrigation that almost immediately dried up a domestic well located nearby. The court held that the water right for the domestic well was perfected prior to the irrigation water right and before the reasonable pumping level standard was applied to domestic beneficial uses, and that the domestic water right holder was entitled to the protection of the ground water pumping level existing prior to pumping by the junior appropriator. The court held that the injunction was not permanent, and could be absolved upon full compensation by the junior appropriator for the cost of deepening the senior appropriator's well and payment of the costs of additional equipment and energy.

6. The Idaho Supreme Court stated in *Parker v. Wallentine*:

> Under the doctrine of prior appropriation, because Parker's domestic well was drilled prior to Wallentine's irrigation well, Parker has a vested right to use the water for his domestic well. That right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water.

103 Idaho 506, 512 (1982) (emphasis supplied). The Idaho Supreme Court went on to note that:

> Parker will not be deprived of any right to his use if water can be obtained for Parker by changing the method or means of diversion. The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator, Wallentine, so that Parker will not suffer any monetary loss. Thus, upon a proper showing by Wallentine that there is adequate water available for both he and Parker, it is within the inherent equitable powers of the court upon a proper showing and in accordance with the views herein expressed to enter a decree which fully protects Parker and yet allows for the maximum development of the water resources of the State.

103 Idaho at 514.

7. Under *Parker*, if (1) pumping of ground water by junior ground water appropriators causes declines in pumping water levels in wells of the senior water right holders because of local well interference, and (2) the water rights held by the senior water right holders bear priority dates earlier than 1953, or 1978 for domestic water rights, the holders of the senior water rights are, at a minimum, entitled to compensation for the increased costs of diverting ground water caused by the declines in ground water levels.

8. The extent to which *Parker* provides protection to the protestants' water rights depends on proof of injury and similarities to the facts of the *Parker* case.

9. In *Parker*, the owner of the domestic well was unable to divert water from the domestic well within minutes of when the junior priority right holder began pumping ground water. The proof of the lowered water table caused by pumping from the irrigation well that resulted in inability to pump water from the domestic well was established through testimony about the effects of the initial pumping from the Wallentine well and by a pump test conducted by the parties and the Department.

10. In an administrative hearing for an application to appropriate water, the applicant bears the burden of proving that the proposed use of water will not injure other water rights. If a protestant seeks the protection of *Parker* that would insulate the protestant from the reasonable pumping level standard of the Ground Water Act, however, the protestant must come forward

with evidence that: (1) the protestant is the holder of a water right that is not subject to the reasonable pumping standard of the Ground Water Act, and (2) the protestant's diversion equipment and facilities are capable of diverting the protestant's water right at the ground water levels at or about the time the application is being considered. Once the protestant comes forward with the information, the applicant ultimately bears the burden of proving that the proposed use of water will not injure the protestant under the *Parker* standard. If there are additional facts necessary to establish the extent of injury that can most equitably be provided by the party seeking *Parker* protection, the party seeking Parker protection may be required to provide the factual information.

11. Pumping of 2.23 cfs will not cause water level declines in area wells below a level that is reasonable.

12. The following describes how *Parker* applies to each of the active protestants.

**Moyles**

13. The priority dates of water rights held by Moyle predate the 1953 amendment of the Ground Water Act subjecting subsequent appropriations of water to the reasonable pumping level standard. Moyles are entitled to protection of their historical water levels in the four wells recorded by their water rights and in one other domestic well associated with a home owned by Joseph and Lynn Moyle. Evidence presented established that Moyles were receiving water under artesian pressure at the time Eagle filed its applications and during the summer preceding the hearing.

14. In order to avail themselves of *Parker* protection, on or before August 1, 2008, Moyles must test each of their wells to determine the actual reduction in delivered flow for their beneficial uses resulting from a pressure head reduction of four feet, or a direct pressure reduction of approximately 1.7 pounds per square inch. Moyles must notify Eagle when the tests will be conducted, must submit a plan for conducting the test to Eagle and the Department, and Moyles must allow Eagle to participate in the tests.

15. Following the results of the tests, Eagle must (a) be ready and able to supply the tested loss of water flow in the Moyle wells for uses of ground water from the five Moyle wells entitled to *Parker* protection at no cost to Moyles except the cost for incidental electricity that adds pressure to the water supply for domestic and commercial uses; or (b) acquire all or a portion of the water rights from Moyles corresponding to the tested loss of flow, possibly through condemnation. Following a determination of the loss of water flow resulting from a reduction in pressure, if Eagle decides not to acquire all or a portion of Moyle's water rights, Eagle must complete one of the following: (a) physically connect Moyle's water delivery system to Eagle's municipal water system; or (b) with Moyles' consent, place the necessary pumps in the Moyle wells and/or delivery system, supply the power for the pumps, construct or install any other physical features, including running power to the wells, and at the same time, insure the water supply to Moyles' beneficial uses is not interrupted; or (c) drill new wells that will supply the water to Moyles' beneficial uses and construct and install all necessary features. Eagle must

well must be constructed so that water levels in each of the three aquifers can be independently measured.

Prior to diversion of water under this right, the right holder shall develop and the Department must approve, a monitoring, recording, and reporting plan for the observation wells.

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

The wells constructed at the points of diversion shall be constructed in accordance with the rules of the Idaho Department of Water Resources regarding well construction standards and measurement of diversions and the rules of the Department of Environmental Quality for Public Drinking Water Systems, IDAPA 58.01.08.

IT IS FURTHER ORDERED that the request for oral argument filed by Muller and Howarth is **Denied**.

Dated this 3rd day of October, 2007.

**Gary Spackman**
Hearing Officer

# Attachment C

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

| | | |
|---|---|---|
| IN THE MATTER OF APPLICATION FOR AMENDMENT OF PERMIT NO. 63-12448 IN THE NAME OF THE CITY OF EAGLE | ) ) ) ) | **FINAL ORDER** |

This matter is before the Director of the Department of Water Resources ("Director" or "Department" or "IDWR") as the result of an application to amend water right permit no. 63-12448 filed by the City of Eagle ("Eagle" or "Applicant"). The application seeks to add two new points of diversion from ground water to the permit.

## STANDARD FOR DECISION

Applications to amend existing permits are considered pursuant to Idaho Code § 42-211. Idaho Code § 42-211 provides in part:

> Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment upon forms furnished by the department of water resources together with the statutory fee for filing and recording the same, and upon receipt thereof it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder. The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny the same. Notice of partial approval or conditions or denial of an amendment shall be forwarded to the applicant by certified mail and shall be subject to judicial review as hereafter provided. The priority of the right established pursuant to a permit which has been amended under these provisions shall date from the date of the original application for permit, provided the permit holder has complied with other provisions of this act.

An applicant bears the burden of proof for the factors the Department must consider under Idaho Code § 42-211. The Director should also determine whether an amendment of a water right permit is in the local public interest. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

The Director, having examined the application and the written record and having reviewed the testimony of the parties, makes the following findings of fact and conclusions of law.

well no. 3, operation of Eagle well no. 4 would also minimally affect ground water levels in the wells of Weldon Fisher and Eagle Water Company.

## CONCLUSIONS OF LAW

Based on the Findings of Fact and applicable Idaho law, the Director makes the following Conclusions of Law.

### Effect on Other Water Rights

1. The Director must determine whether the proposed amendment of permit no. 63-12448 will adversely affect other water rights.

2. In 1951, the Idaho Legislature enacted legislation known as the Ground Water Act. In 1953, the Idaho Legislature amended the Ground Water Act. The 1953 Amendment recognized that:

> while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels ... .

Idaho Code § 42-226.

In 1978, the Idaho Legislature again amended the Ground Water Act. The 1978 Amendment expressly stated that domestic water rights are subject to the reasonable economic pumping level standard.

3. In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Idaho Supreme Court determined that a later in time appropriator should be enjoined from withdrawing ground water for irrigation that almost immediately caused the ground water level to drop below a domestic well located nearby. The Court held that the water right for the domestic well was perfected prior to the irrigation water right and before the reasonable pumping level standard was applied to domestic beneficial uses, and that the domestic water right holder was entitled to the protection of the ground water pumping level existing prior to ground water withdrawals by the junior appropriator. The Court held that the injunction was not permanent, and could be absolved upon full compensation by the junior appropriator for the cost of deepening the senior appropriator's well and payment of the costs of additional equipment and energy.

4. The Idaho Supreme Court stated in *Parker v. Wallentine*:

> Under the doctrine of prior appropriation, because Parker's domestic well was drilled prior to Wallentine's irrigation well, Parker has a vested right to use the water for his domestic well. That right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is

> allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water.

103 Idaho 506, 512 (1982) (emphasis added).

The Idaho Supreme Court went on to note that:

> Parker will not be deprived of any right to his use if water can be obtained for Parker by changing the method or means of diversion. The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator, Wallentine, so that Parker will not suffer any monetary loss. Thus, upon a proper showing by Wallentine that there is adequate water available for both he and Parker, it is within the inherent equitable powers of the court upon a proper showing and in accordance with the views herein expressed to enter a decree which fully protects Parker and yet allows for the maximum development of the water resources of the State.

103 Idaho at 514.

5. Under the principles of *Parker*, if (1) diversion of ground water by junior ground water appropriators causes declines in ground water levels in wells of senior water right holders because of local well interference, and (2) the water rights held by the senior water right holders bear priority dates earlier than 1951, or 1978 for domestic water rights, the holders of the senior water rights are, at a minimum, entitled to compensation for the increased costs of diverting ground water caused by the declines in ground water levels.

6. The extent to which *Parker* provides protection to the Chase Estate water rights depends on proof of injury and factual similarities to the facts of the *Parker* case.

7. In *Parker*, the owner of the domestic well was unable to divert water from the domestic well within minutes of when the junior priority right holder began withdrawing ground water. The proof of the lowered ground water level caused by diversion of ground water from the irrigation well that resulted in inability to divert ground water from the domestic well was established through testimony about the effects of the initial withdrawals from the Wallentine well and by a pump test conducted by the parties and the Department.

8. In an administrative hearing for an application to amend a permit, the applicant bears the burden of proving that the proposed change will not injure other water rights. If a protestant seeks the protection of *Parker* from application of the reasonable pumping level standard of the Ground Water Act, however, the protestant must come forward with evidence that: (1) the protestant is the holder of a water right that is not subject to the Ground Water Act, and (2) the protestant's diversion works are capable of diverting the water right at the ground water levels existing at or about the time the application is considered. Once the protestant comes forward with the information, the applicant ultimately bears the burden of proving that the amendment will not injure the protestant under the *Parker* standard.

9. Withdrawing ground water from the proposed Eagle well no. 3 is expected to cause a decline in ground water levels in the Chase dairy-domestic well below the level at which

(9) Rights no. 63-11413 and no. 63-12017 also have authorized points of diversion from the wells in the SWSW (Eagle well no. 1) and NWSW (Eagle well no. 2), Section 3, T4N, R1E, and the wells in the SWSW (Eagle well no. 3) and NESE (Eagle well no. 4), Section 4, T4N, R1E, B.M.

(10) Rights no. 63-11413, no. 63-12017, and no. 63-12448, when combined, shall not exceed a total maximum diversion rate of 3.25 cfs and a total annual maximum diversion volume of 1,455 acre-feet.

(11) The place of use for rights no. 63-11413, no. 63-12017, and no. 63-12448 is within the service area of the City of Eagle municipal water supply system as provided for under Idaho law.

(12) The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

IT IS FURTHER ORDERED that pursuant to the Department's Rule of Procedure 740, this is a final order and subject to review by reconsideration or appeal.

DATED this 22nd day of September 2005.

KARL J. DREHER
Director

# Attachment D

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

| | | |
|---|---|---|
| IN THE MATTER OF APPLICATIONS TO APPROPRIATE WATER NOS. 63-32089 AND 63-32090 IN THE NAME OF THE CITY OF EAGLE | ) | **FINAL ORDER** |

On January 19, 2005, the City of Eagle ("Eagle") filed two applications for permits to appropriate water, numbered in the files of the Idaho Department of Water Resources ("IDWR" or "Department") as 63-32089 and 63-32090. IDWR published notice of the applications in the Idaho Statesman on April 21 and 28, 2005. The applications were protested by the following individuals: Roy Barnett; Tim Cheney; City of Star; Dean and Jan Combe; Michael Dixon/Hoot Nanney Farms; Bill Flack; Bob and Elsie Hanson; Michael Heath; Charles Howarth; Corrin Hutton; Norma Mares; Michael McCollum; Charles Meissner, Jr.; LeRoy and Billie Mellies; Robyn and Del Morton; Frank and Elaine Mosman; Joseph, Lynn, and Mike Moyle; Eugene Muller; Tony and Brenda O'Neil; Bryan and Marie Pecht; Dana and Viki Purdy; Sam and Kari Rosti; Ronald Schreiner; Star Sewer and Water District; Jerry and Mary Taylor; United Water Idaho; and Ralph and Barbara Wilder.

IDWR conducted a prehearing conference on July 28, 2005. At the prehearing conference, Scott Reeser hand-delivered a letter to IDWR. In the letter, Scott Reeser asked to intervene in the contested case.

On September 13, 2005, IDWR issued an order granting Scott Reeser's petition to intervene.

Several protestants failed to appear at the prehearing conference. IDWR mailed a notice of default to the non-appearing protestants. The following non-appearing protestants who failed to show good cause for non-appearance were dismissed as parties: Roy Barnett, Bryan and Marie Pecht, Del and Robin Morton, Tony and Brenda O'Neil, and Frank and Elaine Mosman.

The hearing officer conducted a second prehearing conference on October 18, 2005. At the prehearing conference, Eagle proposed to drill two wells for conducting a pump test. Eagle proposed to pump water from one of the wells and measure water levels in other wells in the vicinity of the pumped well to determine the impacts of pumping.

On December 22, 2005, IDWR approved two drilling permits to construct wells for the pump test.

On January 17, 2006, IDWR received a "notice of protest" from Bud R. Roundtree. IDWR interpreted the document as a petition to intervene.

10. In 1987, the Idaho Legislature amended the Ground Water Act to address concerns involving the administration of rights to the use of low temperature geothermal ground water resources, most specifically to restrict its use for non-heating purposes by the addition of Idaho Code § 42-233. 1987 Idaho Sess. Laws, ch. 347, § 3, p. 741. The 1987 amendments also added the following language to Idaho Code § 42-226 relating to reasonable pumping levels: "In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resources to the extent that he determines such protection is in the public interest." The 1987 act also amended what originally was the last sentence of Section 1 of the 1951 Ground Water Act, later codified as Idaho Code § 42-226, to read as follows:

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

1987 Idaho Sess. Laws, ch. 347, § 1, at 743.

11. The effect of this latter amendment to Idaho Code § 42-226 under the 1987 act was to make the new restriction on the use of geothermal rights prospective only. Thus, all pre-1987 geothermal water rights for non-heating purposes remain unaffected by the restriction in the 1987 act. The 1987 amendment to Idaho Code § 42-226 does not have the effect of exempting all pre-1951 ground water rights from administration under the Ground Water Act. Section 4 of the 1951 Ground Water Act, codified at Idaho Code § 42-229, continues to provide that, "the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act."

12. The constitutional and common law principles upon which Idaho Code § 42-226 is based, date from the early part of the twentieth century. Art. 15, §§ 1, 3, and 7, Idaho Const.; Idaho Code § 42-101; *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) ("It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes."); *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900) ("It is the policy of the law to prevent wasting of water.").

13. In *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), the Idaho Supreme Court noted::

> . . . [T]he original version of what is now I.C. § 42-226 was enacted in 1951. 1951 Idaho Sess.Laws, ch. 200, § 1, p. 423. *Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute.* Therefore, we fail to see how I.C. § 42-226 in any way affects the director's duty to distribute water to

> 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.

*Id.* at 584, 513 P.2d at 636.

21. Under the Ground Water Act as affirmed by *Baker*, full economic development of Idaho's underground water resources is required. Unless a water right is specifically excepted under Idaho Code § 42-229, holders of senior ground water rights are protected if junior ground water diversions exceed the reasonably anticipated rate of future natural recharge, or if pumping levels become unreasonable.[2]

22. In this case, there is no evidence that diversions have exceeded the reasonably anticipated rate of future natural recharge or that pumping levels are unreasonable.

23. In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Idaho Supreme Court determined that a later in time appropriator should be enjoined from pumping ground water for irrigation that almost immediately dried up a domestic well located nearby. The Court held that the water right for the domestic well was perfected prior to the irrigation water right and before the reasonable pumping level standard was applied to domestic uses by the Legislature in 1978, and that the domestic water right holder was entitled to the protection of the ground water pumping level existing prior to pumping by the junior appropriator. The Court held that the injunction was not permanent, and could be absolved upon compensation by the junior appropriator for the expenses incurred by the senior appropriator.

24. In *Parker*, the Court stated:

> Under the doctrine of prior appropriation, because Parker's domestic well was drilled prior to Wallentine's irrigation well, Parker has a vested right to use the water for his domestic well. That right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water. *See Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933).

*Id.* at 512, 650 P.2d at 654 (emphasis supplied). The Court went on to note that:

> Parker will not be deprived of any right to his use if water can be obtained for Parker by changing the method or means of diversion. The expense of changing

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[2] In the contested administrative case *In the Matter of Application to Amend Permit to Appropriate Water no. 63-12448 in the Name of the City of Eagle* (Sept. 22, 2005), IDWR determined that two water rights authorizing non-domestic uses were entitled to protection of historic pumping levels under *Parker*. This order determines that water rights authorizing non-domestic uses that bear priority dates earlier than the 1953 amendment to the ground water act do not create a right to protection of historic ground water levels. The holding in this order supercedes the previous holding in the decision for application to amend permit no. 63-12448.

> the method or means of diversion, however, must be paid by the subsequent appropriator, Wallentine, so that Parker will not suffer any monetary loss. Thus, upon a proper showing by Wallentine that there is adequate water available for both he and Parker, it is within the inherent equitable powers of the court upon a proper showing and in accordance with the views herein expressed to enter a decree which fully protects Parker and yet allows for the maximum development of the water resources of the State.

*Id.* at 514, 650 P.2d at 656.

25. Under *Parker*, if (1) pumping of ground water by junior ground water appropriators causes declines in pumping water levels in the wells of holders of senior-priority domestic water rights because of local well interference, and (2) the water rights held by the senior domestic water right holders bear priority dates earlier than 1978, the holders of the senior domestic water rights are entitled to compensation for the increased costs of diverting ground water caused by the declines in ground water levels. The maintenance of historic pumping levels that was discussed in *Noh* and relied upon in *Parker* to protect senior-priority domestic ground water rights cannot be extended to non-excepted ground water rights, such as those for irrigation. Idaho Code § 42-229. As stated in *Baker*, *Noh* has been superseded by the Ground Water Act: "We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the Ground Water Act." 95 Idaho 581, 513 P.2d at 633. "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." *Id.* at 584, 513 P.2d at 636.

26. The extent to which *Parker* provides protection to the protestants' water rights depends on proof of injury and similarities to the facts of the *Parker* case.

27. In *Parker*, the owner of the domestic well was unable to divert water from the domestic well within minutes of when the junior priority right holder began pumping ground water. The proof of the lowered water table caused by pumping from the irrigation well that resulted in inability to pump water from the domestic well was established through testimony about the effects of the initial pumping from the Wallentine well and by a pump test conducted by the parties and the Department.

28. In an administrative hearing for an application to appropriate water, the applicant bears the burden of proving that the proposed use of water will not injure other water rights. If a protestant seeks the protection of *Parker* that would insulate the protestant from the reasonable pumping level standard of the Ground Water Act, however, the protestant must come forward with evidence that: (1) the protestant is the holder of a domestic water right that is not subject to the reasonable pumping standard of the Ground Water Act, and (2) the protestant's diversion equipment and facilities are capable of diverting the protestant's water right at the ground water levels at or about the time the application is being considered. Once the protestant comes forward with the information, the applicant ultimately bears the burden of proving that the

tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

The wells constructed at the points of diversion shall be constructed in accordance with the rules of the Idaho Department of Water Resources regarding well construction standards and measurement of diversions and the rules of the Department of Environmental Quality for Public Drinking Water Systems, IDAPA 58.01.08.

IT IS FURTHER ORDERED that the request for oral argument filed by Eagle is **Denied**.

Dated this 26th day of February, 2008.

**David R. Tuthill, Jr.**
**Director**