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

A & B IRRIGATION DISTRICT, Petitioner, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources, Respondents.	)	Case No. CV 2009-647 **IDWR RESPONDENTS' BRIEF**
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	)	

IDWR RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
Gary Spackman, Interim Director

Honorable Eric J. Wildman, Presiding

Lawrence G. Wasden
ATTORNEY GENERAL
Clive J. Strong
Deputy Attorney General
Chief, Natural Resources Division

Phillip J. Rassier, ISB # 1750
Chris M. Bromley, ISB# 6530
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0098
(208) 287-4800

Attorneys for Respondents Idaho Department of Water Resources and Gary Spackman, Interim Director

BARKER ROSHOLT & SIMPSON
Attorneys for Petitioners A&B Irrig. Dist.

RACINE OLSON NYE BUDGE & BAILEY
Attorneys for Respondent Idaho Ground Water Appropriators, Inc.

WHITE JANKOWSKI
Attorneys for Respondent City of Pocatello

RIGBY ANDRUS & RIGBY
Attorneys for Respondent Freemont-Madison Irrig. Dist.

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I. STATEMENT OF THE CASE

This is a proceeding for judicial review of a final agency order issued on June 30, 2009 by David R. Tuthill, Jr., Director of the Idaho Department of Water Resources (collectively referred to herein as "Department"). Following the retirement of Director Tuthill on June 30, 2009, Gary Spackman was appointed Interim Director. Petitioner, the A&B Irrigation District ("A&B"), contends that the Department erred in finding that it was not materially injured, thereby denying its delivery call.

II. ISSUES PRESENTED ON JUDICIAL REVIEW

In this brief, the Department will respond to the issues on review raised by A&B as identified in its Opening Brief.

III. FACTUAL AND PROCEDURAL BACKGROUND

1. The A&B Project and the A&B Delivery Call

The Minidoka Northside Pumping Division project was initiated by the United States Bureau of Reclamation ("USBR") to develop irrigable land on the southern portion of the eastern Snake River Plain in south-central Idaho. R. at 1111. The project was constructed in the 1950s and irrigates approximately 78,000 acres of land. *Id.* Of those acres, approximately 15,000 are designated Unit A (surface water) and approximately 62,604 are designated Unit B (ground water). *Id.* The first irrigation well was pumped in the spring of 1949. *Id.* By the mid-1960s, 177 deep wells provided the source of irrigation water for approximately 62,604 acres of farm land. *Id.* "Unit B was the first large-scale ground-water pumping project on the Snake Plain." Ex. 113 at 3. Operation of the project was transferred from the USBR to A&B in 1966 under a

repayment agreement. R. 3080. "The project was begun about the water level peak period and was completed during a water level decline period." Ex. 113 at 28. By 1965, approximately half of the project's wells had been deepened. R. at 1132.

On July 26, 1994, A&B filed a petition for delivery call, which sought administration of junior-priority ground water rights diverting from the ESPA, as well as designation of the Eastern Snake Plain Aquifer ("ESPA") as a ground water management area ("GWMA"). R. at 1105. Administration of junior-priority ground water rights was sought because "of the lowering of the ground water pumping level within the E[SPA] . . . [thereby] reducing the diversion of A&B . . . to nine hundred seventy-four (974) cfs . . . ." R. at 1106. On May 1, 1995, A&B, the Department, and other participants entered into an agreement that stayed the petition for delivery call until such time as a Motion to Proceed was filed with the Director.[1] On March 16, 2007, A&B filed a Motion to Proceed seeking administration of junior-priority ground water rights, as well as the designation of the ESPA as a GWMA. *Id.*

2. The Department's Response

Following a September 20, 2007 status conference on the Motion to Proceed, the Director notified the parties that the Director was lifting the 1995 stay governing A&B's 1994 delivery call, and stated that the call would proceed "under IDWR's Rules for Conjunctive Management of Surface and Ground Water Resources." R. at 1106. Gerald F. Schroeder was appointed by

[1] In its Opening Brief, A&B states that, contrary to the terms of the stay, the Department "failed to make any effort to 'develop a plan for management of the ESPA.'" *Opening Brief* at 7. While this issue is not a part of this proceeding on review, the Department responded to this same argument in A&B's writ of mandamus action in Minidoka County Case No. CV-07-665. In its *Brief in Support of Motion to Dismiss Petitioner's Alternative Writ of Mandate and the Verified Petition for Peremptory Writ of Mandate* ("Brief in Support") filed September 21, 2007, the Department presented the court with the numerous steps it has taken to address administration of the ESPA. *See Brief in Support* at 8-15 (completion of hydrogeologic studies of the ESPA; adoption of the CM Rules; creation of water measurement districts; creation of ground water management areas; filing of Director's reports in the Snake River Basin Adjudication in basins that overlay the ESPA; creation of water districts; and long-term planning through the Comprehensive Aquifer Management Plan).

the Director to serve as independent hearing officer ("Hearing Officer") and to "conduct a hearing and issue a recommended order pursuant to IDAPA Rule 37.01.01.410 and -413 and the provisions of chapter 52, title 67, Idaho Code." *Id.*

On October 29, 2007, the Honorable John K. Butler, in and for the County of Minidoka, ordered the Director "to make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules . . . ." *Id.* On November 16, 2007, the Director issued an *Order Requesting Information*, in accordance with Rule 42, requesting that A&B provide the Department with specifically identified information the Director deemed relevant in making his determination of material injury. R. at 1107. On January 29, 2008, following receipt of information from A&B, the Director issued an order finding that A&B was not materially injured within the meaning of Rule 42. R. at 1151. In addition, the Director denied A&B's request to designate the ESPA as a GWMA. *Id.*

3. Hearing on the A&B Delivery Call

On December 3, 2008, the hearing on the A&B delivery call commenced. R. at 3078. Participating at the hearing were A&B, the Department, the City of Pocatello, the Freemont-Madison Irrigation District, and the Idaho Ground Water Appropriators, Inc. R. at 3080-82. The hearing ran for a period of approximately eleven days in which testimony and evidence were presented by the participating parties. The Department provided witnesses to explain the background of the Department's action and the administrative record relied upon by the Director in entering the orders at issue and to assist the parties and the Hearing Officer.

4. The Hearing Officer's Recommended Order and the Director's Final Order

On March 27, 2009, the Hearing Officer issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* ("Recommended Order"). R. at 3078. The Hearing Officer determined, among other things: that the inherent hydrogeologic setting in which A&B is located hinders its ability to pump water; that A&B has sufficient water with which to irrigate crops; that A&B's pumping levels are reasonable; that A&B was not materially injured; and that the Director properly denied A&B's request to designate the ESPA as a GWMA.

On April 10, 2009, A&B filed a petition for reconsideration of the Recommended Order. R. at 3123. On May 29, 2009, the Hearing Officer issued his *Order Granting in Part and Denying in Part A&B's Petition for Reconsideration* ("Response Order"). R. at 3231. In the Response Order, the Hearing Officer corrected two procedural errors: that A&B's Motion to Proceed was filed in 2007, not 2008; and that the Committee of Nine was not a party to the case. R. at 3319. The Hearing Officer made one editorial change to remove the term "catastrophic loss" from paragraph 5, page 26, of his Recommended Order. *Id.* In his subsequent *Response to A&B's Petition for Clarification*, the Hearing Officer clarified the term "total project failure" and explained his use of the term as a finding of fact. R. at 3262.

On June 30, 2009, the Director issued his *Final Order Regarding the A&B Irrigation District Delivery Call* ("Final Order"). R. at 3318. In the Final Order, the Director accepted all substantive recommendations of the Hearing Officer. In addition, based on the evidence presented, the Director further clarified the Hearing Officer's recommendation that A&B's pumping levels are reasonable. R. at 3320-21.

IV. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). "The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Urrutia v. Blaine County, ex rel. Bd. of Comm's,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

The court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron* at 417, 18 P.3d at 222.

V. ARGUMENT

In this case, the Court is called upon for the first time to review the Director's exercise of his authority to administer hydraulically connected ground water rights that divert from the Eastern Snake Plain Aquifer ("ESPA"). Pursuant to Idaho Code § 42-602, "The director of the department of water resources shall have discretion and control of the distribution of water from

all natural sources . . . in accordance with the prior appropriation doctrine." At the heart of this case is a dispute over whether the Director has properly applied the prior appropriation doctrine in the context of the delivery call filed by A&B.

The prior appropriation doctrine as established by Idaho law serves two core objectives: to provide security of right and to ensure the full utilization of the resource. Most of the time these objectives are compatible and the issue of administration is easily resolved based upon seniority of right. Occasionally, however, these core objectives come into tension with one another, as shown in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911). In that case the senior surface water user sought to preclude junior surface water users from damming the Snake River in order to protect the current of the river. Because enforcement of seniority would have resulted in the senior monopolizing the resource, the United States Supreme Court refused to enforce the senior priority.[2]

In the facial challenge to the conjunctive management rules, the Idaho Supreme Court recognized this tension and stated, "Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director." *American Falls Reservoir District No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 466 (2007)

The movement of ground water in the unconfined and geologically heterogeneous ESPA is complex. *Id.* at 877, 154 P.3d at 448. This complexity is particularly manifested in the administration of ground water rights. While a senior may complain that his or her pumping

[2] *See also Basey v. Gallagher*, 87 U.S. 670, 683 (1874) ("Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.")

levels have been impacted, junior ground water pumping is not the only action that can impact a senior. The inherent hydrogeologic setting in which the senior right holder is located may directly impact the senior's pumping levels. The senior's own pumping may also reduce his or her pumping levels or result in localized well interference. Drought and conversion from flood/furrow irrigation to sprinkler, as well as other irrigation efficiencies, have also reduced the amount of water that supplies the ESPA, which necessarily results in an impact to a senior's pumping level. While impact to the resource may be the result of a combination of these factors, the Director can only administer junior ground water rights to the extent that their impacts have injured senior right holders.

Recognizing that ground water levels are not static and desiring to promote full economic development of the State's ground water resources, the Idaho Legislature passed the Ground Water Act in 1951, applying it retroactively to all non-excepted ground water rights, such as A&B's irrigation right, 36-2080: "the administration of all rights to the use of ground water, whenever and however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act." Idaho Code § 42-229. In 1953, the legislature amended the Ground Water Act, stating that non-excepted ground water rights would be protected in the maintenance of reasonable pumping levels: "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block the full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels . . . ." Idaho Code § 42-226. This departure from the common law protection of historic pumping levels was deemed constitutional by the Idaho Supreme Court in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513

P.2d 627 (1973). *See also Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982) (excepted ground water rights remain protected in maintenance of historic pumping levels).

Under Idaho Code § 42-602, the Director is charged with the duty to administer ground water rights within water districts in accordance with the prior appropriation doctrine as established by Idaho law, which includes the directives in Idaho Code §§ 42-226, -229. Because of the complex nature of the hydraulic connection between ground water rights, the Director must use his professional judgment to determine whether and to what extent junior ground water rights are causing material injury to senior right holders.

1. A&B's September 9, 1948 Water Right Is Subject To the Ground Water Act's Reasonable Pumping Level Requirement

As its first issue, A&B asserts that the Director erred in his determination that A&B's water right, 36-2080, is subject to the reasonable pumping level requirement of Idaho's Ground Water Act ("Act"). Idaho Code §§ 42-226 *et seq.* R. at 1630-38; R. at 3322-23. A&B argues that because its water right predates the 1951 Ground Water Act, its right is protected in the maintenance of its historic pumping level. A&B's argument ignores not only the plain meaning of the Act, but also controlling case law.

A. The 1951 Ground Water Act Applies Retroactively to A&B's Non-Excepted Irrigation Right

A&B claims that, since its enactment, the Act has exempted all pre-1951 ground water rights from its requirements. *Opening Brief* at 17-18. A&B's argument relies solely on the last sentence of Section 1 of the Act for its position: "All rights to the use of ground water in this state however acquired before the effective date of this act are hereby <u>in all respects validated and confirmed</u>." 1951 Idaho Sess. Laws, ch. 200, § 1, p.423 (approved March 19, 1951)

(emphasis added). In this section of its argument, A&B ignores the remainder of the 1951 Act (particularly sections 2, 3, and 4), which make clear that its September 9, 1948 irrigation right, 36-2080, is subject to the requirements of the Act. "The rule that statutes *in pari material* should be construed together applies with peculiar force to statutes passed at the same session of the Legislature." *Peavy v. McCombs*, 26 Idaho 143, 149, 140 P. 965, 967 (1914) (emphasis added).

Section 4 of the Act states 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." 1951 Idaho Sess. Laws, ch. 200, § 4, p.424 (emphasis added). Sections 2 and 3, respectively, "excepted" wells for "domestic" and "drainage or recovery purposes" from the requirements of the Act. 1951 Idaho Sess. Laws, ch. 200, §§ 2-3, pp. 423-24. Notably, irrigation wells, like the right held by A&B, 36-2080, were not excepted from the Act.

Section 1 makes sense when read in the context of the Act. Prior to 1963, ground water could be appropriated without the requirement of a permit. *See* 1963 Idaho Sess. Laws, ch. 216, § 1, p. 624 (approved March 25, 1963) *currently codified as* Idaho Code § 42-229. Therefore, Section 1 ensured that a prior appropriator of ground water that had not perfected his or her right through a license would be entitled to maintain his or her use. This interpretation is consistent with statements made by R.P. Parry, during a presentation at the twenty-third annual Idaho State Bar meeting in McCall. Parry, "a leading authority on Idaho water law,"[3] who participated in drafting the Act, stated as follows:

> The next point we thought was fundamental in preparing any underground water bill was that assuredly we should not take any existing rights away from anyone. All presently existing rights should be confirmed and validated. There

[3] Douglas L. Grant, *Reasonable Groundwater Pumping Levels Under the Appropriation Doctrine: The Law and Underlying Economic Goals*, 21 Nat. Resources J. 1, 24 (1987).

> are many of them in Idaho of which there is no record. We thought 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.

R.P. Parry, *An Underground Water Code*, 23 Idaho State Bar Proceedings 19, 23 (1949).[4]

As explained by Parry, Section 1 does nothing more than "confirm[] and validate[]" that previously established rights would continue to be recognized as valid appropriations of water. Simply confirming that water rights acquired prior to the effective date of the Act remain valid and enforceable does not impute an exception from the statute.

A&B argues that the 1951 Act cannot be applied retroactively to its 1948 water right: "Since there is no 'expressly . . . declared' statement that the [Act] applies retroactively, it cannot be used to abrogate the common law protections afforded to pre-enactment ground water rights . . . ." *Opening Brief* at 20. In Section 4, the legislature used incontrovertible language to apply the requirements of the Act to all ground water rights, regardless of priority, unless specifically excepted (*see* sections 2 and 3). As explained by the Supreme Court, the legislature does not need to use the term "retroactive" for a statute to be retroactive:

> The defendants contend that to make chapter 58 apply to warrants issued before it went into effect would be to render it a retroactive or retrospective law. It is the rule that all statutes are to be considered as having only a prospective operation unless the purpose and intention of the Legislature to give them a retrospective effect is clear. 36 Cyc. 1205, c, and cases cited; Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873. This rule is embodied in section 3, Rev. Codes, which provides that "no part of these Revised Codes is retroactive, unless expressly so declared." We do not think, however, that this section means that the statute must use the words, "This statute is to be deemed retroactive." We think it is sufficient if the enacting words are such that the intention to make the law retroactive is clear. In other words, if the language clearly refers to the **past** as well as to the **future**, then the intent to make the law retroactive is expressly declared within the meaning of section 3, Rev. Codes.

Peavy at 151, 140 P. at 968 (emphasis added).

[4] For purposes of convenience, the cited material, which is part of the records of the Idaho State Bar, is attached at the end of the Department's brief.

Consistent with *Peavy*, Section 4 of the Act makes clear the intent of the legislature that all rights, no matter when or how they were "acquir**ed**" (here the legislature used the past participle of the verb), were to be governed by the act, as were all rights "**to be** acquired," (the legislature employed a future construction here), unless specifically excepted.

Where a statute is plain and unambiguous, courts must follow that meaning and neither add to the statute nor take away by judicial construction. *Rule Sales and Service, Inc. v. U.S. Bank Nat. Assoc.*, 133 Idaho 669, 672, 991 P.2d 857, 860 (2000). Had the legislature intended to exclude prior "acquired" rights from the provisions of the legislation, and only apply the provisions of the Act prospectively, surely Section 4 would have simply read "all rights to be acquired." Instead, the 1951 Act applies to water rights "whenever or however acquired, or to be acquired," a clear indication that the legislature intended to apply the provisions of the Act both prospectively and retroactively.

Under Idaho law, all sections of a statute must be construed together so as to determine the legislature's intent. *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). "In order to determine, however, the intention of the Legislature, it is necessary to consider and construe, together, all of the sections of the statutes applicable, and from all of the provisions determine what was really meant." *Lebrecht v. Union Indemnity Co.*, 53 Idaho 228, 234, 22P.2d 1066, 1068 (1933). "It is to be construed that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony by interpretation." *State v. Barnes*, 133 Idaho 378, 382, 987 P.2d 290, 294 (1999).

In construing the 1951 Act as a whole, its sections make sense: Section 1 confirms the validity of A&B's September 9, 1948 water right, 36-2080; Section 4 makes clear that the provisions of the 1951 Act apply to A&B; and sections 2 and 3 make clear that A&B's irrigation right is not excepted from the requirements of the 1951 Act.

B. The 1953 Amendments to the Ground Water Act Protect A&B's Non-Excepted Irrigation Right in the Maintenance of Reasonable Pumping Levels

In 1953, the Idaho Legislature amended the Act. Most notably, the legislature amended Section 1 by adding the following italicized language:

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

1953 Idaho Sess. Laws, ch. 182, § 1, p. 278 (approved March 12, 1953).

The amendment to Section 1 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, and that ground water appropriators would be required to pump from a "reasonable pumping level" "as may be established" by the Director. The reasonable pumping level provision applied to "all rights to the use of ground water, whenever or however acquired or to be acquired . . . unless specifically excepted" from the Act. *See* 1951 Idaho Sess. Laws, ch. 200, § 4, p.424 *now codified as* Idaho

Code § 42-229 (emphasis added). As in 1951, the 1953 amendments did not except irrigation water rights from the Act's requirements. *See* 1951 Idaho Sess. Laws, ch. 200, §§ 2-3, pp. 423-24 *now codified as* Idaho Code §§ 42-227 (domestic wells) and -228 (drainage or recovery wells).

In its Opening Brief regarding the 1953 amendments, A&B again ignores sections 2, 3, and 4; instead relying upon the last sentence of Section 1 and the newly added Section 27 (uncodified). *Opening Brief* at 18-19. A&B argues that Section 27 expresses the legislature's intent to exclude A&B's pre-enactment, non-excepted irrigation right from administration

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

1953 Idaho Sess. Laws, ch. 182, § 27, p. 291 (emphasis added).

According to the plain language of Section 27, the Act applies to "acquisition," "acquire[ment]," or "perfect[ion]" of "ground water" rights. Acquisition and perfection of a water right (i.e. appropriation) are not synonymous with how the right will be subsequently administered by the Director. At the time of the 1953 amendment, a ground water right could be acquired and perfected by placing the water to beneficial use (the constitutional method) or by filing an application for permit with the Department. The 1951 Act and its 1953 amendments, however, added additional procedural provisions regarding the acquisition and perfection of ground water rights. *See* 1953 Idaho Sess. Laws, ch. 182, §§ 6 (duty of the Director to "control the appropriation and use of ground water"); 7 ("application to appropriate ground water"); 8 ("examination of application"); 9 ("notice of application"); 10 ("protest and hearing" of application); and 11 ("time for completion of work—permit—cancellation of permit"). Section 27 was added to simply ensure that the provisions of the Act relating to "acquisition" of ground

water rights would not be applicable to "proceedings commenced prior to . . . 1951." *See* Parry, 23 Idaho State Bar Proceedings at 23.

As of the 1953 amendments, Section 4 remained the only provision that spoke directly to "administration" of ground water rights. *See* 1951 Idaho Sess. Laws, ch. 200, § 4, p. 424 *now codified as* Idaho Code § 42-229. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 313, 208 P.3d 289, 295 (2009) ("the more specific statute controls"). Unless a ground water right was "specifically excepted" from Section 4 (i.e. domestic wells), it was subject to Section 1 and its requirement that, for purposes of administration, it was subject to "reasonable ground water pumping levels," so as to ensure "full economic development" of the State's ground water resources. 1953 Idaho Sess. Laws, ch. 182, § 1, p. 278. Therefore, under the 1953 amendments to the Act, A&B's pre-enactment, non-excepted irrigation right was subject to the reasonable pumping level requirement in Section 1.

C. The 1987 Amendments Regarding Low-Temperature Geothermal Wells do not Alter the Ground Water Act's Administrative Requirements for Non-Excepted Ground Water Rights

In 1987, the Idaho Legislature amended the 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 (approved April 6, 1987). The 1987 amendments also added the following language to Idaho Code § 42-226 relating to reasonable pumping levels and amended what originally was the last sentence of Section 1 of the 1951 Act, 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.

A&B argues that this amendment further supports its position that its pre-enactment, non-excepted irrigation water right is exempt from the Act. In making this argument, A&B ignores the purpose of the 1987 amendment, which was to make the new restriction on the use of geothermal rights prospective only. All pre-1987 geothermal ground water rights for non-heating purposes, however, 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 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." Despite numerous chances to amend Section 4, the legislature has chosen not to do so, thereby evidencing its intent that only a very narrow classification of ground water rights be excepted from the Act's reasonable pumping level requirement.

D. Judicial Interpretation of the Ground Water Act Confirms that A&B's Non-Excepted Irrigation Right is Protected in the Maintenance of its Reasonable Pumping Level

(1) *Baker v. Ore-Ida Foods, Inc.*

Contrary to assertions by A&B, the Idaho Supreme Court has already ruled that the reasonable pumping level provision from Section 1 applies to all non-excepted ground water rights, regardless of priority. *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973). In *Baker*, senior ground water users who held six irrigation water rights with priority dates of 1948, 1950, and 1959, brought an action in district court to enjoin junior ground water irrigators from pumping until such time as the senior wells resumed normal production. *Id.* at 577, 513

P.2d at 629.[5] During trial, it was established that ground water pumping by juniors and seniors resulted in withdrawals from the aquifer in excess of the annual rate of recharge, thereby mining the aquifer. *Id.* Because pumping by senior ground water irrigators did not exceed the annual rate of recharge, the district court entered an order enjoining junior ground water irrigators from pumping and assigned further administration to the Department. *Id.* at 578, 513 P.2d at 630. In affirming the district court, the Idaho Supreme Court framed two issues on appeal:

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

Id. at 576, 513 P.2d at 628 (emphasis added).[6]

In response to the issue of annual rate of recharge, the Court first examined its prior decisions on maintenance of water table levels, particularly *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933), which found "that a senior appropriator of ground water is forever protected from any interference with his method of diversion. Under *Noh* the only way that a junior can draw on the same aquifer is to hold the senior harmless for any loss incurred as a result of the junior's pumping. If the costs of reimbursing the senior become excessive, junior appropriators could not afford to pump." *Id.* at 581, 513 P.2d at 633. In analyzing the Act, the Court stated that it "forbids 'mining' of the aquifer." *Id.* at 583, 513 P.2d at 635. Therefore, ground water withdrawals by juniors are permitted under the Act, provided that the "reasonably anticipated

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[5] Inexplicably, A&B argues that *Baker* "was not asked to address the scope of the [Act] as it relates to <u>pre-enactment</u> ground water rights." *Opening Brief* at 25 (emphasis added). As stated previously, the Act was originally passed in 1951. Two of the rights at issue in *Baker* pre-date 1951. *Baker* at 577, 513 P.2d at 629, fn. 1. Therefore, the Court had before it "pre-enactment ground water rights."

[6] Despite the Court's statement of issues before it, A&B argues that the *Baker* "decision did not discuss the scope of the [Act]." *Opening Brief* at 23. As will be discussed more below, *Baker* went to great lengths to construe the Act's scope and its applicability to pre- and post-enactment, non-excepted ground water rights.

rate of future natural recharge" is not exceeded. *Id.* "Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law. 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." *Id.* (emphasis added) (internal citations omitted).[7]

In response to the Act's requirement of "full economic development" of the State's underground water resources, the Court found that "the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. Art. 15, § 7. Full economic development of Idaho's ground water resources will benefit all of our citizens." *Id.* at 584, 513 P.2d at 636.

While full economic development was prescribed, the Court stated that the Act protected holders of senior ground water rights through the maintenance of "reasonable pumping levels," but did not state that the senior irrigation wells that pre-dated enactment were excepted:

> In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote full economic development of the resource. The legislature has said that when private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is the promotion of the welfare of all our citizens. *See* Clark, 5 Water and Water Rights, § 446 at 474 (1972). We conclude that our legislature attempted to protect historic water rights while at the same time promoting full development of ground water. Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an

[7] A&B argues that *Baker* "did not overrule *Noh*." *Opening Brief* at 25 (emphasis in original). A&B obviously ignores the above-cited quotation and also fails to KeyCite *Noh*. KeyCite is Westlaw's version of Shepards. According to KeyCite, *Noh* was "Superseded by Statute as Stated in *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (Idaho Jul 26, 1973)." Clearly, *Noh* is no longer good law for the proposition that pre-enactment, non-excepted ground water rights are protected in their historic pumping level.

> unreasonable pumping level his historic means of appropriation will not be protected.

Id. at 584, 513 P.2d at 636 (emphasis added).

Baker clearly holds that full economic development of Idaho's underground water resources is required. In order to ensure full economic development, holders of pre-enactment, non-excepted ground water rights are protected in the maintenance of reasonable pumping levels. As will be explained later in this brief, A&B has not exceeded its reasonable pumping levels.

(2) *Parker v. Wallentine*

Following its decision in *Baker*, the Court was asked to examine the impact of a 1978 amendment to the Act in *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). The 1978 amendment modified Section 2 of the 1951 Ground Water Act, now codified as Idaho Code § 42-227, to emphasize that domestic wells are exempt from the permit requirements of Idaho Code § 42-229, by striking the words "in any way affected by this act," and substituting the words "subject to the permit requirement under section 42-229, Idaho Code":

> AN ACT
>
> RELATING TO DOMESTIC WELL REGULATIONS; AMENDING SECTION 42-227, IDAHO CODE, TO CLARIFY THAT DOMESTIC WELLS ARE EXEMPT FROM THE PROVISIONS OF SECTION 42-229, IDAHO CODE.
>
> Be It Enacted by the Legislature of the State of Idaho:
>
> SECTION 1. That Section 42-227, Idaho Code, be, and the same is hereby amended to read as follows:
>
> 42-227. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be ~~in any way affected by this act~~ <u>subject to the permit requirement under section 42-229, Idaho Code</u>; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of health and welfare and providing further that the drilling of such wells shall be subject to the licensing

> provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.
>
> Approved March 29, 1978.

1978 Idaho Sess. Laws, ch. 324, § 1, p. 819.

In *Parker*, the 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.[8] The Court held that the injunction was not permanent, and could be dissolved 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.

> 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 645 (emphasis added).

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[8] A&B argues that *Parker* addressed Idaho Code § 42-229, and held that "nothing in the 1978 amendment [to Idaho Code § 42-227] or the circumstances of its enactment indicates that the legislature intended this amendment to have retroactive effect." *Opening Brief* at 22 citing *Parker* at 511, 650 P.2d at 653, fn. 7. Because of this language, A&B asserts that Idaho Code § 42-229 should not be interpreted to apply retroactively. A&B's misreads *Parker*. On page 511, the Court was discussing why the amendment to Idaho Code § 42-227 could not be applied retroactively to impose reasonable pumping levels on the senior user with a pre-1978 domestic well. In comparing the language of Idaho Code § 42-227 with that of Idaho Code § 42-229, *Parker* was correct in holding that Idaho Code 42-227 was not retroactive. *See Peavy* at 151, 140 P. at 968 ("if the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared"). Unlike *Baker*, *Parker* did not examine whether Idaho Code § 42-229 was retroactive because the junior irrigation right at issue post-dated the Act.

As discussed above in regards to the Court's decision in *Baker*, *Noh* is no longer good law for the proposition that non-excepted ground water rights are protected in their historic pumping levels. *Noh*, however, remains good law for the proposition that excepted ground water rights (i.e. pre-1978 domestic wells) are protected in their historic pumping levels. Given that *Baker* and *Parker* had different classes of ground water rights before them, the decisions are consistent in their treatment of the Act. Furthermore, four of the justices who concurred in *Parker* also concurred in *Baker*, including Justice Shepard, who wrote the *Baker* opinion, yet made no mention of any inconsistency between the two cases.

(3) *Musser v. Higginson*

In spite of its previous rulings that squarely addressed the scope and applicability of the Act, A&B argues that the Court in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) overruled its previous decision in *Baker*. In *Musser*, the Department appealed a decision by the trial court to issue a writ of mandamus against the Director to force action on a delivery call made by a senior water right holder. After analyzing Idaho law concerning writs of mandamus, the Supreme Court upheld the trial court's decision to issue the writ, despite the Director's testimony that, pursuant to Idaho Code § 42-226, "a decision has to be made as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource." *Musser at* 396, 871 P.2d at 813. In response, the Court stated that "[b]oth 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." *Id.* A&B argues that this single sentence in *Musser* overrules the in-depth, on-point analysis undertaken in *Baker*.

The statement by the Court in *Musser* must be considered to be dicta, as the effect of the Ground Water Act on the rights in question was not at issue in that case. The issue in *Musser*

was whether the Director had a duty to take administrative action on a delivery call by the holder of a senior-priority surface water right, such that the issuance of a writ of mandate was proper; not whether the Ground Water Act is applicable to water rights existing prior to its enactment. The Court ruled that the Director's duty was clear and executive, and that he could indeed be compelled to act by writ of mandate. There is no discussion in *Musser* of either Idaho Code § 42-229, or the precedent established in *Baker*. A&B's reading of *Musser* as overruling *Baker* without any analysis of the Act or its prior decision in *Baker* whatsoever is untenable. As concluded by the Hearing Officer:

> The Mussers made a claim based upon a very old water right for administration to enforce their priority right. The Director denied their claim on the basis that he was "not authorized to direct the watermaster to conjunctively administer ground and surface water within Water District 36A short of a formal hydrologic determination that such conjunctive management is appropriate." *Id.* The Supreme Court said the Director was wrong. Little more should be read into *Musser*.

R. at 1636.

Thus, there is no basis in law for A&B's contention that *Musser* overruled *Baker*.

E. The Policy Objectives of the Ground Water Act Support the Conclusion that the Act Applies to All Pre-Enactment, Non-Excepted Ground Water Rights

The requirement that all pre-enactment, non-excepted ground water rights are subject to the reasonable pumping level requirements of the Act is sound public policy. Prior to 1951, very few ground water rights were diverting from the ESPA. *See* Ex. 200, Figs. 5-2, 5-3; Ex. 136, p. 2; Ex. 459, p. 5. Indeed, even though A&B holds a water right with a 1948 priority date, the project was not completed and fully operational until approximately 1963. R. at 1113. In addressing the Idaho State Bar, R.P. Parry remarked: "When you start talking about underground water, you are probably discussing the greatest undeveloped asset or resource of the State of

Idaho." 23 Idaho State Bar Proceedings at 19. At the time of the Act, it was realized that the ESPA was a vast resource that could improve the economy of the State, if developed. "In Idaho, at least, there is strong evidence of concern about promoting more groundwater development." Grant, 21 Nat. Resources J. at 24.

This preference was shared by the entity responsible for development of the A&B project. At the 1949 State Bar meeting in McCall, Howard R. Stinson, Regional Counsel for the USBR, engaged in the following discussion with R.P. Parry:

> [Mr. Parry:] To the extent I can, if any of you have question[s], I will try to answer them.
>
> . . . .
>
> Howard R. Stinson: There is one phrase that we, the Bureau of Reclamation, are greatly interested in. <u>In going over one of the early drafts of the Bill it seemed to me that as framed it provided that any late developer would be practically without right. That is, it prevented any further development of wells where there was any possible interference, such as increase in pumping head or any effect at all on existing wells. As we understood it, the Bill prevented the drilling of additional wells unless there was a finding that there could not be any such interference. We took exception to that.</u> We talked about it in the Bureau of Reclamation. We did not have a full chance to review the last draft of the Bill in the late days, and didn't attempt to. But what is the situation now on that score?
>
> Mr. Parry: <u>First I agree with you that that was an objectionable feature, and it is my understanding that that has been completely eliminated from any proposed bill.</u>
>
> . . . .
>
> Mr. Howard R. Stinson: Before your Bill comes up at the next session of the legislature, we will make some sort of a proposal on that count.
>
> Mr. Parry: Yes, the Bureau of Reclamation, of which Mr. Stinson is Regional Counsel, is probably the most vitally interested organization in underground water and in irrigation development.
>
> Mr. Howard R. Stinson: As a matter of fact, Pat, I might say just to correct a figure and make it look bigger, that the North Side Pumping Development will reach a maximum of around 60,000 acres. Of course, I am

> prejudging some facts as to what that underground water supply really is there, but that is the ultimate development now planned.

23 Idaho State Bar Proceedings at 26-27 (emphasis added).

The USBR, like any other later-in-time appropriator, was concerned that the common law doctrine established in *Noh* could hinder its development of the A&B project. "In many areas the first appropriator could require damages from every subsequent appropriator and each subsequent appropriator, in turn of priority, could require damages from all later appropriators, until the last one would have to pay tribute to all." Grant, 21 Nat. Resources J. at 24. *Baker* at 582, 513 P.2d at 634 "(Apparently our Ground Water Act was intended to eliminate the harsh doctrine of *Noh* . . . ."). If tribute were not required, later-in-time appropriators, such as the USBR, would be able "to take stored ground water <u>that was providing lift for senior appropriators</u> and use it more productively on the surface." Grant, 21 Nat. Resources J. at 26 (emphasis added). According to Douglas L. Grant, former professor of law at the University of Idaho, the 1953 amendment to Section 1 recognizes:

> (1) <u>stored groundwater is not always used most economically in providing lift for the wells of early appropriators</u>, and (2) <u>absolute protection of historic means of diversion may hinder economic development</u>. The statutory safety valve against counterproductive security of investment under the priority principle is the reasonable pumping level concept.

Grant, 21 Nat. Resources J. at 25.

By protecting appropriators in their reasonable pumping levels, the Act prevents monopolization of the ground water resource. Passage of the Act with its protection of reasonable pumping levels was in fact essential to the success of the A&B project. Interestingly, A&B now seeks to undo the efforts of its predecessor by advocating against reasonable pumping levels to require tribute from all later-in-time appropriators. This result cannot be reconciled

with the Act's stated purpose of furthering full economic development of the State's ground water resources.

2. The Director Applied The Appropriate Burdens Of Proof And Deference To A&B's Water Right

A. Appropriate Deference was Afforded to A&B's Partial Decree

According to A&B, the Director and his watermasters are obligated to deliver water to water rights, in order of priority, without engaging in any analysis. *Id.* This is simply incorrect. In *American Falls*, the Supreme Court stated "the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development." *American Falls* at 876, 154 P.3d at 447. Other factors that the Director may consider are expressly listed in the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"). *See* CM Rule 10.07 (full economic development); 20.03 (reasonable use); and CM Rule 42.01 (material injury factors). In performing his analysis, the Director may determine that the senior does not need the "full quantity" of his or her decreed right. *American Falls* at 876, 154 P.3d at 447. This evaluation does not constitute a "re-adjudication" of the right. *Id.* at 877, 154 P.3d at 448. By requiring the Director to conduct his own investigation prior to his initial order, the Court recognized that the Director is not obligated to find material injury based simply upon the filing of a delivery call.

Here, A&B filed its Motion to Proceed on March 16, 2007. R. at 830. A&B subsequently sought a writ of mandamus from the Minidoka County District Court for the Director to respond. The Director was ordered by that court "to make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules . . . ." R. at 1106, ¶ 6. Consistent with *American Falls*, the Director subsequently requested that A&B provide the Department with information in support of its delivery call. R. at 1107. Following

the submittal of information, the Director issued his January 2008 Order. R. at 1105. In his initial order, the Director stated, "Material injury is a highly fact specific inquiry that must be determined in accordance with CM Rule 42; therefore, the establishment of injury is a threshold determination that must be established by prima facie evidence." R. at 1147.

A&B points to this statement in support of its position that the Director flipped the burden of proof, thereby requiring A&B to prove material injury and re-prove its water right. *Opening Brief* at 12. The statement, however, was not directed at A&B; A&B met its obligation by providing the Director with the information required by *American Falls.* R. at 1146; *see American Falls* at 877, 154 P.3d at 448. Instead, the statement was made by the Director in regard to his duty to evaluate the information prior to issuance of his initial order. The Minidoka County District Court understood this when it ordered the Director "to make a determination of material injury, <u>if any</u>, in accordance with Rule 42 of the Conjunctive Management Rules . . . ." R. at 1106, ¶ 6 (emphasis added). If a "threshold determination" for material injury does not exist, the CM Rules would not have been promulgated and the Court in *American Falls* would have simply required the Director to enter a finding of material injury based solely upon the filing of a delivery call. Instead, the Director is duty-bound to review the information and exercise his discretion and professional judgment to determine whether junior ground water rights are causing material injury to A&B.[9]

As explained above, ground water appropriators that divert water for irrigation purposes are protected in the maintenance of reasonable pumping levels. Idaho Code § 42-226, -229. If reasonable pumping levels are not exceeded, the senior is not entitled to have the junior rights

[9] As stated in the Recommended Order: "The allegation of material injury under oath invoked the Director's authority and responsibility to develop facts upon which a well-informed decision could be made as to the existence of material injury and the consequences if there were material injury." R. at 3085. *See American Falls* at 878-879, 154 P.3d at 448-49.

curtailed. Rather, it is the senior appropriator's duty to extend his or her diversion works to satisfy his or her prior right. *Baker* at 584, 513 P.2d at 636. In this sense, ground water to ground water administration is decidedly different than surface water to ground water administration. To the extent material injury is found in a surface-to-ground water call, the senior must rely upon the watermaster to curtail junior pumping in order to supply more surface water to the senior's point of diversion, in the absence of mitigation.

As will be explained in detail below, the Director found that A&B's reasonable pumping levels have not been exceeded. A&B maintains the ability to exercise the full extent of its right, but is obligated, to the extent it chooses, to drill its wells deeper to fully satisfy its right. While the Director did engage in an analysis regarding A&B's reasonable irrigation needs (0.75 miner's inches per acre, R. at 3110), at no time in these proceedings was A&B informed, or should it infer, that it was not authorized to exercise the full extent of its right: "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." R. at 3102; *American Falls* at 878-79, 154 P.3d at 449-50 ("The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has.") Proper deference was therefore afforded to A&B's partial decree.

B. Because Material Injury was not Found, it is Incorrect for A&B to Assert that Junior Ground Water Users Carried a Burden of Proof

A&B asserts that junior ground water users failed to carry their burden of proof by proving through a showing of "waste, forfeiture, abandonment, etc." that A&B did not need the full extent of its water right. *Opening Brief* at 28 citing *American Falls* at 878-79, 154 P.3d 449-50. As explained in *American Falls*, this argument is incorrect.

There, the Court was presented with a facial constitutional challenge to CM Rules. The case arose following the filing a delivery call by the Surface Water Coalition ("SWC"), of which A&B is a member. The Director exercised his discretion and professional judgment in his analysis of the information, which led him to determine that the SWC was materially injured within the meaning of the CM Rules. As a result of this initial determination, junior ground water users were ordered to provide replacement water or face curtailment.

Speaking to burdens of proof following a finding of material injury by the Director in his initial order, the Court stated as follows: "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *American Falls* at 877-78, 154 P.3d at 448-49. Here, no finding of material injury was made by the Director; therefore, junior ground water users did not carry a burden of proof.[10]

3. Reasonable Pumping Levels Have Not Been Exceeded, Therefore, A&B Must Extend Its Diversion Works To Access Water

A. The Director Correctly Denied A&B's Request to Establish a Reasonable Pumping Level for the Entire ESPA

A&B approaches the issue of reasonable pumping levels from two perspectives: (1) that the Director failed to establish a reasonable pumping level for the ESPA; and (2) that irrespective of the Director's failings regarding the ESPA, A&B has exceeded its reasonable pumping levels. *Opening Brief* at 47-49.

The establishment of reasonable ground water pumping levels is defined by Idaho Code § 42-237a.g:

[10] As stated in the Recommended Order, "The language of *AFRD#2* is that after the '<u>initial determination</u>' of material injury is made the junior has the burden of establishing a defense to the senior's call, not that the allegation of material injury constitutes that determination." R. at 3085 (emphasis added).

> [The Director] may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.

Emphasis added. *See also* CM Rule 10.18. Notably, Idaho Code § 42-237 a.g. does not mandate that the Director establish a reasonable pumping level.

The term "reasonably anticipated average rate of future natural recharge" is defined by CM Rule 10.19:

> The estimated average annual volume of water recharged to an area having a common ground water supply from precipitation, underflow from tributary sources, and stream losses and also water incidentally recharged to an area having a common ground water supply as a result of the diversion and use of water for irrigation and other purposes. The estimate will be based on available data regarding conditions of diversion and use of water existing at the time the estimate is made and may vary as these conditions and available information change.

It is an unequivocal finding of fact reached by the Hearing Officer that there is more water entering the ESPA than is withdrawn by ground water pumping. R. at 3087 and 3113; *see* Ex. 121 at 5 (A&B 1076) ("Annual discharge by pumping from the aquifer presently does not begin to approach annual recharge."). Therefore, reasonable pumping levels for the ESPA have not been exceeded and it was an appropriate exercise of the Director's discretion to deny A&B's request in this regard.

B. Based on its Inherent Hydrogeologic Environment, A&B has not Exceeded its Reasonable Pumping Level

In stating that the Director erred by not establishing a reasonable pumping level for the A&B project, A&B points to aquifer declines across its project, which the Director and Hearing

Officer each addressed, but does not address the great weight of evidence that was presented at hearing regarding its inherent hydrogeologic setting and how that setting directly impacts pumping levels. The importance of understanding the hydrogeologic environment cannot be overstated in the Director's determination that reasonable pumping levels have not been exceeded.

The hydrogeologic setting of A&B is varied, was known at the time of its development, R. at 1127-29 (discussing published reports from 1948 and 1956 that detail the area's hydrogeology), and understood by the Hearing Officer, R. at 3089-92. The project is "located in a transition zone where the subsurface consists mostly of basalt to the north and northwest and mostly sediment to the south and southeast." Ex. 121 at 6 (A&B 1077) (emphasis added).[11] "The geologic formations in the area differ markedly in their water bearing properties. The materials range from highly permeable to nearly impermeable. Permeability influences the rate at which the materials accept recharge, transmit water, and yield water to wells." R. at 1128 (emphasis added). "In Minidoka County and most other parts of the Snake River Plain the Snake River basalt is the principal water-bearing formation and it yields water copiously to wells. Inter-tongued sedimentary beds are saturated below the water table but yield little or no water to wells." *Id.* (emphasis added).

The sedimentary materials were deposited by a body of water that is referred to today as "Lake Burley, and in it the Burley lake beds . . . . The areal distribution of these beds approximately coincides with the area of the Minidoka Project in Cassia and Minidoka Counties. At the boundaries of the lake shore phases of the accumulating sediments overlapped or abutted on the surrounding lavas and other rocks. Northward and westward of Burley, Rupert, and

[11] Figure 2a to Exhibit 121 is a "Geologic Map" that shows the transition between sediments (south) and basalts (north). Figures 2b and 2c provide explanations of the "Geologic Units" in Figure 2a. Figures 3 and 4 show the respective "Thickness of Quaternary Basalt" and "Thickness of Sedimentary Rocks."

Acequia, the Burley lake beds thin and disappear against the basaltic rock masses of the unknown thickness." Ex. 121 at 7 (A&B 1078).

The hydrogeologic setting is depicted in Exhibit 121, Figures 1, 2a, 2b, 2c, 3, and 4. *Id.* at 22-27, A&B 1093-98. Water-bearing basalts with thin or discontinuous sedimentary interbeds are predominantly located in Townships 7 and 8, the northern two-thirds of the project. Tr. p. 80, lns. 10-13. *See* Exhibit 215 (map of the area with Township and Range coordinates). Thick sedimentary interbeds with little water bearing basalt are predominantly located in Township 9, the southern third of the project. *See* Ex. 121, Figures 2a, 2b, 2c, 3, and 4; Ex. 215. As understood by the USBR: "Nearly all the area beneath the Northside Pumping Division Unit B is made up of basalt with few to minor amounts of sediment. <u>The subsurface beneath tract 4 is composed of basalt innerbedded [sic] with substantial amounts of mostly fine grain sediment</u>." R. at 1129 (emphasis added). Tract 4 is located in Township 9. *Id.*

A more specific, visual understanding of the subsurface in and around the A&B project may be gained by examining Exhibit 106. Exhibit 106 is a depiction of "Geologic Cross-Sections" that were prepared by the Department. Cross-section A-A' through E-E' plots wells from west to east. *Id.* at 1-6 (A&B 83-88). The closer the plot is to the southern boundary of the A&B project (historic Lake Burley), the more sedimentary layers are present in the well. *See* B-B' at 3 (A&B 85). As the plot moves northward, sediments are replaced by basalt. *See* E-E' at 6 (A&B 88). A review of the south to north plot shows that the sedimentary environment is more pronounced in the south and west, but less so in the north and east. *See* F-F' through L-L' at 7-14 (A&B 89-96).

Not surprisingly, well yield is directly tied to the hydrogeologic environment in which the well is sited. As discussed by Dr. Dale R. Ralston[12] and Sean D. Vincent, the Department's hydrology section manager, well yield is greatly influenced by "specific capacity" (discharge ÷ well drawdown). Tr. p. 80, lns. 4-21; Tr. p. 1733, lns. 4-25; p. 1734, lns. 1-5. Higher specific capacity values are an indicator of higher well yield. Using Exhibit 113D, it was explained that higher specific capacity values are generally located in the eastern two-thirds of the project, whereas the southwestern area generally has lower specific capacity values. Tr. p. 95, ln. 25; p. 96, lns. 1-22; Tr. p. 1733, lns. 10-25; p. 1734, lns. 1-5. For Dr. Ralston, the high specific capacity values in the main pumping center of the project (Township 8) is "consistent with geology, because . . . when you get down here (indicating [to the southwest]) as we said numerous times, there is a lot more lake [sediment] there. And so it's consistent with their history of pumpage, because two-thirds of the pumpage come[s] from wells in these . . . townships. And these are, obviously, the higher producing areas." Tr. 97, lns. 1-8.

Similar to specific capacity, hydraulic gradient can be used to understand aquifer transmissivity and well yield.

> Q. [BY MR. BROMLEY] What is Figure 14 [from the January 2008 Order]? What is the significance, and where did it come from?
>
> A. [MR. VINCENT] This is a water table contour map. It looks like it's based on water level measurements in the spring of 1952. This is a figure that was reproduced from the USGS report that was published by Crosthwaite and Scott in 1956.
>
> And what it shows is -- it's difficult to see the contour intervals, but I know that the lines of equal water table elevations, which these contour lines

[12] Dr. Ralston prepared a report for the Department entitled a "Hydrogeologic Analysis of the A and B Irrigation District Area." Ex. 121. The objectives of the report were: "1) develop a hydrogeologic conceptual model of . . . the general vicinity of the A&B Irrigation District with an emphasis on the presence of low hydraulic conductivity sedimentary strata interbedded with the basalt of the aquifer, 2) analyze the significance of [the] hydrogeologic conceptual model with respect to the ability of the A&B Irrigation District wells to obtain water from the aquifer, and 3) evaluate the impacts on A&B Irrigation District production wells from declining ground-water levels in the aquifer." *Id.* at 4 (A&B 1075).

> represent, are highest in the eastern part of the project, and they are lower in the western part of the project. And as Dr. Ralston talked about in his testimony, water flows from elevations that are high to elevations that are low. So we have water flowing more or less perpendicular to these contour lines from east to west, and then to the southwest. And in the southwest, you can see where the contour lines are sort of more closely spaced. And I can talk about that.
>
> Q. Sure, please do.
>
> A. Yeah. The fact that they are mostly -- or closely spaced, typically is an indication of reduction in aquifer transmissivity. And Dr. Wylie spoke to that a little bit when he talked about what is referred to as the barrier rift and also the Mud Lake barrier, and those two features caused the same sort of thing.
>
> And what happens is, in accordance with Darcy's Law, you have to have more energy to draw water through less permeable, less transmissive materials. And so to have that energy, you have to have a build-up of hydraulic gradient, which is the difference in water table elevation between some specific distance.
>
> So this contour map to me suggests that the transmissivity in the southwest part of the district there is lower in a relative sense, because it's got this higher hydraulic gradient.

Tr. p. 1740, lns. 18-25; p. 1741, lns. 1-25; p. 1742, lns. 1-8.

Steeper hydraulic gradient leads to decreased transmissivity, which directly impacts specific capacity and results in reduced yields. Tr. p. 1742, lns. 9-25; p. 1743, lns. 1-7. Because drawdown is "inversely proportional to transmissivity," Tr. p. 1743, lns. 16-17, steeper cones of depression develop in low transmissivity environments, which results in greater well interference. Tr. p. 1742, lns. 9-25; p. 1743, lns. 1-25; p. 1744, lns. 1-25; p. 1746, lns. 1-14. Not surprisingly, due to these inherent factors, A&B experiences reduced yields and well interference in the southwestern part of the project. These factors are not experienced to the same degree in the eastern part of the project, resulting in sufficient yield (pumping in Township 8 accounts for approximately 67% of total discharge). Tr. p. 80, lns. 22-25; p. 81, lns. 1-12.

The problems that A&B experiences today in the southwestern part of the project have been present since the 1950s. In fact, in 1948, the USBR was warned against development of lands in the southwest without a better understanding of the area's water supply. R. at 3091; Tr.

p. 79, lns. 1-25; p. 80, lns. 1-3 (Ralston testimony regarding Nace); Tr. p. 1761, lns. 18-25; p. 1762, lns. 1-7 (Vincent testimony regarding Nace). However, the USBR believed that lands in Township 9, particularly those in Range 22, were highly desirable for irrigation and "should therefore be irrigated if at all possible." Ex. 152BB at 1. Due to the inherent hydrogeologic environment, reclamation of lands in Township 9, Range 22 proved to become a "problem area" for the USBR. Ex. 152P. *See also* Exs. 152Q, 152II, and 152TT. As noted by the USBR on October 9 1961, "The downward trend in pumping water levels is readily apparent and the absence of any tendency of ground water levels to stabilize is of considerable concern." Ex. 152BBB.[13] Tr. p. 1777, lns. 9-20. Mr. Vincent circled the locations of the wells in the above-cited letters on Exhibit 215A with a silver marker. Tr. p. 1173; lns. 11-18.

Abandoned Wells

In its Opening Brief, A&B refutes the Director's finding that reasonable pumping levels have not been exceeded by pointing to the presence of abandoned wells. *Opening Brief* at 48. According to A&B's Motion to Proceed, "7 wells have been abandoned because they no longer provide adequate water." R. at 1131. Exhibit 215A depicts, with green circles, where the abandoned wells are located. As was stated in the January 2008 Order, R. at 1131, and further explained by Mr. Vincent during the hearing, five of the abandoned wells are located in the Township 9, Range 22 "problem area;" one is located in Township 10, Range 22;[14] and one is located in Township 8, Range 25.[15] Tr. p. 1753, lns. 17-23.

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[13] For a complete discussion of these USBR letters and the inherent problems associated with this area of the A&B project, *see* Tr. p. 1762, ln. 8 through p. 1777, ln. 20.

[14] In his direct examination, Mr. Vincent, in referring to cross-section G-G' in Exhibit 106, stated that the same hydrogeological problems that exist in Township 9, Range 22 are present in Township 10, Range 22. Tr. p. 1775, lns. 7-13.

Using Exhibit 215A, Mr. Vincent circled the abandoned wells with a red marker and explained that the reason the wells in the southwestern part of the project were abandoned was because of the inherent hydrogeologic problems that exist in that area (presence of thick layers of sediment, greater initial depth to water, Tr. p. 1746, lns. 15-20, lower transmissivity, lower specific capacity, lower initial yield, and greater well interference). According to Mr. Vincent: "I think the southwest area in relation to the northeast area of the project is problematic in terms of initial well drilling, in terms of well yield, in terms of maintenance on pumps. Basically, everything that you want a well to do, is more difficult in the southwest area. . . . The greatest problem with the water supply system at A&B is, and has always been, A&B's inability to effectively deal with the sediment layers." Tr. p. 1756. lns. 21-25; p. 1757, lns. 10-13 (emphasis added).

Not surprisingly, each of the abandoned wells in the southwestern part of the project (circled in red) are in the area that USBR identified as a "problem" during the initial construction of the project (circled in silver). *See* Exhibit 215A. The "problem area" is in and around the area in which A&B is currently importing surface water. While A&B would lead this Court to believe that importation of surface water is a recent measure taken to deal with a recent problem, this is not the case. Given the problems that were occurring with development of the lands in Township 9, Range 22, the "idea of importing water into an area of desirable agricultural land with limitations on the productivity of wells in that area was expressed by the Regional Director to the Construction Engineer in a letter dated March 15, 1961. Exhibit 152QQ." R. at 3092; Tr. p. 1765, lns. 2-25; p. 1766, lns. 1-25; p. 1767, lns. 1-20.

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[15] "According to A&B records, the seventh abandoned well (15B825) was replaced because it had a crooked borehole." R. at 1131. A crooked borehole evidences a problem with the initial well drilling and is not a consequence of ground water depletion. Tr. p. 1752, lns. 18-25; p. 1753, lns. 1-12.

Wells with Reduced Yield, Replacement Wells, Unused Used Wells

After A&B filed its Motion to Proceed, the Director requested information from A&B. In response to the Director's request, A&B provided, among other things, a map "showing the locations of seven wells that did not yield additional water despite having been deepened." R. at 1131. In its Opening Brief, A&B states, "there is no question that a 'reasonable pumping level' has been exceeded where a well is drilled to the point in the aquifer that produces no more water." *Opening Brief* at 48.

During his direct testimony, Mr. Vincent circled these seven wells with a black marker on Exhibit 215A. Tr. 1757, lns. 20-25; p. 1758, lns. 1-14. All seven of these wells "are located in the southwest part of Unit B." R. at 1131; (for a detailed discussion of the well driller logs associated with these wells, *see* Finding of Fact 97 from the January 2008 Order). Using a blue marker, Mr. Vincent circled the wells that "have been replaced or drilled deeper since the '80s." Tr. p. 1758, ln. 19. The well in the eastern part of the project (Township 8, Range 25) was drilled to replace the well that was abandoned because of a crooked borehole (previously circled in red). Tr. p. 1759, lns. 4-6. The other wells that are circled in blue are located in the southwestern part of the project. Ex. 215A.

Of the 177 original production wells, five were never used by A&B. R. at 1132. One well in Township 8, Range 24 was sold to the City of Rupert. *Id.* Mr. Vincent circled the other unused wells in green on Exhibit 215A. Tr. p. 1759, lns. 12-25; p. 1760, lns. 1-25; p. 1761, lns. 1-14. Again, these wells are located in the southwestern part of the project.

As can be plainly seen in Exhibit 215A, and with the exception of the well with the crooked borehole in Township 8, all of the wells identified by A&B as problematic are located in the southwest. The Hearing Officer understood these issues:

> The problem of water production is primarily in the southwest portion of Unit B. The greatest problem faced by A&B is the inability to produce the amount of water it desires under its water right from the wells in the southwest portion of the project as a consequence of the declining water level and the slow rate of transmissivity resulting from the ancient lake bed silt and sand. Those portions of the project that lie over a subsurface consisting of primarily fractured basalt are generally able to access water, though additional drilling and other rectification may be necessary.

R. 3111.

In discussing the southwestern part of the project, Dr. Ralston likened its environment to that of a "higher elevation spring that's discharging out of the canyon into the Snake River." Tr. p. 84, ln. 25; p. 85, lns. 1-3. Because of its physical location, inherent geology, and the fact that the project was begun when aquifer levels were at their peak, Dr. Ralston stated that the southwestern part of Unit B, like a higher elevation spring, demonstrates greater sensitivity to aquifer declines (due to conversions, climate, and pumping). *See* Tr. pp. 85-91. In his review of the evidence, the Hearing Officer concluded that A&B's request for curtailment was not supported by the record and guiding legal principles:

> The conditions of a difficult area for water production do not justify curtailment or mitigation. The conditions in the southwest area create a situation which in significant ways is analogous to the problem addressed in *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107, 32 S. Ct. 470, 56 L. Ed. 686 (1912), which weighed the public interest against the exercise of an established water right. . . . Th[e] injury [in *Schodde*] was to his means of diversion, not to his underlying water right. This case creates a similar issue. A&B has a water right with points of diversion in the southwest region. That right can be used if the water is accessible, but the inability to access the amount of water to which A&B is entitled under the right by the current configuration of the system of diversion does not justify curtailing the extended development that has occurred over the ESPA with the blessing of State policy.

R. at 3111.[16]

[16] On judicial review in the Thousand Springs delivery call proceeding, this Court explained similar rationale: "Ultimately what this means is that a senior surface right that depends on a connected aquifer for essentially what amounts to 'dead storage' to support the means of diversion may not be absolutely protected in the historic means of diversion to the extent the 'dead storage' is not subject to appropriation or development by subsequent appropriators.

Interestingly, A&B ignores the record and instead directs the Court's attention to a recent administrative order issued by the Director regarding a senior, non-excepted domestic well in the Clearwater drainage that could be impacted by the appropriation of new water rights. There, the Director made numerous findings of fact regarding the specific hydrogeologic setting and the movement of water therein. Based on the hydrogeologic environment, the Director determined that, if depth to water exceeded 190 feet, the new appropriations would cause injury to the senior. As evidenced in the record before this Court, there is no indication that A&B, like the single domestic user in the Clearwater drainage, is nearing the extent of its reasonable pumping level. Despite the difficulties of producing water in the southwestern part of the project, and in spite of aquifer declines, A&B has maintained a water supply through its well rectification efforts that support its crop needs, evidencing the fact that water is available for diversion and beneficial use. R. at 3104-05.[17] A&B must extend its diversion works before seeking curtailment of junior ground water users. As will be explained below, A&B's water right provides it with a great degree of flexibility with which to extend its diversion works.

4. A&B Is Not Water-Short, And Its Reasonable Irrigation Needs May Be Met With 0.75 Miner's Inches Per Acre

In its Motion to Proceed, A&B alleged that it "is unable to divert an <u>average</u> of 0.75 of a miner's inch per acre which is the <u>minimum</u> amount necessary to irrigate lands within A&B

While the senior would still be protected as to the full quantity of the water right, the means of diversion may have to be modified to access the full quantity." *Order on Petition for Judicial Review*, Case No. 2008-444, at 35 (June 19, 2009). *See also* Grant, 21 Nat. Resources J. at 25.

[17] Dr. Ralston explained that, based on inherent hydrogeology, the likelihood of success in deepening wells in the southwestern area is low, but it is highly likely that water remains available at greater depths in the rest of the project. Tr. p. 89, lns. 15-25; p. 90, lns. 1-25; p. 91, ln. 1. In response to cross-examination by an attorney for A&B, Dr. Ralston stated that water is available in the southwest, just not at A&B's desired yield. Tr. p. 133, lns. 9-25; p. 134, lns. 1-3. Dr. Ralston opined that A&B could return to its original yield in the southwest by drilling additional wells. Tr. p. 134, lns. 15-24. A&B presently has 11 unused points of diversion. Tr. p. 467, lns. 3-7; Tr. p. 1316, lns. 19-22.

during the pe[a]k periods when irrigation water is most needed." R. at 1119 (emphasis added). In responding to this statement, the Director engaged in a thorough analysis of A&B's diversions. Based on the accepted recommendation of the Hearing Officer that A&B's conveyance loss is 3%, the average rate of diversion across the A&B project is 0.751 miner's inches per acre, which is consistent with its Motion to Proceed.[18]

In analyzing the peak period, which occurs during the summer months, Tim Luke, manager of the Department's water distribution section, explained that, in 1963, 1964, and 1967, A&B achieved its targeted goal of 0.75. Tr. 1200, lns. 11-16; Ex. 155; Ex. 155A. With the exception of those years, A&B has never diverted an average of 0.75 during the peak period. Ex. 155; Ex. 155A. In his direct testimony, Mr. Luke agreed that the reduction in peak diversions was due to improved irrigation efficiencies (less water is needed for sprinkler irrigation than flood/furrow irrigation)[19] and the fact that A&B added nearly 4,100 irrigable acres beyond the 62,604 acres licensed under its calling water right, 36-2080. Tr. p. 1200, lns. 24-25; p. 1201, lns. 1-25; p. 1202, lns. 1-7. Mr. Luke's belief that A&B is "spreading" its decreed water on enlargement acres, Tr. p. 1201, lns. 20-25; p. 1202, ln. 1, was confirmed by an A&B farmer, Tr. p. 2133, lns. 8-19. During peak periods, when A&B is on allotment, Dan Temple, manager for A&B, agreed that there is no system in place to prevent its users from irrigating enlargement acres. Tr. p. 605, ln. 25; p. 606, lns. 1-4.[20] Therefore, A&B compounds its alleged shortage by failing to properly limit water use within its 62,604.3-acre place of use under 36-2080.

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[18] In the January 2008 Order, the Director, in Finding of Fact 64, found that A&B's current water supply was 970 cfs, which equated to 0.77 miner's inches per acre. R. at 1119. Assuming conveyance loss of 5%, the Director found that A&B could deliver an average of 0.74. *Id.* However, in his Recommended Order, the Hearing Officer found that 3% was A&B's conveyance loss. R. at 3088.

[19] *See* R. at 1115, Figure 4 (depicting A&B's conversions from gravity to sprinkler irrigation).

[20] The Idaho Supreme Court recognized that A&B's enlargement acres are irrigated with ground water and are subordinated to April 12, 1994, Idaho Code § 42-1426. *A&B Irrig. Dist. v. Aberdeen-American Falls Ground Water*

In its Opening Brief, A&B points to approximately 5,000 acres that are served by wells that produce less than 0.75 for its proposition that it is materially injured (known as the "Item-g" lands). "At a minimum, the Director should have found injury to those parts of A&B's water right . . . ." *Opening Brief* at 26. Again, if A&B believes that it needs more water, it is obligated under the Ground Water Act to extend its diversion works.

In order for the Director to objectively understand whether the "Item-g" lands were water-short during the peak period, the Department used remote sensing data from June 20, July 22, and August 7, 2006,[21] to compare Item-g lands with lands in and around the A&B project that were not alleged to be water-short:

> The Department performed an analysis of data produced using the METRIC evapotranspiration model and digital data collected by the Landsat satellite system. Landsat is used by the Department to identify irrigated land and to compute and map ET, evapotranspiration representative fraction ("ETrF"), and normalized difference vegetation index ("NDVI") data. ET data shows the amount of consumptive use by crops, and NDVI shows the relative amount of biomass of crops. Areas of cropland that receive water below their minimum requirements would show lower ET, ETrF, and NDVI values than areas of cropland that are receiving an adequate supply of water.

R. at 1123.[22]

Dist., 141 Idaho 746, 118 P.3d 78 (2005). The constitutionality of Idaho Code § 42-1426 was affirmed by the Supreme Court in *Freemont-Madison Irrig. Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

[21] On June 20 and August 7, the daily temperature was average. July 22, however, "was the hottest date on record for the summer that year." Tr. p. 1108, lns 22-25; p. 1109, lns. 1-2.

[22] METRIC "is an acronym for mapping evapotranspiration at high resolution with internalized calibration. It is a model developed by the University of Idaho to take Landsat data, and using a remote sensing and energy-balanced approach, convert that to evapotranspiration data." Tr. p. 1098, lns. 1-6. METRIC has been published, peer reviewed, and used by the Department since 2000. Tr. p. 1098, lns. 15-25; p. 1099, lns. 1-3. METRIC is used by the ESPA Modeling Committee, and in other western states to analyze water use. Tr. p. 1101, lns. 12-25; p. 1102, lns. 1-25; p. 1103, lns. 1-19; Ex. 160. The Department has won awards for its use of METRIC. Tr. p. 1103, lns. 20-25; p. 1104, lns. 1-13. Following the hearing, notification was received from the John F. Kennedy School of Government at Harvard University that the Department had won its 2009 Innovations in American Government Award for its use of METRIC. http:// www.idwr.idaho.gov/News/news_releases/rels2009/09Sep/2009-27.pdf.

At hearing, William J. Kramber, senior remote sensing analyst for the Department, discussed the Department's use of this data. Mr. Kramber explained in his direct examination that it was not necessary to know what crops are grown or how much water was applied to the land to understand if the Item-g lands were water-short:

> Q. And then using Landsat images to compute ET, ETrF, and NDVI, is it necessary to know what type of crops are on the ground?
>
> A. No, it isn't.
>
> Q. And why is that?
>
> A. It's just the nature of the METRIC algorithm. It doesn't need to know what types of crops are on the ground. That's one of the big advantages of doing an energy balance ET with METRIC. It doesn't have to have that information.
>
> . . . .
>
> Q. Is it necessary to know how much water is being diverted and applied to the land?
>
> A. No, that's not part of this at all.
>
> Q. And why not?
>
> A. Again, that's -- what METRIC is looking at is ET or consumptive use. It's not looking at the diversions or amount of water applied.

Tr. p. 1117, lns. 7-16; Tr. p. 1117, lns. 24-25; p. 1118, lns. 1-6.

Mr. Kramber explained that if Item-g lands were water-short, the imagery would show lower values of ET, ETrF, and NDVI. In discussing Figures 10-13 from the January 2008 Order, Mr. Kramber concluded that Item-g lands were not water short. Tr. p. 1116, lns. 24-25; p. 1117, lns. 1-6.

In evaluating the evidence, the Hearing Officer determined that "[c]rops may be grown to full maturity on less water than [0.75]" and that the "delivery rate of 0.75 is higher than that of" users in the SWC delivery call. R. at 3107. As found by the Hearing Officer:

> The Director's determination is supported by substantial evidence. Several factors support the Director's determination. It is consistent with the Motion to Proceed which indicates 0.75 to be a minimum need. A minimum need is not a desirable amount, but it is adequate. The 0.75 is consistent with the policy of rectification adopted by A&B. It is unlikely rectification would be prompted at a level below the amount necessary for crop production. More is sought, and more is better, but 0.75 meets crop need. There is persuasive evidence that 0.75 is above the amount nearby irrigators with similar needs consider adequate.

R. at 3110.

5. A&B Is Required To Take Reasonable Steps To Interconnect Its System And Extend Its Diversion Works Within Project Boundaries

Despite the plain language in its Motion to Proceed, which asked the Director to review average diversions across its project, A&B now argues that the Director "failed to properly analyze injury to A&B's senior water right according to the elements of the water right, notably the 177 individual points of diversion or wells." *Opening Brief* at 41. In making this argument, A&B ignores the four corners of its partial decree, correspondence between the USBR and the Department during the licensing process, and the accepted findings of the Hearing Officer.

As stated on the face of its partial decree, A&B is authorized to divert 1,100 cfs for the irrigation of 62,604.3 acres. Ex. 139. While individual points of diversion are listed, A&B's water right provides it with great flexibility because the points of diversion are not appurtenant to certain places of use, allowing A&B to move water freely within its boundaries. This is consistent with the desire of the USBR in developing the project. As cited by the Hearing Officer in his Recommended Order, the Bureau, in its 1955 Definite Plan Report, stated as follows: "In the best interests of the Division as a whole, the permit is upon the basis that <u>all the wells will, as a group, be appurtenant to all the lands of the entire Division</u>, rather than being made appurtenant to a particular parcel of land. <u>This would permit a more satisfactory distribution of water to lands and maximum over-all development</u>." R. 3093 (emphasis added).

When specifically approached by the Department in 1964 to provide a land list for purposes of licensing,[23] the USBR again reiterated its position: "We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, depending on project operational requirements, can be served from water from several wells. Therefore, it is impractical and undesirable to designate precise land areas within the project served only by each of the specific wells on the list." Ex. 157D (emphasis added).

Because topography limited A&B's initial ability to interconnect its system, the Hearing Officer recognized that "consideration must account for the fact that water from one pump is not accessible to the entire system." R. at 3095. The Hearing Officer concluded, however, that A&B must take "reasonable steps" to interconnect its system and "maximize the use of that flexibility . . . before it can seek curtailment or compensation from junior users." R. at 3096. These determinations, which were accepted by the Director in the Final Order, are supported by CM Rule 42.01.g ("The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices . . . ."); and CM Rule 20.03 (senior must engage in "reasonable use" so as not to "command the entirety of large volumes of water . . . to support his appropriation . . . ."). Reasonable use requires that A&B exercise the flexibility that its predecessor sought for its water right.[24]

Reasonable use of its water right also requires A&B to extend its diversion works laterally within its project boundaries. According to the Supreme Court in *Baker*, "although a

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[23] Ex. 157 (.pdf page 628, bate stamp page 4398).

[24] In its Opening Brief, A&B states that "a physical interconnection of the A&B project would likely cost approximately $360 million." *Opening Brief* at 46. The project discussed by A&B is full conversion of its system from ground water to surface water, as proposed by the Comprehensive Aquifer Management Plan. Tr. p. 481, lns. 19-25; p. 482, lns. 1-6. These costs cannot be implied to full or partial interconnection of its ground water wells.

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." *Baker* at 584, 513 P.2d at 636 (emphasis added). *Baker* therefore 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.

During cross-examination by an attorney for A&B, Dr. Ralston explained that A&B could improve yield by altering its historic practices. Tr. at 131, lns. 3-25; p. 132, lns. 1-25; p. 133, lns. 1-25; p. 133, lns. 1-25; p. 134, lns. 1-24. Additional yield could be achieved by: (1) pumping its wells for longer periods of time to achieve its desired volume; (2) drilling additional lower yield wells to achieve its desired pumping capacity; or (3) moving wells from areas of lower yield (southwest) to areas of higher yield (rest of the project). *Id.* It was also established at hearing that, of its 188 authorized points of diversion, Tr. p. 1316, lns. 19-22, A&B pumps from 177 wells, Tr. p. 467, lns. 3-7. As suggested by Dr. Ralston, A&B could increase its yield by putting its 11 unused points of diversion into production. Because of the structure of its water right and the fact that its 66,686.2-acre place of use is described by digital boundary, A&B is authorized to freely move its points of diversion to areas of greater yield to achieve its desired volume. Tr. p. 1160, lns. 6-25; p. 1161, lns. 1-9. Taking advantage of the great flexibility afforded under its water right would allow A&B to achieve additional yield and comply with the requirements of *Baker*.

6. Failure Of The Project Is Not An Injury Standard

A&B devotes an entire section of its Opening Brief in support of its belief that the Director has created a "new standard" for determining material injury, a "failure of the project" standard. *Opening Brief* at 32. A&B is mistaken in its interpretation of the Recommended Order and the Final Order. In the Recommended Order, the Hearing Officer used the phrase, "total

project failure" in discussing certain aspects of evidence presented at hearing. In his *Response to A&B's Petition for Clarification*, the Hearing Officer explained his use of the term: "In context the finding that there has not been a 'total project failure' is a finding of fact, not a measure of material injury. Material injury may occur before a total project failure. It is a finding made because of the extensive evidence offered concerning the nature and operation of the project, not as a threshold requirement before curtailment or mitigation can be sought." R. at 3262 (emphasis added). The Director's Final Order accepted this recommendation. Nothing more should be read into use of the term.

7. The Director Properly Denied A&B's Petition To Designate The ESPA As A Ground Water Management Area

A&B seeks review of the Director's determination that denied its petition to designate "the ESPA" as a GWMA. *Opening Brief* at 49. Creation of a GWMA is driven by Idaho Code § 42-233b, which states that the Director may designate a GWMA if he discerns that the location "may be approaching the conditions of a critical ground water area." A ground water area "may" be designated "critical" if the Director determines that it does not have "sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits . . . ." Idaho Code § 42-233a.

While there is ongoing debate over whether the ESPA is nearing or has reached equilibrium, since 1992, there has been a moratorium in place. R. at 3116. Because the "recharge of the aquifer far exceeds the depletion from ground water pumping," the Hearing Officer found that the ESPA "is not being mined." R. at 3087 and 3113. Based on these facts,

the requirements of Idaho Code § 42-233a and -233b are not met, and it was not error for the Director, in exercising his discretion, to deny A&B's petition for creation of a GWMA.

Furthermore, as explained at hearing and understood by the Hearing Officer, "the designation of a ground water management area adds nothing to the management that can be effectuated through the water districts." R. at 3115. In addition to adding an unnecessary administrative layer, the creation of a GWMA would limit the Director's authority to protect A&B's senior-priority ground water right if he determined it was materially injured. In a GWMA, the Director may curtail junior ground water users in the upcoming irrigation season, but only if he provides notice "before September 1" of the current irrigation season. Idaho Code § 42-233b. This procedural limitation does not exist in water districts. Therefore, under the current administrative framework of water districts, the Director may immediately curtail junior ground water users that divert from the ESPA if material injury is found.

8. The Director's Final Order Complies With Idaho Code § 67-5248(1)

A&B states that the Director's Final Order does not comply with Idaho Code § 67-5248(1)(a) and (b). In reading the Final Order, it is clear which portions of the Recommended Order are accepted and which are rejected. *See generally* R. 3318-3323. The Recommended Order clearly states that findings from the January 2009 Order are accepted unless "the recommendation explicitly finds differently or the Director's findings are inconsistent with the findings in this recommendation." R. at 3085. Moreover, the Final Order is consistent in form with the final orders issued by the Director in response to the hearings held in the delivery calls filed by Blue Lakes Trout Farm, Inc., Clear Springs Foods, Inc., and the SWC. The purpose of drafting the Final Order in this fashion is to promote economy by not engaging in needless duplication of established findings.

A&B takes specific exception with Finding of Fact 21 from the Final Order, whereby the Director stated: "Any interpretation not included by the Hearing Officer in his Recommended Order should not be considered by the Director in this contested proceeding and should not be made part of the record." R. at 3321. This finding was entered in response to the Hearing Officer's statement that he had "made recommendations in the Spring Users case and the Surface Water Coalition case. The recommendations in those cases included interpretations of the State Constitution, Idaho statutes and the Conjunctive Management Rules. . . . [and] are incorporated in this recommendation to the extent they are relevant. To the extent necessary for clarity they will be repeated." R. at 3085-3086.

A&B claims that the Director's decision is not "justif[ied]" because he "failed to [explain] why his interpretation of the law changed in less than a year from his decisions in the other cases." *Opening Brief* at 55 (emphasis added). The Director's decision not to accept the Hearing Officer's recommendation on this point has nothing to do with a change in view of guiding legal principles. Indeed, many of the legal principles established by the Hearing Officer in the prior delivery calls were directly "repeated" and accepted by the Director. R. at 3086 and 3322. As stated in the Final Order, unrepeated recommendations from prior orders were not accepted because the information was not made part of the record and could not be reviewed. *State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 827, 820 P.2d 695, 697 (1991) (matters or materials outside the record cannot be considered).

VI. CONCLUSION

In this case, the actions taken by the Director in responding to the conjunctive administration delivery call filed by A&B were consistent with constitutional and statutory provisions, were supported by the record, were made upon lawful procedure, and were within the

Director's discretion. Based on the foregoing, the Department respectfully requests that this Court affirm the Final Order. Idaho Code § 67-5279(3).

RESPECTFULLY SUBMITTED this 28th day of January, 2010.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION

CHRIS M. BROMLEY
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 28th day of January, 2010.

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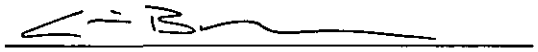
Judge Wildman (courtesy copy) SRBA District Court 253 3rd Ave. N P.O. Box 2707 Twin Falls, Idaho 83303-2707 Facsimile: (208) 736-2121	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Jerry R. Rigby RIGBY ANDRUS & RIGBY 25 North 2nd East Rexburg, ID 83440 jrigby@rex-law.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

Randall C. Budge Candice M. McHugh RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Sarah A. Klahn WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email



CHRIS M. BROMLEY
Deputy Attorney General

ATTACHMENT

PROCEEDINGS

of the

Idaho State Bar

VOLUME XXIII, 1949

TWENTY-THIRD ANNUAL MEETING

SHORE LODGE, (Payette Lakes) McCALL, IDAHO

June 27, 28, 29, 1949

State Laws are now drafting a statute dealing with the problem arising when the husband goes to another state and does not support his family.

PRES. MERRILL: In drafting this program, we intentionally tried to avoid long sessions and too many speeches. We want to call your attention to the announcements that Mr. Martin made a little while ago in regard to the barbeque tonight and the pleasure program during the convention.

Tomorrow morning at 10:00 o'clock we will again have our session here, and we urge that you all be here on time. We assure you we will get through as quickly as possible without crowding the discussion.

EDWARD BLOOM: Mr. President, I just want to note for the record the passing of Jesse B. Hawley. He was a great lawyer, a great humanitarian. All of the middle aged lawyers such as myself, who have been members of the Bar 20 years or more, have come under the influence of Jesse at one time or another. He was an outstanding member of our Bar.

TUESDAY, JUNE 28, 1949, 10:00 A. M.

PRES. MERRILL: Ladies and gentlemen: The first part of our program this morning is "An Underground Water Code" by R. P. Parry. We will turn the time over to Mr. Parry.

R. P. PARRY: I found, during the last session of the legislature, that the underground water code was a highly controversial matter. It was almost unbelievable how many toes we few innocents stepped on, apparently, when we came into the legislature with this proposed code. Many people are against it. Many people think we should not have an underground water code at all. On the other hand, the State Reclamation Association and others have a strong feeling that to really further develop Idaho and protect rights in underground water, we should have such a code.

The State Reclamation Association asked our office to prepare a draft of a code. We attended various meetings and submitted such a draft to the last legislature.

It is my purpose this morning, in a rather rambling way, to outline generally some of the problems and mention some of the questions that have been raised in order that you gentlemen may be thinking about it. Because, surely, I do not propose to know all the answers.

It would be rather hopeless repetition for me to go into any detailed discussion of our Idaho cases on the subject, because last year, before this same program, Mr. Inman of the Boise Bar gave a very definite paper on the state of our case-made law with respect to underground water. The paper, of course, was printed in the annals of this association, and there have been no substantial changes since then.

When you start talking about underground water, you are probably discussing the greatest undeveloped asset or resource of the State of Idaho. As we all know, our surface water is pretty much all developed, where it is within reasonable economic bounds. The only further development that we can have in Idaho in surface water are the one or two large projects—either from Snake River below Bliss, or the trans-mountain diversion of the Payette and Boise Rivers through tunnels, which will run into unnumbered millions of dollars and will have to be accomplished, if at all, by some government agency. But, apparently, underground we have a lot of water.

It is, of course, axiomatic that in every state the limit of development, either from agriculture, industry or population standpoints, is controlled in the last analysis by the amount of water available. In Idaho our water supply, of course, is particularly valuable, since we are an arid region and need it for our agricultural use.

Many of you men know that from the point where the Snake River comes out of the foot hills, north and east of Idaho Falls, in the neighborhood of Ashton, all the way down to the final diversion at Milner Dam near Twin Falls, there is a heavy leakage from Snake River to the west, under the lava. That underground pool is in turn contributed to by Little Lost River and Big Lost River and other disappearing streams. Apparently we have a large flow of water underground there. As an example: In the irrigation season, the Snake River is dry at Milner, where the two canals take out, one on the north side and one on the south side. About 60 miles downstream, at the Bliss bridge, there has never been measured less than 6,000 second feet of water. In that short stretch of river, there is a gain from this underground flow in this amount.

Scattered in other places in Idaho we have similar flows. We have underground water about which we know little. We don't know whether it is a flowing or static body or an artesian basin. Naturally that underground supply has been accumulating for many, many years. In the first instance it has to come from the same source as our surface water. It has to fall from the sky, and at the present time we rather seem to think that this water is inexhaustible.

The development of this water is proceeding with extreme rapidity. According to the Department of Reclamation, since the time they have kept records, there have been about 984 permits granted for the use of underground water covering either supplemental or original water for about 400,000 acres. Their records go back to 1907. In the year 1948, up to November 15th, there were some 424 permits granted out of that 984. Counting both supplemental and new water rights, those 424 permits cover almost 200,000 acres. There have been many other developments of which there is no record in the State Reclamation Department.

We take the water out from under the ground for a variety of purposes. The most obvious is the use for domestic purposes. I believe the thinking of everyone is that so far as individual domestic wells are concerned, there should be no control over them. Anyone who wants to develop domestic water for their own use, or for stock use, should be allowed to do so uncontrolled. The proposal has been made that wells be exempted to the extent of one miner's inch which seems to make a very adequate flow for farm and ranch use.

There are places in Idaho where water is taken out of the ground for drainage purposes, such as the Boise River Valley and other places. we do that some in the Twin Falls country. It has been found that the best way of controlling the underground water so that it does not rise too high is by wells. In some instances the wells are purely for the purpose of getting rid of the water. In many other instances the wells have a dual purpose. The water is pumped from under the ground in one place, and conveyed by canals and ditches for use again in another place.

Industrial use of underground water is beginning to develop in Idaho.

One of the first ones with which we came in contact in drawing this bill was the Westvaco Chemical Corporation near Pocatello. They are going to use there large electric furnaces which will consume, in the ultimate, some 50,000 kilowatts of power. They will need a vast amount of water for cooling purposes. They are drilling wells and expect to use a large amount of subterranean water. The Atomic Energy Commission is now engaged in drilling a 20 inch well out in the Arco flats. It is admittedly an exploratory well. Back of it is the idea that they are going to require a tremendous amount of water.

The Bureau of Reclamation over north of Rupert is planning to develop, I understand, some 20 or 30 thousand acres with a series of wells. There are private individuals in there now with several thousands of acres irrigated from wells.

So you can see that there is a vast development of underground water going on, both from the agricultural point of view and the industrial point of view.

The history in most of the other western states that are more advanced than Idaho in this use of underground water is that they inevitably run into a tremendous amount of trouble. Arizona developed a great part of its marvelous Central Valley area by the use of underground water. Part of it was drainage water they pumped up and reused in their canals, and the other part was original use of underground water. Their situation became critical about 18 months or two years ago. They found that this water supply was not inexhaustible. The net result was that the year before last Arizona had five separate sessions of its legislature trying to agree on some control of underground water, and of wells and their relative priorities. California has had similar trouble for many, many years. New Mexico has had a host of such problems.

It was our thought that possibly we could get at the problem early enough in Idaho so that we could obviate some of the troubles that other states had gotten into. On the general subject of underground water, as you gentlemen know, there are about three basic rules. There is the old English Common Law rule that the man who owns the surface of the ground owns everything under it; the rocks, the dirt and everything to the theoretical center of the earth, and that this includes all underground water. In the states that follow that rule, any man can put down a well on his own land pump just as deep and as hard as he desires, regardless of whom he may injure. That rule is not in much favor in the arid western states.

There is another sort of hybrid form of that rule which has been called the American Common Law doctrine, or the rule of reasonable use, or the doctrine of correlative rights. There are a flock of names for it. In over simplification, it seems to be to the effect that in any given underground water basin, every man owning land over it has the right to use his theoretical proportionate share of water in that basin. They use that rule in California, and it is similar to the rigarian rights doctrine that they follow in surface water. It has resulted in a race to see who can drill the deepest well and put on the heaviest pump. In any given basin they keep going down and down, further and further, and keep putting on stronger and stronger pumps.

There is a third doctrine, the doctrine of appropriation. "The first in time is the first in right." Of course, that it the doctrine we follow in Idaho on surface water; and it has been the thought of those working on the underground water code that for a variety of reasons, uniformity and everything else, that this is the doctrine that should be established in Idaho.

As was pointed out by Mr. Inman, our Supreme Court seems to be pretty well committeed to this rule. We have one case, known as the Natatorium Case, involving the natural hot water near Boise, which was a Public Utility Commission case and not a water appropriation case, in which the Supreme Court of the State of Idaho held that the water involved was percolating water, using "percolating" in the sense of static water, and that therefore it was not subject to appropriation nor was it public water. The general line of cleavage that has been followed by western courts, in deciding what water is subject to appropriation, is to make a distinction between percolating water and flowing water. To me the term "percolating" connotes some movement. But in the one and only case we have had in Idaho, which I said was not an appropriation case, where it was clearly admitted that it was percolating water, in the sense of static water, the Idaho Supreme Court held that the water in question was private water and the doctrine of appropriation did not apply. In all other Idaho cases which have come up, while they have done lots of talking, the actual holding of the Court, as distinguished from the language used, has been that in every case the water there was flowing or moving water, and our Court has said that the doctrine of appropriation applied.

Merely as an item of interest, the initial case of that kind was the case of Bower vs. Moorman in which the majority opinion was written by Judge Budge. In the second case on the subject, Judge Budge dissented and said he didn't mean to say, in the Bower case, that the doctrine of appropriation applied; and that what he was trying to say was that we had the doctrine of correlative use in Idaho. But the other members of the Court said they disagreed with the Judge and he didn't know what he had decided, and that the doctrine of appropriation did apply (laughter).

Now, in every one of those cases—there are four or five in number—our Court has found, as a fact, that it was flowing water or moving water which was involved, and they applied the doctrine of appropriation. They have used language which has used "percolating" water in the sense of moving water. Judge Givens, in one of the cases, said the water was percolating because it was moving, which gets right over to the opposite use of the same word. In two of the cases they have gone so far as to say that subterranean waters are subject to appropriation and that as to all such water the first in time is first in right.

So in drafting the bill, it was our thought that one rule of property should now be established in Idaho, and that at an early date so everyone would know what it was and that was this: That we abolish the distinction of what is flowing and what is percolating water, because after all no one can see below the surface of the ground and see what is happening. If we are going to have a law suit, we get to the narrow point of when does the "flow" stop and when does it start "percolating" again. Do you percolate up and down, or do you percolate sideways? It all would have to be fought out in long and expensive cases. So it was our thought that

it would be best to say that all water that is under the surface of the ground is underground or subterranean water, and abolish the distinction between percolating water and flowing water, or static water and moving water, as the case may be; and announce, as a legislative rule, that all water under the ground is dedicated to the public use of Idaho citizens just the same as the surface streams. It seemed to those who have given it the most thought that this would create the most substantial form of underground water rights, and it would protect those who have gone in and expended a large amount of money developing such underground water.

It is expensive to develop underground water. There are some wells that have actually been drilled in Idaho 20 and 22 inches 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 thing, there is a large investment. It would be too bad from any angle if a chap who develops such a water right and has gone to that expense is vulnerable to subsequent attack.

To us this seemed obvious, but again there are some very substantial dissents to such legislation. For instance, Senator Elmer Williams of Blackfoot, who was very much opposed to the underground water bill in the last session of the legislature, is, according to the press dispatches, touring eastern Idaho making speeches at luncheon clubs and so forth saying the old English Common Law doctrine is the rule to follow in Idaho. A number of men who have large areas of land on which they have put wells seem to think their rights will be best protected if that doctrine is adopted. It is quite a bit different than anything that the Courts of Idaho have announced so far.

The next point we thought was fundamental in preparing any underground water bill was that assuredly we should not take any existing rights away from anyone. All presently existing rights should be confirmed and validated. There are many of them in Idaho of which there is no record. We thought 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.

It was next thought we should state specifically the legislative rule that all underground water rights could be acquired by appropriation and appropriation only. Now, there is a divergence of thought there as to whether or not there should be an attempt made to require that all underground water rights be acquired, in the first instance, exclusively by applications to the State Reclamation Engineer. As you gentlemen know, our Constitution says that the use of the water of natural streams in Idaho shall never be denied. Back in 1903, or somewhere along in there, when the legislature attempted, with respect to surface water, to provide that you could get water rights only by making application to the Department of Reclamation, our Supreme Court held that to be unconstitutional. They said that the provision in the Constitution which said the right to use the water of natural streams should never be denied prohibited the legislature from making any particular method exclusive, and that we could still go ahead and get our water rights by diversion and actual use.

Now it isn't clear what parts of the underground water are natural streams within the definition contained in the Constitution. Mr. Inman,

in his very well reasoned paper of a year ago, suggested that he thought that an attempt should be made to pass an underground water bill which would make the administrative method of getting a water right exclusive in so far as it went to that part of the underground water which was not flowing water. However, that would seem to add many complications to the matter rather than clarify it. Unless and until there is an interpretation of whether or not any underground water is a natural stream within the meaning of the Constitution, we will not know whether or not this administrative process can be made exclusive.

In the bill that was submitted in the last session of the legislature, it was provided that you could acquire water by appropriation only; but there was no attempt to make the administrative measures absolutely exclusive. The bill did set up a very detailed method of getting underground water rights by administrative procedure. Many of them are now being obtained that way, following the procedure that is set up primarily for surface water rights. As I say, 424 permits were issued last year under the present statutory method.

Then the question came up, and it caused a great deal of debate, as to whether or not there should be any method of determining the adverse effect of one well or a group of wells upon another other than by court action. One of the original drafts of the bill proposed that whenever there were adverse claims that a hearing could be had before the State Reclamation Engineer. A storm of protests arose over this provision from those who were interested in wells. They claimed that they didn't want any one man to have the power to make such a decision. A number of drafts were written. Finally one came out, after discussion with the joint committees of the two houses, providing that wherever adverse claims were filed as to a specific well, that a Local Underground Water Board would be set up to determine that particular controversy alone. The board was to be composed of the State Reclamation Engineer as one party; a trained engineer or geologist appointed by the District Judge of the district which included the well in controversy as the second party; and the two to select a third member. This board, under rather informal rules and procedure, was authorized to make a finding and determination as to the adverse claims of these wells which would be binding and effective but which would be subject to appeal to the District Court. If appealed to the District Court, their findings of fact would not be binding upon the court at all, but there would be a trial de novo.

It seemed to be the consensus of opinion of those who had gone into the matter that that was about as far as we could go in having some preliminary decision of the adverse effect of the wells and still preserve our judicial processes.

The one thing to which everyone seemed to be agreed was that no arbitrary power should be given to any one man. One of the early drafts provided that you couldn't drill a well without a permit from the State Reclamation Engineer. But it was the general thinking of almost everyone that there was so much uncertainty as to the existence, and quantity, and location and so forth of underground water, that the only practical way would be to let any man drill that wants to drill. 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?

As I have mentioned, the Act exempted from its conditions all domestic wells. It exempted all wells where the water was pumped for drainage purposes only by existing canal companies or irrigation districts, or such organizations, for either drainage of land alone or for both drainage and reuse on the sale project.

There were so many objections raised and so much time taken, that by the time a reasonably acceptable bill was drawn, it was in the late hours of the session. Slot machines and liquor and so forth were so far in the forefront that it seemed rather absurd, on a matter of such great importance, to throw it out into the legislature and try to pass it in any last minute rush. So it was our suggestion that the matter be withheld for further study and circulation, with the thought that possibly by the time the next session of the legislature rolled around there would be some congealing of thought on the matter.

Some other objections occur to me now. For instance, Canyon County folks around Nampa or Caldwell, or both, seemed greatly excited and felt there should be some exemptions so that a municipality would be able to drill a well any time they wanted to and without any restrictions. A thriving city could conceivably, under such a rule, go out and buy land adjoining an existing irrigation well, put a well down as a domestic well and take the water away from the irrigation well. The municipalities already have the power of eminent domain. Any time they want to, by that process, they can get water or wells. The Chamber of Commerce of Caldwell passed some very strong resolutions stating that we were trying to interfere with their domestic water rights. That problem will have to be solved.

The folks at Mud Lake seemed to think it was going to hurt them where they allowed water to run from artesian wells the year around and store it in a lake and use it in their canals later in the season. It was our thinking that this was a right of use, and that the proposed bill in no way interfered with such a right.

What the power of the Federal Government may be in this atomic development and the extent of the use of water they may require, you can guess just as well as I. We have heard stories of the tremendous amount of water being used at the Hanford Plant in Washington. If they propose to tap our underground flow in Idaho for a similar use, they perhaps will have a priority and use large quantities of water.

As a passing side issue, in the pending Columbia Valley Administration Act now before Congress, they give absolute priority to water rights for uses connected with or related to the development of atomic power. They put that even ahead of domestic use. That Act would only apply to future rights, if passed, but undoubtedly the government does have the right of eminent domain now.

It is an intensely interesting subject. I have only hit upon the high points.

To the extent I can, if any of you have question, I will try to answer them.

ASHER B. WILSON: How much water do we take out at Wilner? You said there was 6,000 feet at Bliss?

MR. PARRY: At the peak 6,700 feet.

MR. WILSON: Approximately 100% of the water comes back 50 miles below after we take it all out?

MR. PARRY: Yes.

HOWARD R. STINSON: There is one phase that we, the Bureau of Reclamation, are greatly interested in. In going over one of the early drafts of the Bill it seemed to me that as framed it provided that any late developer would be practically without right. That is, it prevented any further development of wells where there was any possible interference, such as increase in pumping head or any effect at all on existing wells. As we understood it, the Bill prevented the drilling of additional wells unless there was a finding that there could not be any such interference. We took exception to that. We talked about it in the Bureau of Reclamation. We did not have a full chance to review the last draft of the Bill in the late days, and didn't attempt to. But what is the situation now on that score?

MR. PARRY: First I agree with you that that was an objectionable feature, and it is my understanding that that has been completely eliminated from any proposed bill.

MR. STINSON. How would you get at the rule of property? Is this a rule of property to be developed by this local board without standards or guidance and then by the courts, or is there some attempt to get a rule of property?

MR. PARRY: The rule of property must of necessity be laid down in the statute, as I see it.

MR. STINSON: What is it then?

MR. PARRY: At the present time it is still nebulous. It has been our suggestion, as I say, that the doctrine of appropriation apply—first in time, first in right—and that all water underground is public water.

MR. HOWARD R. STINSON: I agree on both counts.

MR. PARRY: Now you come to the question of what is interference, and that is a problem to which I do not know the answer. Is it interference if a man is in any way interfered with in using a pump of his then capacity and a well of his then depth? Or should there be allowed the greatest economic use of water? Are we going to say that if you can make your well deeper or put on a stronger pump and get your water out, you still must do that?

MR. HOWARD R. STINSON: That's right. That is the problem. It is someplace between the two.

MR. PARRY: It is someplace in there, and the legislature or the courts, or both, will have to answer it.

MR. HOWARD R. STINSON: Before your Bill comes up at the next session of the legislature, we will make some sort of a proposal on that count.

MR. PARRY: Yes, the Bureau of Reclamation, of which Mr. Stinson is Regional Counsel, is probably the most vitally interested organization in underground water and in irrigation development.

MR. HOWARD R. STINSON: As a matter of fact, Pat, I might say, just to correct a figure and make it look bigger, that the North Side Pumping Development will reach a maximum of around 60,000 acres. Of course, I am prejudging some facts as to what that underground water supply really is there, but that is the ultimate development now planned.

MR. MORGAN: Mr. Parry, did you encounter the problem of whether or not there should be a standard set up for the type of well or method of diversion? By that I mean, when you come to a question of whether or not there has been interference, if the well has not been properly drilled and cased—the second well—then the mere capping of the top of the well would not restore to the original well, the one interfered with, its water. To go back in and do it would be an expensive proposition. And likewise, some of the older wells, I understand, were not properly cased and not properly drilled, and so it becomes a difficult question of fact as to whether or not there has been interference from another well or whether it is sluffing off or drainage of one into the basin. Did you encounter anything about standards?

MR. PARRY: That was discussed at length, Mr. Morgan. New Mexico, as I now recall, has gone into that at some length and have now put very stringent control regulations on the standards of the casing and of the capping of wells and so forth. We, perhaps in a cowardly way, dodged the issue. We figured we were going to try to get some basic rules first, and then those steps of control would have to come along in the orderly development. There are some existing statutes in Idaho which may apply. One of the legislators, a very bright young fellow, came tearing up to me one day and said that he was getting wires from home. "I have got to go against this Bill. We have got a lot of artesian wells in our country that flow all the time. We can't afford to put caps and valves and so forth on them, and I have got to be against your Bill."

I showed him our present statute. I said, "You are all guilty of a misdemeanor now, because we have a present statute against allowing wells to continue flowing like that. There is also one stating that a well such as you have described is a nuisance. (laughter).

What our present statute really means, I don't know. I don't think it has ever been applied or enforced in Idaho.

MR. MORGAN: I have an auxiliary question. Where did you consider, in your discussion of the problems, the point of diversion? Is it at the top of the ground or where they tap the water supply?

MR. PARRY: Well, the top of the ground seemed to be the answer most generally agreed upon for practical purposes. Of course, that again goes to whether your method of conveying the water from the water supply to the top of the ground is such that you don't have leakage and waste.

MR. JOSEPH McFADDEN: As you well know, up in our country we have a peculiar situation. The situation is that we have the subterranean flow developing into what is known as Silver Creek. What effect would the proposed legislation have on existing water rights down there in the Silver Creek area, which is actually a subterranean flow rising to the surface?

MR. PARRY: This whole problem is a mixture of law and fact. You can only announce the rules and the law, and then you get into the questions of fact. I believe that it is the generally accepted rule everywhere, that any subterranean flow which has direct contact or connection with the flow of a surface stream, such as Silver Creek, is actually a part of the flow of that stream and not subject to an appropriation as underground water. Does that answer your question, Joe?

MR. JOSEPH McFADDEN: I think so.

MR. PARRY: If you can prove it. But you can't pass any law that will change the facts. You still have the question of proof connected with it. I was shown an instance within the last 30 days where a chap had gone along Snake River with a dragline and dug a sump about the size of this room just 90 feet from the shore line of Milner Reservoir. It was just about as far from the Reservoir as this room is from the lake. There was water standing in the sump, and you could see that there was a gravel bar there, and he was gaily pumping the water out of there and irrigating several hundred acres of land. He might just as well have gone to the reservoir and pumped it right out of the lake.

MR. HOWARD R. STINSON: Is he pumping there now, Pat?

MR. PARRY: I think he is. (laughter)

MR. FRANK MARTIN: I notice a tendency lately for a good many well owners to go into the Department, or to the State Engineer, and file applications setting up their priority of appropriation. They make that purely for the purpose of getting a record someplace to show a prior appropriation. Do you think that is an effective record, or is it just an attempt to do something?

MR. PARRY: The latter. I think it is an attempt to do something.

MR. FRANK MARTIN: What I had in mind was: Do you suppose those applications could, at a later date and when the only parties who knew about putting in these wells are gone, could those affidavits and papers that are filed ever be used for the purpose of establishing the date of original appropriation?

MR. PARRY: I would think not. They are self serving.

MR. FRANK MARTIN: Well, for instance, you have the affidavits of the men who did the work—not the owner of the well but of the men who put in the well and saw it in operation.

MR. PARRY: Of course, it is an attempt to perpetuate evidence, I take it. There is no specific statutory regulation to do that.

MR. FRANK MARTIN: How many of these new applications are of that class? Quite a few?

MR. PARRY: I couldn't tell you, Mr. Martin, but there are quite a few. From the time we started talking about this underground water code, along last fall, there has been quite a rush, in different ways, for people to establish their claims on underground water rights, particularly old priorities.

Thank you, Mr. Chairman. (applause)

PRES. MERRILL: The next item of business, gentlemen, is "The Permanent Continuing Code" by Carey Nixon.

CAREY NIXON: Members of the Bar:

On July 17, 1948, at the Idaho State Bar meeting at Sun Valley, Mr. Oscar W. Worthwine of the Code Commission reported on the progress of the new Idaho Code as of that date, and at this time the Commission's report will be confined to its activities since that time.

The new Idaho Code has been completed and by proclamation of the Governor, is the authorized compilation of the general statutes, codes and laws of the State of Idaho.

The new Idaho Code consists of 12 volumes bound in fabrikoid.

Volume 1 embraces the Declaration of Independence, Constitutions of the United States and of the State of Idaho, the Organic Act, Idaho Admission Bill, Federal Laws of particular interest to Idaho, indexes of the same, and parallel reference tables.

Vols. 2, 3 and 4, consisting of Titles 1 to 20, embrace the subjects, Courts, Civil and Criminal Procedure, Estates, Crimes and Prisons.

Vols. 5 to 11, consisting of Titles 20 to 73, embrace statutes, alphabetically arranged, covering the subjects, Aeronautics to Workmen's Compensation and related laws, the Industrial Accident Board and General Court Provisions.

Volume 12 contains special indexes, as well as the general index of the entire set.

The price of the new Idaho Code for sale in Idaho is $80.50.

It is to be hoped that those who have had occasion to handle and use the new Idaho Code will have found it an improvement over the 1932 Code.

The volumes have been kept as nearly uniform as possible and the Titles and Subjects so arranged as to permit the replacement of separate volumes whenever replacement becomes desirable, instead of the publication of an entire new Code.

The new Idaho Code will be kept up to date through biennial pocket-part supplements. The 1949 pocket-part supplements now are or shortly will be available. New supplemental pocket-parts will be issued following each regular session of the Idaho Legislature. Each supplement will cumulate all relevant laws in previous pocket-parts, together with new laws and amendments to existing laws as passed by each Legislature. All