Docket No. 38403-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

A & B IRRIGATION DISTRICT,
Petitioner-Appellant,

v.

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

v.

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

A&B IRRIGATION DISTRICT'S OPENING BRIEF

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

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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the *Final Order Regarding the A&B Irrigation District Delivery Call* ("*Final Order*"), R. 3318, issued by the Director of the Idaho Department of Water Resources ("Department" or "IDWR") on June 30, 2009.

II. Course of Proceedings

The A&B Irrigation District ("A&B" or "District") filed a water right delivery call in 1994 to prevent injury to its senior ground water right 36-2080 (September 9, 1948 priority). R. 12-14. Shortly after A&B filed its call, the District worked with junior water users to reach an informal resolution. R. 641. The parties entered into a stipulation as an "interim solution" to A&B's water supply concerns. *Id.* at 642. According to the stipulation, IDWR would be required to "adopt and implement an active enforcement plan" to prevent excessive and unauthorized diversions from the aquifer. *Id.* at 642-43. The agreement further required IDWR to measure "all ground water diversions in the ESPA." *Id.* at 643. The Director adopted the parties' stipulation in a *Pre-Hearing Conference Order* dated May 1, 1995 ("*Stay Order*") and the case was stayed. *Id.* at 669. However, the *Stay Order* provided that any "party may file a Motion to Proceed at any time to request the stay be lifted." *Id.* at 676.

From 1995 to 2007, aquifer levels continued to decline across the Eastern Snake Plain Aquifer ("ESPA") and A&B was still unable to divert and beneficially use the full quantity of its water right. R. 834-35. IDWR also failed to take all of the actions required by the *Stay Order*. R. 833-34. Accordingly, A&B filed a *Motion to Proceed* with the call on March 16, 2007. R.

830. Despite A&B's request, and the express terms of the *Stay Order*, the Director again refused to act on A&B's call – forcing A&B to seek relief in district court. On October 23, 2007, the Honorable John K. Butler issued a writ of mandate ordering the Director to respond to A&B's delivery call.[1] R. 1106. The Director then requested information from A&B,[2] and a month later denied A&B's call by an initial order. A&B challenged the Director's decision, and a contested case followed with former Chief Justice Gerald F. Schroeder presiding as the Hearing Officer.

A&B filed a motion for declaratory ruling challenging the applicability of the Ground Water Act to its 1948 senior water right. R. 1451. The Hearing Officer denied A&B's motion, R. 1630, and the case proceeded to an administrative hearing. On March 27, 2009, the Hearing Officer issued a recommended order.[3] R. 3078. The Director then issued a *Final Order* on June 30, 2009.[4] R. 3318.

A&B appealed the *Final Order* to the Minidoka County District Court. Clerk's R. at 143. On May 4, 2010, the Honorable Eric J. Wildman issued a *Memorandum Decision and Order on Petition for Judicial Review*. *Id.* at 45. In that decision, the District Court affirmed the Director's application of the 1951 Ground Water Act to A&B's 1948 water right. *Id.* at 93. Next, the Court affirmed the Director's decision that A&B had not been required to exceed a

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[1] The agency has a demonstrated history of failing to properly respond to water right delivery calls on the ESPA as A&B's case was not the first time a senior water user was forced to file a mandamus action in district court regarding water right administration. *See Musser v. Higginson*, 125 Idaho 392 (1994).

[2] In his November 16, 2007 *Order Requesting Information*, the Director requested 18 different types of information from A&B, including "average monthly deliveries per headgate since 1959," "average monthly pumping rates since 1959 for each well," and "specific types of crops planted and acreage planted for each crop type since 1959." R. 964-65. A&B provided the available information within 30 days. R. 1030.

[3] The Hearing Officer also issued an order granting in part and denying in part A&B's petition for reconsideration as well as a response to A&B's petition for clarification. R. 3231, 3262.

[4] A&B's request for reconsideration of the *Final Order* was denied. R. 3360.

reasonable pumping level. *Id.* In addition, the Court found that an evaluation of material injury to A&B's water right should be based on depletion to the cumulative quantity of the water right, rather than depletions to individual wells or points of diversion. *Id.* at 94. Finally, the District Court held the Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that A&B's decreed diversion rate exceeds the quantity of water being put to beneficial use for purposes of determining material injury.[5] *Id.* at 93.

A&B, IGWA, and the City of Pocatello appealed the District Court's decision. Clerk's R. at 143, 147 & 152. IDWR and the Interim Director filed a notice of appeal, *id.* at 138, however, they withdrew their appeal later.

STATEMENT OF FACTS

I. The A&B Irrigation Project and Water Right 36-2080

The North Side Pumping Division of the Minidoka Project was initiated, designed, and constructed by the United States Bureau of Reclamation ("Reclamation") to develop irrigable land in Jerome and Minidoka Counties in the early 1950's and 60's. R. 1111. Reclamation completed the project in 1963.[6] *See* Ex. 200 at 2-2 to 2-3. The project consists of two units, Unit A that serves approximately 15,000 acres with surface water from the Snake River, and Unit B

[5] The District Court remanded the case to the Director to re-evaluate A&B's call and apply the appropriate burden of proof and evidentiary standards in analyzing material injury to A&B's senior ground water right. Clerk's R. at 93. The Director, however, failed to act on the District Court's order – forcing A&B to, *again*, go back to court for relief. In an *Order Granting Motion to Enforce in Part & Denying Motion to Enforce in Part*, the District Court held that the Director erred in not timely addressing the remand issues by applying the appropriate burden of proof and ordered the Director to "forthwith comply with this Court's *Order of Remand*." The Director issued his *Final Order on Remand Regarding A&B Irrigation District's Delivery Call*, on April 27, 2011.

[6] For a detailed history the A&B irrigation project see Ex. 200 at 2-1 to 2-9.

that serves approximately 66,000 acres with ground water from the ESPA.[7] R. 1111-12. Reclamation transferred operation and maintenance of the project to the A&B Irrigation District in 1966. R. 3080.

A&B is the beneficial owner of water right 36-2080.[8] The water right authorizes the diversion of 1,100 cfs from 188 separate points of diversion, or wells, with a priority date of September 9, 1948. R. 3081. Currently, A&B has 177 active production wells. *Id.* The SRBA Court decreed water right 36-2080 on May 7, 2003. Ex. 139.

A&B's groundwater unit is not a single distribution system like a typical large scale irrigation project in Idaho. A&B diverts groundwater from individual wells which comprise over 130 separate "well systems." Tr. Vol. III, p. 467, lns. 3-7, p. 475, lns. 2-9.[9] Water pumped from individual wells can only be delivered to specific acres on the project.[10] At hearing, A&B's manager Dan Temple described the project's well systems as follows:

> . . . A well system is an independent delivery system that stands by itself, that consists of a well and pump or pumps, a couple wells, a couple pumps, and a conveyance system to land that the District – that under the Bureau of Reclamation, that had an entitlement to from that well system. They defined the land in the development that was going to receive water from that well system. It's independent of other well systems.

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[7] A&B's decreed water right 36-2080 provides water to 62,604.3 acres. R. 1112. A&B also appropriated other beneficial use and enlargement ground water rights to irrigate an additional 4,000 acres in Unit B. *Id.* This case only concerns A&B's senior ground water right 36-2080.

[8] Water right 36-2080 is held in trust by the United States, for the benefit of A&B's landowners. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106 (2007).

[9] A "well system" is comprised of one or more wells providing water to a specific distribution system serving a specific number of acres. *Id.* p. 474-75; *see* Ex. 200 at 4-32 (a table of A&B's separate well systems and the acreage served by each system). For the Court's convenience, a copy of Exhibit 200 page 4-32 is attached hereto.

[10] Not all wells in a "well system" can provide water to each acre served by that individual system. Tr. Vol. III, p. 475, lns. 10-16, p. 477 ln. 22 – p. 478, ln. 4 (emphasis added) (*see also* pp. 476-77, an explanation of an "interconnected" system provided at Ex. 238).

Tr. Vol. III, p. 473, ln. 14 – p. 474, ln. 3.

A&B measures water at each well and delivers it upon demand to its landowners during the irrigation season. *Id.*, pp. 469-70, 514. A&B compiles annual reports to detail a well's performance, including the diversion rate per acre and the total acre-feet pumped and delivered. Ex. 133 (Example Report: 2007 found at A&B 2782-98).[11]

A&B maintains the pumps and motors on its individual well systems on an annual basis and has instituted a "rectification" program for wells that experience reduced water production. Tr. Vol. III, pp. 490-92, 550-58. As part of its "rectification" program, A&B deepens wells, rebuilds pumps, replaces pump bowls, and adds horsepower. *Id.* at 556-58. A&B has also drilled new wells and added new points of diversion as part of this program. *Id.* at 559.

Separate from improving its points of diversion (wells), A&B has also improved its water delivery system over time by piping laterals, eliminating drain wells, and connecting landowners' irrigation systems directly to the wells. Ex. 200 at 2-6; Tr. Vol. III, p. 489. A majority of the project is now irrigated by sprinkler irrigation. R. 3098-99 (only 3-4% of the project is irrigated by gravity flow). Pipelines have replaced open ditches – "eliminating ditch loss and evaporation" – laterals and drains have been removed, and injection wells have been eliminated. *Id.* As a result of these efforts, A&B is a highly efficient irrigation project, as the Hearing Officer found "conveyance losses to the farm turnouts were estimated to be between zero and five percent. Three percent is a proper figure to use." R. 3088.

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[11] The Annual Pump Reports found at Exhibit 133 were bate-stamped for IDWR's record as "A&B ___".

II. A Depleting Ground Water Supply and the A&B Delivery Call.

From the early 1960s to 1995, IDWR issued over 30,000 new ground water rights throughout the ESPA. Ex. 200 at 5-17 (Figure 5-2). This dramatic increase in ground water diversions impacted A&B's ability to divert water under its senior right. Pumping levels dropped by as much as 46.4 feet. R. 3087. Reduced ground water levels impacted A&B's production capacities and forced the abandonment of some wells. R. 835, 3090. By early 1994, A&B had experienced significant ground water declines – leaving many landowners without a full irrigation supply. R. 12-14.

In light of the impacts to its senior water right, A&B filed a *Petition for Delivery Call* on July 27, 1994, seeking the administration of junior priority ground water rights. R. 12-14. A&B also asked the Director to designate the ESPA as a Ground Water Management Area pursuant to Idaho Code § 42-233b. *Id.*

Shortly after the *Petition* was filed, the parties stipulated to hold the contested case "in abeyance for a time." R. 670. Pursuant to the stipulation adopted by the Director, IDWR was obligated to "develop a plan for management of the ESPA which will provide for active enforcement of diversion and use of water pursuant to established water rights." R. 676.

Notwithstanding the terms of the *Stay Order*, IDWR did not "develop a plan for management of the ESPA." Instead, diversions under junior priority ground water rights continued to deplete the ESPA and aquifer levels continued to fall.[12] Specifically, ground water

[12] The Department has determined that the ESPA is an area of common ground water supply. IDAPA 37.03.11.050 (CM Rule 50). Therefore, depletions by junior ground water right within the ESPA are hydraulically connected to and impact A&B's water supply under its senior water right 36-2080.

levels within A&B dropped another 12 feet on average from 1999 to 2006, which followed an average 22 feet decline from 1987, and a 25 to 50 feet average decline since the 1960's. R. 836.[13]

Consequently, A&B filed a *Motion to Proceed* with the delivery call on March 16, 2007. R. 830. A&B requested IDWR to lift the stay and proceed with administration of junior priority ground water rights. The *Motion* identified the continued impact that a depleted water supply was having on A&B and its landowners, including: (i) investing in infrastructure to convert 96.5% of A&B's lands to sprinkler irrigation; (ii) upgrading of pumps and piping distribution systems; (iii) increasing motor sizes to lift ground water from deeper levels; (iv) spending hundreds of thousands of dollars for well rectification; (vi) drilling at least 8 new wells; (vii) deepening at least 47 wells; (viii) replacing bowls on 109 pumps; and (ix) abandoning 7 wells. R. 834-35. A&B was even forced to convert some of its lands to a new surface water supply. R. 838 ("To the extent conversion to surface water has been possible, it has been done.").

Notwithstanding these efforts to improve its delivery system and wells throughout the project, A&B continued to suffer impacts to its ground water supply:

> a. … [S]ince 1994 the total water supply from the A&B wells has declined to 970 cfs. Many of the wells that have been drilled deeper, some to depths of 800 feet, because of the low transmissivity and low well yields deeper in the aquifer, do not produce additional water. ***All of these issues cause A&B to suffer water supply shortages during peak demand periods.***

R. 835-36 (emphasis added).

[13] This continued decline in aquifer levels at A&B followed a similar trend in water levels throughout the ESPA. Ex. 200 at 5-23 to 5-31.

Although A&B was able to pump approximately 225,000 acre-feet per year in the 1960's, its diversions dropped to as low as 150,000 acre-feet during the 2000's. *Id.* Importantly, "A&B has no other source or supply of water to replace its lost ground water supply needed to irrigate Unit B land." R. 838.

Despite A&B's *Motion* and request for administration, the Director refused to act – forcing A&B to seek and obtain a writ of mandate from the Minidoka County District Court. R. 1106. Following the Court's writ of mandate, the Director finally issued an initial order on January 29, 2008, denying A&B's call and request for a GWMA designation. R. 1105. In that *Order*, the Director erroneously concluded that A&B had not suffered material injury for various reasons, including wrongly assuming that A&B's physical delivery capacity was limited to 0.75 miner's inches per acre, that A&B's well drilling techniques were inappropriate, and that the project's wells were not properly sited by Reclamation when the project was initially designed and constructed in the 1950's and 1960's.[14] R. 1147-49. Importantly, the Director applied the wrong legal standard and determined that despite its decreed water right, A&B, the senior water right holder, carried the burden of proof to establish "material injury" by "prima facie evidence". *Id.* 1147.

A&B challenged this decision and requested an administrative hearing. R. 1182. A formal hearing was held and the Hearing Officer issued a recommended order, an order on reconsideration, and a clarification order. R. 3078, 3231, 3262. A&B filed exceptions to the recommended order, R. 3284, and the Director issued his *Final Order* on June 30, 2009. R.

[14] The Hearing Officer's findings on these points demonstrated the errors made by the Director in the initial order. R. 3091, 3097-98; *see also* R. 3312-13.

3318. A&B requested and was denied reconsideration of the *Final Order*, and this appeal followed.

ISSUES PRESENTED

A&B presents the following issues on appeal:

A. Whether the Director erred in concluding that A&B's 1948 water right is subject to the provisions of the 1951 Idaho Ground Water Act (Idaho Code §§ 42-226 *et seq.*) and the 1953 amendment, even though the statute provides that "This act shall not effect the rights to the use of ground water in this state acquired before its enactment"?

B. Whether the Director erred in finding that A&B has not been required to pump water beyond a "reasonable ground water pumping level" even though the Director failed to identify a specific pumping level as required by Idaho Code § 42-226?

C. Whether the Director erred in failing to analyze water availability at the 177 individual wells or points of diversion for purposes of an injury analysis to A&B's senior water right?

D. Whether the Director unconstitutionally applied the CM Rules by finding that A&B must interconnect individual wells or well systems across the project before a delivery call can be filed even though water right 36-2080 was developed, licensed and decreed with 177 individual wells?

STANDARD OF REVIEW

Any party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835 (2003). The Court reviews the matter "based on the record created before the agency." *Chisholm v. IDWR*, 142 Idaho 159, 162 (2005). Generally, a Court is charged with deferring to an agency's decision. *Mercy Medical Center v. Ada County,* 146 Idaho 220, 226 (2008). The Court, however, is "free to correct errors of law." *Id.*

An agency's decision must be overturned if it (a) violates "constitutional or statutory provisions," (b) "exceeds the agency's statutory authority," (c) "was made upon unlawful procedure, " (d) "is not supported by substantial evidence in the record as a whole" or (e) is "arbitrary, capricious or an abuse of discretion." *Chisholm*, 142 Idaho at 162 (citing Idaho Code § 67-5279(3)).

An agency's decision must be supported by "substantial evidence." *Chisholm, supra* at 164 ("Substantial evidence … need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusions as the fact finder"); *Mercy Medical Center, supra* (agency decision must be "supported by substantial and competent evidence"). The "reviewing courts should evaluate whether 'the evidence supporting [the agency's] decision is substantial." *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 261 (1985). This Court is not required to defer to an agency's decision that is not supported by the record. *Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431 (2002).

An agency action is "capricious" if it "was done without a rational basis." *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). It is "arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Id.*

Although the Court grants the Director discretion in his decision making, *supra*, the Director cannot use this discretion as a shield to hide behind a decision that is not supported by the law or facts. Such agency decisions are "clearly erroneous" and must be reversed. *See Galli v. Idaho County*, 146 Idaho 155, 159 (2008) ("A decision is clearly erroneous when it is not supported by substantial and competent evidence").

SUMMARY OF ARGUMENT

A&B holds a 1948 ground water right. Idaho law provides certain protections for ground water rights that pre-date the 1951 Ground Water Act. The District Court and Director misinterpreted the Ground Water Act and disregarded this Court's precedent by concluding that the Act, and its "reasonable ground water pumping level" provision, applies retroactively to A&B's water right. The Director's failure to properly administer A&B's senior water right in compliance with controlling Idaho law is erroneous and should be set aside.

Notwithstanding this error of law, and assuming, *arguendo*, that the Ground Water Act does apply to A&B's 1948 ground water right, the Director erred in finding that A&B has not exceeded a "reasonable pumping level." The Director's finding results in an obvious "Catch-22" – whereby, the Director decides that A&B's right is subject to the Ground Water Act yet simultaneously refuses to apply the Act and protect A&B's senior right to a "reasonable

groundwater pumping level." The Director did not identify a single fact to support his decision on this issue. The failure to identify an objective standard is arbitrary and capricious and therefore should also be set aside.

Finally, the Director failed to give proper presumptive effect to A&B's decreed water right by refusing to recognize the individual points of diversion (wells). Instead, the Director unlawfully forced A&B, the senior right holder, to demonstrate as a condition to administration why it was infeasible to interconnect separate well systems across the project. The Director's application of the CM Rules in this manner violates Idaho law.

The Court should correct these errors of law and set aside the agency's decision.

ARGUMENT

I. The 1951 Ground Water Act Does Not Affect the Administration of A&B's Water Right 36-2080, with a Priority Date of September 9, 1948.

Whether a ground water right is subject to the Ground Water Act for administration depends upon the priority date. Water rights pre-dating the Act are governed by common law principles confirmed by the Idaho Supreme Court. On the other hand, post-Ground Water Act water rights are only protected to a "reasonable pumping level." I.C. § 42-226. The distinction is critical for this case.

In *Noh v. Stoner*, 55 Idaho 651 (1933), the Idaho Supreme Court held that senior ground water rights are protected to their historic pumping levels:

> If [subsequent appropriators] may now compel [prior appropriators] to again sink the well, to a point below [the subsequent appropriators'], to again receive the amount of water heretofore used, it would result ultimately in a race for the bottom of the artesian belt.

> ...
>
> If subsequent appropriators desire to engage in such a contest ***the financial burden must rest on them and with no injury to the prior appropriators or loss of their water.***

55 Idaho at 657 (emphasis added).

Under this rule, a senior appropriator "has a vested right to use the water," which "includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred ... to change his method or means of diversion in order to maintain his right to use the water." *Parker v. Wallentine*, 103 Idaho 506, 512 (1982) (emphasis added). This right is more than just a casual benefit to the senior water right holder. The *Parker* Court clarified that "under the doctrine of prior appropriation," the "right to have water available at the historic pumping level" became a "***vested***" part of the water right. *Id.* (emphasis added). This rule applies to all ground water rights not subject to the Ground Water Act. *Id.* at 513, n.11.

Passage of the Ground Water Act, as amended in 1953, marked a sweeping change to the method of administering ground water rights in the state of Idaho. This Court confirmed the change in *Baker v. Ore-Ida Foods, Inc.*:

> A necessary concomitant of this statutory matrix is that the senior appropriators are not entitled to relief if the junior appropriators, by pumping from their wells, force seniors to lower their pumps from historic levels to reasonable pumping levels.

Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 585 (1973); *see also Clear Springs Foods, Inc. v. Spackman*, 2011 WL 907115 at *11-12 (Idaho 2011).

As discussed herein, the Ground Water Act does not apply to pre-enactment ground water rights, including A&B's 1948 water right.

A. This Court Has Held that The Plain Language of Section 42-226 Precludes the Director from Applying the 1951 Ground Water Act to A&B's 1948 Water Right.

When interpreting a statute, the Court's primary objective is to derive the legislature's intent in enacting the statute. *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312 (2005). Statutory interpretation begins with the literal language of the statute. *Id.* If the language is unambiguous, the Court need not engage in statutory construction and the statute's plain meaning controls. *Id.* In other words, "[a]n unambiguous statute must be given its plain, usual, and ordinary meaning." *Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 15 (2010).

In this case, the language of the Ground Water Act is unambiguous.

> This act ***shall not effect*** the rights to the use of ground water in this state ***acquired before its enactment***.

I.C. § 42-226 (emphasis added).

Despite the statute's plain language, the Director erroneously found that A&B's 1948 ground water right was subject to the Act and the "reasonable pumping level" provision. R. 1630, 3322. The Director even went so far to ignore this Court's precedent to arrive at his conclusion. *Id.* A state agency has no authority to ignore decisions of the state's highest court. *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77 (1990) ("When there is controlling precedent on questions of Idaho law 'the rule of stare decisis dictates that we follow it'"); *see also*, 73 C.J.S. Public Admin. Law & Proc. § 55 ("An administrative agency is without power to render a judgment differing from a court's prior judgment or judicial precedent").

In *Musser v. Higginson*, the Idaho Supreme Court reviewed the exact language and held that the Ground Water Act, as originally drafted and amended, "makes it clear that ***this statute does not affect the use of ground water acquired before the enactment of the statute***." 125 Idaho 392, 396 (1994) (emphasis added).[15]

In *Musser*, the Director refused to honor a call by a senior surface water user, asserting that there was no method for conjunctively administering water within a water district unless a "formal hydrologic determination" is made "that such conjunctive management is appropriate." 125 Idaho at 394. The district court issued a writ of mandate ordering the Director to administer the water rights. *Id.*

On appeal the Director argued that an agency "'policy' ... prevented him from taking action." *Id.* at 396. The Director claimed section 42-226 required "a decision ... as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource." *Id.* The Court rejected the Director's argument, stating "we fail to see how I.C. § 42-226 ***in any way*** affects the Director's duty to distribute water to the Mussers ***whose priority date is April 1, 1892***." *Id.* at 396 (emphasis added). Relying on the plain language of section 42-226, the Court concluded that Musser's pre-1951 water right was not affected by the Act. *Id.*[16]

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[15] The Hearing Officer overlooked the plain language of *Musser*, finding that it was inconsistent with *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575 (1973). R. 1636. However, the Court's decision in *Baker* did not discuss the issue here and cannot be interpreted to expand the scope of the Ground Water Act to cover pre-enactment water rights. *Infra* Part I.C.

[16] The SRBA District Court has relied on *Musser* and recognized that:

> [T]he ***groundwater management statutes do not apply to water rights prior to their enactment in 1951***. *Musser*, 125 Idaho at 396 (statutes do not affect rights to the use of groundwater acquired before enactment of the statute).

Order on Cross Motions for Summary Judgment at 27 (Twin Falls County Dist. Ct., Fifth Jud. Dist., In Re SRBA: Subcase No. 91-00005, July 2, 2001) (emphasis added).

Similarly, the Ground Water Act does not affect the administration of A&B's 1948 water right. I.C. § 42-226. Since the statute is clear and unambiguous, as the Court has already determined in *Musser*, the Director's application of the Act to A&B's water right should be reversed.

B. The Court's *Parker* Decision Confirms that the 1953 Amendment and the "Reasonable Ground Water Pumping Level" Provision Does Not Apply to A&B's 1948 Water Right.

The "reasonable ground water pumping level" provision of the Act does not apply to pre-1953 water rights. In 1953, section 42-226 was amended to include, *for the first time*, the "reasonable ground water pumping level" provision. 1953 Idaho Sess. Laws., ch. 182, § 1. Prior to the amendment, all ground water rights – even those that were subject to the 1951 Ground Water Act – were protected to their historical pumping levels. *Noh, supra.* Nothing in the 1953 amendment provides that it would be applied retroactively.

Idaho law requires an express declaration if a statute is to be applied retroactively. I.C. § 73-101 ("No part of these compiled laws is retroactive, unless expressly so declared"); *see also, e.g., Gailey v. Jerome Cty.*, 113 Idaho 430, 433 (1987) ("In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied"); *Parker*, 103 Idaho at 511 (statutes "are not to be applied retroactively in the absence of clear legislative expression to that effect"); *City of Garden City v. City of Boise*, 104 Idaho 512, 515 (1983) (a statute cannot be retroactively applied absent a "clear legislative intent to that effect").

Importantly, the same declaration of retroactive intent is required for <u>an amendment</u> to a statute as well. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614 (1987) ("long standing rule

of this jurisdiction that an amendment to an existing statute will not, absent an express legislative statement to the contrary, be held to be retroactive in application."). Absent such a declaration in the 1953 amendment, the District Court and Director have no authority to retroactively apply the "reasonable ground water pumping level" provision to A&B's 1948 water right.

The case before the Court is directly on point with *Parker, supra*, which rejected an attempt to retroactively apply a 1978 amendment to the Ground Water Act. Prior to 1978, domestic ground water rights were completely exempted from the Ground Water Act pursuant to then-section 42-227. *Parker*, 103 Idaho at 511 (as originally enacted, section 42-227 provided that domestic wells "shall not be in any way affected by this act").[17] In 1978, the legislature amended section 42-227, providing that domestic ground water rights were only exempt from the permitting requirements but not the "reasonable ground water pumping level" provision or other requirements of the Ground Water Act. *Id.*

In *Parker*, the holder of the junior priority ground water right (Wallentine) asserted that the 1978 amendment effectively rendered all domestic ground water rights – even those that predated the 1978 amendment – subject to the "reasonable ground water pumping level" provision of section 42-226. *Id.* at 510. He asserted that the 1978 amendment "eliminates the

[17] The *Parker* Court recognized that the "shall not be in any way affected by this act" language of section 42-227 prior to the 1978 amendment exempted domestic rights from the Ground Water Act for all purposes. 103 Idaho at 511. Importantly, the District Court failed to explain why this language in section 42-227 should be interpreted differently from the similar language originally included in section 42-226 ("This Act shall not affect the rights to the use of ground water in this state acquired before its enactment"). If the terms "shall not affect" give pre-1978 domestic wells the right to a historic pumping levels, the same protection should apply to any pre-1951 ground water rights (irrigation, municipal, stockwater, etc.).

broad exemption for domestic wells" and "should be applied retroactively to thereby extinguish any right [the senior water user] had." *Id.* at 511, n.7.

The Court rejected this argument. The Court reviewed the 1978 amendment to section 42-227 and held: "***nothing in the 1978 amendment or the circumstances of its enactment indicates that the legislature intended this amendment to have retroactive effect***," *id.* at 509, 511, n.7 (emphasis added). Accordingly, the Court concluded the *Noh* rule applies to all pre-1978 domestic water rights. *Id.* at 510, n.11.

The same analysis applies in this case. In 1951, when the Ground Water Act was enacted, there was no "reasonable ground water pumping level" provision in the Act. All rights were protected to their historic pumping levels pursuant to *Noh*. It was not until 1953 – 2 years later – that the Act was amended to include the "reasonable ground water pumping levels" provision. 1953 Idaho Sess. Laws., ch. 182, § 1. Nothing in the 1953 amendment indicates any legislative intent to apply that amendment retroactively. As such, the reasoning in *Parker* is controlling and requires that all pre-1953 ground water rights be protected to their historical pumping levels.

The District Court failed to address this holding in *Parker*. Rather, the Court attempted to distinguish the holding, asserting that the exclusionary language in section 42-227 only applied to domestic wells. Clerk's R. at 63. Yet, neither the Director nor the District Court could identify <u>any provision</u> in the 1953 amendment that would cause the "reasonable ground water pumping level" provision to apply retroactively.

Instead, the District Court concluded that section 42-229 represents a legislative intent to apply the Ground Water Act – including the 1953 "reasonable ground water pumping level" provision – retroactively. Clerk's R. at 57. The District Court's analysis is flawed. Section 42-229 was enacted in 1951 – with the original Act – and remained unchanged by the 1953 amendment. There is no law that allows a district court to retroactively apply a later amendment based upon language in the original enactment. *Nebeker, supra.* With respect to the "reasonable groundwater pumping level" amendment to the Ground Water Act, *Parker* rejected this exact argument. *Supra.*

Indeed, the District Court's analysis begs the question, how could the legislature use a statute passed in 1951 to evidence intent to retroactively apply an amendment passed two years later in 1953? Importantly, similar to the amendment of section 42-227 that was at issue in *Parker*, nothing in the 1953 amendment provided that it would be applied retroactively. There is "nothing in the [1953] amendment or the circumstances of its enactment" to indicate "that the Legislature intended this amendment to have retroactive effect." *Parker, supra* at 509, 511, n.7. By looking to section 42-229, and not the amendment passed in 1953 that included the "reasonable pumping level" provision, the District Court erred as a matter of law.

Notably, IDWR followed the *Parker* precedent for over 25 years. Right after *Parker* was decided former Director A. Kenneth Dunn testified at a Water Resources Board meeting that "the decision [*Parker*] states that a domestic well drilled prior to 1978 ***and an irrigation well drilled prior to 1953 as part of its water rights has a guaranteed water level***." Clerk's Supp. R.

A&B Reply Brief Attachment A (Minutes of September 22, 1982 Idaho Water Resource Board Meeting) (emphasis added).[18]

The current Interim Director also applied the *Parker* precedent in final decisions on new water right permits. Clerk's Supp. R. *A&B Reply Brief* Attachment B (*Amended Preliminary Order* at 25-26, *In the Matter of Applications to Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle*); *see also*, *Id.* Attachment C (*Final Order* at 27-28, *In the Matter of Application for Amendment of Permit No. 63-12488 in the Name of the City of Eagle*). In October 2007, the current Interim Director, then acting as a Hearing Officer, concluded that:

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

Clerk's Supp. R. *A&B Reply Brief* Attachment B at 26 (emphasis added). The Interim Director has never explained the sudden and dramatic shift in the agency's interpretation of *Parker* in A&B's case.

Both the District Court and Director erred in retroactively applying the 1953 amendment to A&B's 1948 water right. *Parker* is clear on this point. The Court should reverse the Director's decision accordingly.

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[18] The District Court filed a supplemental record in this matter on May 16, 2011that included the briefing before the District Court. These documents were not Bates Stamped. References, therefore, will be to the specific document and page number within the supplemental record.

C. Reliance on *Baker* to Expand the Scope of the Ground Water Act is Contrary to Law.

There are only a few relevant cases addressing the applicability of the Ground Water Act to pre-enactment water rights. *Musser v. Higginson*, 125 Idaho 392; *Parker v. Wallentine*, 103 Idaho 506. However, the Director and District Court dismissed these cases and, instead, relied primarily on this Court's decision in *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575 (1973). *Baker* is inapposite here. The issues in *Baker* were stated as follows:

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

95 Idaho at 576. Importantly, the Court did not address the scope of the "reasonable ground water pumping level" provision of section 42-226 and to which water rights it applies. As such, any attempt to extrapolate a conclusion from *Baker* regarding the scope of the Ground Water Act is in error.

In *Baker*, this Court considered the effect of the Act on ground water rights where the total diversions from an aquifer exceeded the available water supply – i.e., the aquifer was being mined. 95 Idaho at 576-78. The Court concluded that the *Noh* rule was "harsh" and "inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest … [and] is further inconsistent with the [Ground Water Act]." *Id.* at 583. The Court did not, however, overrule *Noh*. *See Parker*, 103 Idaho at 514 (holding that

Noh applies to ground water rights not subject to the Ground Water Act); *Clear Springs Foods, Inc., supra* at *11-12.

Likewise, the *Baker* Court was not asked to address the scope of the Act as it relates to pre-enactment ground water rights. In fact, according to the Court, the decision focused on "approximately 20 irrigation wells developed during the late 1950's and early 1960's," which were found to be mining the aquifer. *Id.* at 576, 584 (emphasis added).[19]

The District Court concluded that, since "two of the senior rights held by the plaintiffs who made the delivery call had priorities pre-dating the enactment of the" Act, this Court implicitly held that the Act, and in particular the "reasonable ground water pumping level" provision, applied retroactively. Clerk's R. at 62. This conclusion appears to be based on the mistaken belief that the *Baker* Court applied the "reasonable ground water pumping level" provision to senior rights in that case. *Id.* ("Consequently, the Court did in fact apply the reasonable pumping provision to pre-existing rights"). Not true.

As stated above, the *Baker* decision addressed unlawful mining of the aquifer. 95 Idaho at 576 (This Court must for the first time, interpret our [Ground Water Act] as it relates to withdrawals of water from an underground aquifer in excess of the annual recharge rate")

[19] Two water rights indentified by the *Baker* Court pre-dated the 1951 Ground Water Act. 95 Idaho at 577, n.1. This does not mean, however, that the "reasonable ground water pumping levels" provision applies to A&B's 1948 ground water right. Nothing in *Baker* affects this Court's long standing rule that statutory amendments are not retroactive unless there is an express provision in the amendment indicating intent of retroactive application. In its opinion, the Court expressly stated that its decision was "focused" on "wells developed during the late 1950's and early 1960's." *Id.* at 576 (emphasis added). This indicates the Court was not concerned with a question of whether a pre-1951 water right was subject to the Act in the first place. Indeed, no party even raised the issue.

(emphasis added). The Court recognized that there "is not enough annual recharge water to satisfy the needs of all the well owners during the summer irrigation season." *id.* at 577.

The Court did not rule on the "reasonable pumping level" issue. In fact, the Court rejected an effort by the defendants to make the case about reasonable pumping levels. 95 Idaho at 583. The Court concluded that the "reasonable pumping level" argument "avails appellants nothing because the trial court found the aquifer's water supply inadequate to meet the needs of all appropriators." *Id.* at 584. Accordingly, "we reiterate our holding that Idaho's Ground Water Act clearly prohibits the withdrawal of ground water beyond the average rate of future recharge." *Id.* at 583.

In short, *Baker* did not apply the "reasonable ground water pumping level" provision against a pre-Ground Water Act water right. Furthermore, this Court subsequently confirmed that the Act does not apply to pre-enactment ground water rights. *Musser, supra.* Accordingly, the District Court's overbroad reading of *Baker* is not supported and should be rejected.

II. The Director's Finding that A&B Has Not Exceeded a "Reasonable Ground Water Pumping Level" Violates Idaho Law.

The Ground Water Act protects senior water rights that are subject to the Act to a "reasonable ground water pumping level". I.C. § 42-226. The Director's failure to identify a "reasonable ground water pumping level" in this case violates his duty to administer water rights pursuant to Idaho law. IDAHO CONST. art. XV § 3; I.C. § 42-607, CM Rule 40. Moreover, the Director's failure to disclose the factual basis for his finding that A&B has not exceeded a "reasonable pumping level" also violates Idaho's APA.

A. The Director's Finding is Not Supported by the Record.

Assuming the Ground Water Act does retroactively apply to A&B's 1948 water right, the Director's failure to identify a "reasonable ground water pumping level" for administration was erroneous, arbitrary and capricious. The statute states that senior ground water rights ***shall be protected*** to a "reasonable ground water pumping level." I.C. § 42-226 (emphasis added). The *Baker* Court recognized, "[p]riority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels." *Baker*, 95 Idaho at 584; *see also*, *Clear Springs Foods, Inc.*, 2011 WL 907115 at *12. Recently, this Court confirmed the protection provided to senior ground water rights:

> The reference to reasonable pumping levels only applies to the senior appropriator, not to junior appropriators. ***It is the "prior appropriators" of underground water who are protected "in the maintenance of reasonable ground water pumping levels***," Idaho Code § 42-226, and in context it is only when there is a conflict between senior and junior ground water appropriators.

Clear Springs Foods, Inc., 2011 WL 907115 at *13 (emphasis added).

Until the reasonable pumping level is exceeded, the Director will not administer junior rights, assuming sufficient water is available at the identified pumping level. As such, it is critical for senior ground water users to know what the "reasonable ground water pumping level" is for the aquifer from which they divert their water supply.

The Hearing Officer understood the importance of establishing a reasonable pumping level as he concluded that a "standard" pumping level is needed for ground water administration. He even urged the Director to establish one. R. 3113-14. According to the Hearing Officer, "A&B and other pumpers ***need standards to know when further efforts remain their***

responsibility and when the additional cost of effort passes to junior users." R. 3113 (emphasis added). Indeed, "there should be some predictability as to how far down a pumper must go and when the protection of reasonable pumping levels has been reached." R. 3114 (emphasis added). The Hearing Officer concluded:

> **The amount of water entering the aquifer significantly exceeds the amount of withdrawn by ground water pumping, but the establishment of reasonable pumping levels should not be dependent upon extracting the last drop of that recharge**. The expense and difficulty of that effort strikes at unreasonable and poor management of the aquifer. It ultimately would allow the pumper or pumpers over the deepest part of the aquifer to define a reasonable pumping level for the rest of the pumpers, regardless of priority. At some point, established by reasonableness, there should be a level of predictability and certainty to say that when wells have been deepened and are in good working order enough is enough. At that point reasonable pumping levels have been reached and are protected from junior pumping that would require more. This is what is contemplated by the Legislature in Idaho Code section 42-226: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided."

R. 3114 (emphasis in original).[20]

Notwithstanding the fact that water users need "predictability and certainty," the Director refused to establish a "reasonable ground water pumping level" in this case. R. 3321-22. Instead, the Director arbitrarily concluded that "[t]here is no indication that ground water levels in the ESPA exceed reasonable pumping levels required to be protected under the provisions of Idaho Code § 42-226." R. 1109. The Director made this finding without disclosing the actual depth of the reasonable pumping level in the ESPA that would support his decision.

[20] Despite admitting no objective standard had been set, the Hearing Officer concluded that "A&B has not been required to exceed reasonable pumping levels." R. 3113. Similar to the Director's flawed finding, there is no objective "reasonable pumping level" in the record by which to judge the Hearing Officer's conclusion either.

The Director's refusal to establish a pumping level makes it impossible for an appellate court to review the Director's conclusions.[21] Absent an established level, there is no basis for the Director – or a water user – to determine whether material injury is occurring or not. On the other hand, if the Director disclosed the depth of a pumping level, both a hearing officer and a reviewing court could determine whether A&B's pumping levels actually exceeded the protected depth in the aquifer. Ex. 133 (A&B Annual Reports identifying pumping levels for every well). The Director's error in refusing to establish a pumping level is exacerbated by the fact that, at hearing, IDWR could not provide any factual basis to support the finding that A&B had not exceeded a "reasonable pumping level" in the aquifer. Tr. Vol. IX, pp. 18345-47.[22]

There is no dispute that A&B has been forced to spend hundreds of thousands of dollars in its efforts to divert water under its senior water right. R. 834-35. There is no dispute that A&B has drilled new wells, deepened existing wells (some to levels over 800 feet), and has abandoned others due to declining aquifer levels. *Id.*; R. 3090 ("Two wells in township 9 south, range 22 east were drilled to 700 and 1,000 feet and abandoned."). In short, there is no dispute that A&B has been impacted by declining aquifer levels and water supplies.

However, the Director concluded that the pumping levels have not declined far enough to justify any administration of junior water rights. This decision unlawfully forces A&B to continue self-mitigating for declining aquifer levels without any protection for its senior ground water right. Based upon the Director's arbitrary finding, A&B must apparently continue to drill

[21] How can a reviewing Court ever find fault with the Director's decision regarding material injury if he alone only has knowledge of a reasonable pumping level for the ESPA but fails to disclose it?

[22] A&B was therefore precluded from discovering any factual basis for that finding in the contested case proceeding, and therefore its right to a fair hearing was substantially prejudiced.

and pump from an unknown depth in the aquifer before he will administer junior water rights. This type of administration diminishes A&B's priority contrary to Idaho law. IDAHO CONST. art. XV § 3; I.C. §§ 42-226, 602 & 607; CM Rule 40; *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) ("to diminish one's priority works an undeniable injury to that water right holder.").

Establishing a "reasonable ground water pumping level" is not an impossible task in the exercise of the Director's administrative duties. For example, in the final order issued *In the Matter of Applications to Appropriate Water Nos. 84-12239 in the Name of J.R. Cascade, Inc.* (dated October 22, 2009), at page 8, the Director found that "the bottom depth of 190 feet in the Moore well plus sufficient water depth to provide submergence for Moore's pump intakes at Moore's maximum diversion is the reasonable pumping level."[23] This identified pumping level (190 feet) provided water users in that case with the "predictability and certainty" they require to better manage their ground water diversions. The Director's failure to provide an identified pumping level in A&B's case is not supported by the record and clearly violates Idaho law.

Here, the Director denied the call <u>because A&B had not reached a reasonable pumping level</u>. R. 3223. Yet, the Director refused to identify the pumping level, or aquifer depth, that had not been reached. *Id.* Such a decision violates Idaho's APA, which requires that a decision be supported by "substantial evidence" and a "reasoned statement." *Chisholm*, 142 Idaho at 164; *Galli*, 146 Idaho at 159; I.C. § 67-5248(1).

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[23] Clerk's Supp. R. *A&B Opening Brief* at 48.

In addition, the refusal to establish a "reasonable ground water pumping level" while at the same time denying A&B's delivery call because A&B has not reached that level is arbitrary and capricious. It is arbitrary because the decision was made "without adequate determining principles" – indeed, without any objective standard at all. *American Lung Assoc., supra* at 547. Likewise, it is capricious because it was "done without a rational basis." *Id.* As such, the Director's decision does not comply with the APA standards and should be set aside.

In summary, the Director cannot have it both ways for the administration of A&B's senior ground water right. If the 1953 amendment to the Ground Water Act retroactively applies to A&B's 1948 water right, then, at a minimum, A&B is entitled to the protection of an identified "reasonable ground water pumping level". I.C. § 42-226. The Director's finding that A&B has not exceeded a reasonable pumping level without disclosure of that level should be reversed and set aside.

B. The District Court Erred in its Legal Analysis.

The District Court wrongly affirmed the Director's failure to identify a "reasonable groundwater pumping level." Clerk's R. at 66-68. Citing section 42-237a.g, the District Court concluded that the Ground Water Act does not mandate establishment of a reasonable pumping level "as a matter of course with a delivery call" but that such a decision is left to the discretion of the Director. *Id.* at 67. The District Court failed to recognize the Director's mandatory duty to administer ground water rights pursuant to Idaho law.

The Idaho Constitution is clear and unambiguous: "Priority of appropriation shall give the better right as between those using the water." IDAHO CONST. art. XV § 3. This Court

recently confirmed that the prior appropriation doctrine governs all water right administration in Idaho. *Clear Springs,* 2011 WL 907115 at *9 ("Conjecture that a junior appropriator's use of water will not adversely impact a senior appropriator's water right does not change the doctrine of prior appropriation."). The water distribution statutes require the Director and state's watermasters to administer decreed rights in organized water districts by priority. I.C. §§ 42-604, 607. The CM Rules further incorporate the Director's duty to administer water rights. CM Rule 20.02, 40.

Under Idaho law, the obligation to administer water rights is not discretionary – the Director "shall" have the "duty," through an appointed watermaster, to distribute water in an organized water district in priority.[24] I.C. § 42-607; *Musser, supra.* Pursuant to the Ground Water Act, "prior appropriators of underground water ***shall*** be protected in the maintenance of reasonable ground water pumping levels as may be established by the director."[25] I.C. § 42-226 (emphasis added).

The District Court wrongly relied upon section 42-237a.g to assert that the Director has "discretion" to set a "reasonable pumping level" in administration.[26] Clerk's R. at 67. Although the statute empowers the Director to set a pumping level "in the administration and enforcement of this act and in the effectuation of the policy of the state to conserve its ground water

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[24] A&B's water right is located in Water District No. 130. Ex. 143, Att. A.

[25] If the "reasonable pumping level" is the standard that triggers ground water right administration, the Director does not have the discretion to not set a pumping level when administration is requested by a senior water right holder. In other words, the Director cannot refuse his mandatory duty to administer water rights pursuant to Idaho law. *Musser, supra.*

[26] Although the Director may have discretion in setting the depth of a pumping level, he does not have the discretion to decide whether to even set a pumping level for purposes of administration.

resources", nothing in the statute trumps the Idaho Constitution or allows the Director to avoid his duty under I.C. § 42-607. *See Musser*, 125 Idaho at 395; CM Rule 40.

Under the District Court's reasoning, a senior ground water right in the ESPA is entitled to no administration whatsoever. The following example illustrates the errors in the court's reasoning. First, assume a water right is subject to the Ground Water Act and is not entitled to its historic pumping level. Second, assume the Director has the discretion to not set a "reasonable pumping level" to protect that senior right when the senior makes a call. Under this example the senior never receives the administration required by Idaho law. This absurd result renders the constitution and water distribution statutes meaningless and therefore the District Court's analysis should be reversed. *See George W. Watkins Family v. Messenger*, 118 Idaho 537, 540 (1990); *State ex rel. Wasden v. Maybee*, 148 Idaho 520 (2009) ("Constructions that would lead to absurd or unreasonably harsh results are disfavored.")

Alternatively, the District Court's interpretation of section 42-237a.g, as giving the Director sole "discretion" to set a "reasonable pumping level" or administer ground water rights, leads to a conflict with other statutes. As explained above, if the Ground Water Act applies to A&B's senior water right, then A&B is entitled to protection to a "reasonable pumping level" pursuant to section 42-226. The Director cannot refuse to administer junior water rights in an organized water district. I.C. § 42-607; *Musser*, 125 Idaho at 394. Therefore, if the permissive language in section 42-237a.g strains against the constitution and the Director's mandatory duty to administer junior water rights in an organized water district in section 42-607, the interpretation cannot stand. *State v. Doe*, 147 Idaho 326 (2009) ("this Court must consider all

sections of applicable statutes together to determine the intent of the legislature"). The "Catch-22" the Director placed A&B in demonstrates the plain legal error in the District Court's analysis. Although the court concluded A&B is subject to the Ground Water Act there was no administration for A&B's senior right because the Director was free to not set a "reasonable pumping level". This is not the law in Idaho.

In summary, if the Director's and District Court's analysis survives, A&B is left with an unknown subjective determination that the "reasonable ground water pumping level" has not been exceeded.[27] This determination effectively denies A&B – and all other water users in the ESPA – the "predictability and certainty" that their water rights should be afforded for water right administration. Moreover, the Director's "non-action" promotes the inevitable "race to the bottom" of the aquifer, creating a water use policy that is inconsistent "with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest." *Baker*, 95 Idaho at 584. This type of non-administration plainly violates Idaho law and should be reversed and set aside.

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[27] The fact that the person who made this finding (David R. Tuthill, Jr.) no longer serves as Director of IDWR further complicates the problem. No other Department employee had any information about the "reasonable pumping level" finding in the Director's January 29, 2008 Order. In its March 14, 2008 *Disclosure of IDWR Employees who Participated in the Preparation of the January 29, 2008 Order*, R. 1382, the Department identified Sean Vincent as the sole IDWR employee that participated in the preparation of the provisions addressing the "reasonable pumping level." R. 1383. However, Mr. Vincent testified that he did not draft those provisions and did not know who did. R. 2405-08 (discussing Mr. Vincent's deposition testimony); R. 3239-41 (same). Accordingly, no documented information exists in IDWR's files that would reveal the former Director's pumping level. If Mr. Tuthill is the only person that knows at what depth the "reasonable pumping level" exists in the ESPA, will the current Interim Director now create a new standard for future administration? This decision exemplifies the type of arbitrary and capricious agency action that is prohibited by Idaho law. *See* I.C. § 67-5279.

III. The Director's *Final Order* is Arbitrary and Capricious Because it Failed to Consider A&B's Actual Water Use and Diversions.

A. A&B Diverts Ground Water From 177 Wells Delivered Through Over 130 Separate Well Systems.

A&B pumps water from 177 individual wells. R. 3098. The water is delivered to individual landowners through over 130 separate well systems (a well system can be 1 well, or 2-3 wells connected by a distribution system of laterals and/or pipelines). Vol. III, p. 467, lns. 3-7; p. 473, ln. 14 – p. 474, ln. 7; R. 3092-93. This is how the A&B project was actually permitted, developed, licensed and partially decreed. A&B has never – at any point in its history – had the ability to pump water at one well or well system and deliver that water to any acre throughout the project. Just the opposite, each of the well systems delivers water to specific acres and specific water users. Tr. Vol. III, p. 467, lns. 3-7, pp. 473-74; p. 475, lns. 2-9; Ex. 200 at 4-32; *see also*, Attch. Notwithstanding this fact, the Director determined that A&B's "total water supply" could be *equally delivered* to all acres on the project. R. 1147.[28] This determination was in error and should be reversed.

Importantly, the Hearing Officer recognized that actual water use under A&B's senior right cannot be "averaged" and applied to each and every acre throughout the project area:

> **6. Consideration of the system as a whole must also account for the effect upon individual systems when the number of short systems would constitute a failure of the project**. The geography of the land within Unit B, the design of the system, and the practices in utilizing the system prior to entry of the partial decree indicate that the water right adjudicated is not satisfied by showing that the combined total water that can be pumped from all the wells is equal to the amount necessary to avoid material injury if the water were

[28] The Director erroneously concluded that A&B could divert "0.77 miner's inch per acre" at all wells and therefore deliver "0.74 miner's inch per acre" to each acre on the project. R. 1119.

> equally distributed. It is proper to consider the entire system, but that consideration must account for the fact that water from one pump is not accessible to the entire acreage. Pumping water from wells in excess of what can be beneficially used on the property to which the water can be delivered would be waste, so counting excess water that cannot be utilized towards the water right would be improper. The theoretical right to apply water from any pump to any land must be tempered by the reality of the system as it was designed and utilized and partially decreed.
>
> . . .
>
> Considering the fact that the project was developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury.

R. 3095, 3096 (underline added).

The Department understands that A&B's individual well systems cannot provide water to all acres throughout the entire A&B project. Tim Luke, IDWR's Water Distribution Section Manager, testified that water cannot be pumped from any well and delivered to any acre on the A&B project, Tr. Vol. VI, p. 1209, ln. 20 – p. 1210, ln. 4, and that the Director's "average" diversion rate was *not applicable to all wells* on the project, *id.* Tr. Vol. VI, p. 1246, lns. 3-7, p. 1247, lns. 14-23. This fact was confirmed by Dan Temple, A&B's manager, who testified that not all wells produce the same amount of water on a per acre basis, particularly during the peak of the irrigation season. Tr. Vol. III, p. 517-21.

As requested, A&B provided the Director with specific information about each and every well system in late 2007.[29] *See* Ex. 200 at 4-32. Yet, the Director ignored this data and refused to conduct a well-by-well analysis. Tr. Vol. VI, p. 1847, lns. 18-23 (Luke Testimony); Tr. Vol.

[29] The Director cannot refuse to distribute water to A&B's water right based on an "interconnection" theory that the Director never identified in either his request for information from A&B back in November 2007, or his initial January 2008 order. R. 964 & 1105.

IX, p. 1841, lns. 16-21 (Vincent Testimony).[30] This is the case, even though Mr. Luke testified that such an analysis would be more representative of actual water use on the project. *Id.*, p. 1252, lns. 13-17.

A&B's landowners also testified about the separate well systems on the project and how water delivery varies between those systems serving particular farms. Exs. 229A, 230A, 231A (water delivery criteria lists for landowners); *see also*, Tr. Vol., p. 815, lns. 2-24; p. 817, lns. 13-15 (Eames Testimony); Tr. Vol. V, p. 894, lns. 2-7 (Adamms Testimony); Tr. Vol. V, p. 947, lns. 17 – p. 948, lns. 11 (Kostka Testimony).

The Hearing Officer acknowledged the reality of the project and the fact A&B cannot deliver water from any well to any acre. R. 3095. Indeed, the "theoretical right to apply water from any pump to any land must be tempered by the reality of the system as it was designed and utilized and partially decreed." *Id.*[31]

Although the Director adopted the Hearing Officer's conclusions on this point, R. 3322, he refused to recognize "the reality of the system as it was designed and utilized and partially decreed." Consequently, the Director erred by refusing to honor A&B's partial decree and analyze the actual water availability and use at A&B's 177 active wells.

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[30] The Director and his staff made no attempt to analyze A&B's actual diversions and water use compared to the decreed quantity of A&B's water right 36-2080. *See* Tr. Vol. VI, p. 1265, lns. 14-20 (Luke Testimony) ("Q. And isn't true that you did not compare the water supply referenced in this paragraph to the diversion rate provided by the water right. A. That's correct. It's not in this particular finding. It doesn't make that comparison."); *See also*, Tr. Vol. IX, p. 1844, lns. 12-19 (Vincent Testimony) ("Q. But the comparison is not to the diversion rate provided by the water right; is that correct? A. That's correct.").

[31] Although the Hearing Officer did state that "it is likely that a greater level of interconnection can be achieved than has been accomplished," he concluded that there is insufficient evidence to make any determination on this issue. R. 3095-96. Furthermore, he found that "it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury." R. 3095.

B. Idaho Law Does Not Require A&B to Interconnect its Separate Points of Diversion (Wells) as a Condition to Administer Junior Priority Ground Water Rights.

Notwithstanding the actual layout of the A&B project and the individual decreed points of diversion, the Director concluded "there is an obligation of A&B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from juniors." R. 3096. This decision was affirmed by the District Court, which held that the Director had the discretion to order interconnection of the well systems, Clerk's R. at 83, and that A&B must either interconnect its systems or change its water right through a transfer proceeding, before it can seek administration of juniors, *id.* at 84-85. The District Court and Director have created a new "condition" to the administration of A&B's water right that is contrary to the elements of A&B's partial decree. Moreover, this condition results in an application of the CM Rules that is contrary to Idaho's constitution and water law code.

First, mandating interconnection as a prerequisite to administration is an unconstitutional application of the CM Rules. Idaho is a prior appropriation state. *See* IDAHO CONST. Art XV, § 3; *Clear Springs Foods, Inc.*, 2011 WL 907115 at *9 ("It is the unquestioned ruled in this jurisdiction that priority of appropriations shall give the better right between those using the water."). Denying A&B's water delivery call on the basis of a new "condition" to administration unlawfully diminishes A&B's 1948 priority. *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 388 (1982) ("to diminish one's priority works an undeniable injury to that water right holder."). The Director cannot refuse to administer junior rights causing injury to A&B's senior

right on the "theory" that A&B, the senior water right holder, must first interconnect its separate points of diversion.

Second, the Director's action contradicts the plain terms of A&B's water right decree. The SRBA Court decreed 177 individual points of diversion, or wells, for A&B's water right 36-2080 in 2003.[32] Ex. 139. The decree is binding on IDWR and "shall be conclusive as to the nature and extent" of the water right. I.C. § 42-1420(1). As decreed, the water right does not contain any special conditions, remarks, or general provisions that condition the exercise of the water right, further define or clarify the point of diversion element, or that are necessary for administration. I.C. § 42-1411(2)(i), (j), (3). The Director and state watermasters are bound to honor the plain terms of the decree for purposes of administration. *See Stethem v. Skinner*, 11 Idaho 374, 379 (1905). If the Director wants to condition the administration of a water right, the necessary general provisions or remarks must be included in the SRBA decree. *State v. Nelson*, 131 Idaho 12, 16 (1998) ("If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree. . . . Provisions necessary for the efficient administration of water rights should be preserved in the SRBA decree, not merely in the Administrative rules and regulations.").

A&B's water right decree did not "condition" or limit A&B's ability to seek administration of junior priority water rights in any way. There is no condition that requires A&B to interconnect its individual well systems before the District can seek administration of

[32] A&B filed an application for transfer in 2006 to add 11 points of diversion. Ex. 423. Of the 188 total authorized points of diversion, only 177 are active production wells. R. 3081 & 3098. The approved transfer did not include any "interconnection" conditions either.

junior rights. A&B's water right was permitted, developed, and ultimately licensed with individual wells serving distinct acres throughout the project. That is how the project was designed and constructed by Reclamation. R. 3092-93. The SRBA Court decreed A&B's individual points of diversion without a provision that would require "interconnection" prior to the administration of juniors. Absent such a limitation on the decree, the Director had no authority to deny A&B's request for administration on that basis. The Director's "interconnection" requirement therefore violates section 42-1420(1). Moreover, the Director's new "condition" unlawfully disregards the "presumptive weight" A&B is afforded for the decreed elements of its water right. *See AFRD#2 v. IDWR*, 143 Idaho 862, 878 (2007) ("The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place."). By refusing to administer juniors until A&B interconnects its wells or alternatively proves interconnection is "infeasible", the Director is unlawfully requiring A&B to re-prove the right to have water delivered to its 177 active individual points of diversion.

Third, there is nothing in Idaho's water distribution statutes or the CM Rules that require a senior water right holder to "interconnect" separate points of diversion as a condition to administration of juniors within an organized water district.[33] I.C. §§ 42-602, 607; CM Rule 40. Requiring A&B to interconnect its system as a condition to administration impermissibly shifts the burden to A&B to prove certain conditions or take additional measures in order to receive water under its senior water right through priority administration. *See AFRD#2*, 143 Idaho at

[33] Although CM Rule 42.01.h references "alternate means of diversion" or "alternate points of diversion", the factor only applies to a senior-priority surface water right. A&B's water right 36-2080 is a right to divert groundwater, not surface water. Ex. 139.

878.[34] The *AFRD#2* Court rejected any interpretation of the CM Rules that incorporates "a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has." *Id.* at 877-78. Yet, that is exactly what the Director has required in this case.[35] The Director wrongly ignored IDWR's prior actions in permitting, licensing and recommending the water right to the SRBA Court, without any conditions for administration. Where A&B's partial decree authorized diversion from 177 separate wells that provide water to specific lands, the Director cannot force A&B to interconnect its system (or show that such interconnection is infeasible) as a precondition to water right administration.

Apart from the legal errors in the Director's finding, there is nothing in the record that would demonstrate how a full or even "partial" interconnection of A&B's separate well systems would be feasible or even possible. Just the opposite, Dan Temple, in reference to a study commissioned by the Idaho Water Resource Board, testified that a physical interconnection of the entire A&B project would likely cost about $360 million.[36] Tr. Vol. III, p. 481, ln. 19 – p. 482, ln. 24.

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[34] Importantly, the Director makes these demands even though there is nothing in the record addressing the practicality of interconnection in the project. R. 3092, 95-96 ("The practicality of greater interconnection of wells early in the project is not shown in the record. . . . **7. The ability to interconnect the entire system has not been shown, but the ability to interconnect greater portions of the system remains a question.** . . . The evidence does not demonstrate a level of certainty that partial interconnection could be implemented.") (emphasis in original).

[35] This is the type of case that is ripe for an "as applied" challenge to the Director's use of the CM Rules. *See AFRD #2*, 143 Idaho at 878 ("In an 'as applied' challenge, it would be possible to analyze on a fully developed factual record whether the Director has improperly applied the Rules to place too great a burden on the senior water rights holder.").

[36] These costs are not "speculative." R. 3096. The study commissioned by the IWRB, and familiar to the Director, was completed and presented by MWH to the Board in July 2008. *See A&B Irrigation District Ground Water-to-Surface Water Conversion Project Study* (found at http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/ESPA/LDP/espa-presentations.htm). The report, at page 13, estimates probable project costs at $360 million.

Finally, interconnecting a portion of, or the entire A&B project, will not address the problem of a declining ground water supply. Instead, such an action would force A&B to "injure" it own landowners by taking water away from some well systems and re-distributing it to others. Attempting to move water from one well system to another, which would increase the number of acres served by that well system, would only further reduce the amount of water available for delivery to all landowners served by those wells. *See* Tr. Vol. 4, p. 703, ln. 16 – p. 704, ln. 7 (Temple Testimony). The Director has no authority to force A&B to change its pumping operations and "interconnect" its individual points of diversion where such action would injure existing landowners. *See e.g.*, *Daniels v. Adair*, 38 Idaho 130, 135 (1923) ("under no circumstances can [an exchange] be done where the exchange would result to the detriment of prior users or result in depriving such prior users of a property right"); *see also, Reno v. Richards*, 32 Idaho 1, 5 (1918).

In summary, the Director's "interconnection" theory constitutes an unlawful application of the CM Rules. A&B's project was designed, developed, and ultimately partially decreed with 177 individual points of diversion. The Director cannot disregard the actual layout of the irrigation project and force A&B to interconnect wells as a condition of administration. Furthermore, the Director cannot re-condition A&B's decreed water right and disregard the presumptive weight it carries in administration. Since there is no legal or factual support for the interconnection requirement, the Court should reverse the Director's *Final Order* on this issue.

CONCLUSION

The Director misinterpreted Idaho law by applying the Ground Water Act's 1953 amendment to A&B's 1948 water right. As a result, the Director failed to protect A&B's historic pumping level through administration of junior water rights in the ESPA. Pursuant to well-established precedent in *Parker* and *Musser* the Court should reverse the Director accordingly.

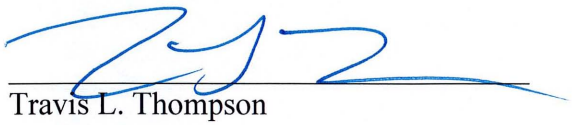
Alternatively, if the 1953 "reasonable ground water pumping level" provision retroactively applies to A&B's senior water right, Idaho law requires the Director to protect A&B's right to a defined pumping depth in the aquifer. The Director's failure to identify a reasonable pumping level, and simultaneously find that A&B has not exceeded that unknown level is clear legal error. The Director's lack of administration to protect A&B's senior right violates the constitution, Idaho's water code, and the APA.

Finally, the Director's refusal to administer juniors until A&B "interconnects" its individual wells also violates Idaho law and is not supported by facts in the record. A&B's decreed water right contains no conditions of administration, and the Director cannot diminish the water right's priority in this manner.

A&B respectfully requests the Court to reverse the Director's *Final Order* accordingly.

DATED this 30th day of June, 2011.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of June, 2011, I served true and correct copies of the foregoing A&B Irrigation District's *Opening Brief on Appeal* upon the following by the method indicated:

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Travis L. Thompson

Attachment

Table 4-1 **Acreage served by well pump systems in 2007 in Unit B under the 1948-priority ground water right 36-2080.**

Pump System	Total acreage	Pump System	Total acreage	Pump System	Total acreage
1AB823	860	12AB825	964	27B823	213
1C823	601	13AB824	974	27C823	283
1A824	431	13A825	160	28AB724	613
1A921	398	14AB823	603	28AB823	1,023
2A823	322	14A824	495	28C823	316
2A824	126	14C825	138	28A922	130
2A923	131	15AB823	784	29A725	282
2A1021	283	15D823	101	29AB823	827
3AB824	755	15A824	359	29A824	340
3AB825	876	15B824	177	30AB724	749
3CD825	592	15AC825	991	30A725	434
3E825	262	15AB922	253	30A822	235
3A921	120	17AB823	541	30A824	309
3BC921	566	17C823	234	30B824	217
3AB922	776	17A825	494	30A922	422
3A1022	231	18A824	738	31A724	273
3C922	226	18AB922	650	31A725	268
3D922	308	19AB823	631	31A823	410
3A923	291	19AB825	954	31AB824	769
3B923	134	19CD825	766	32AB724	813
4AB823	860	19A922	272	32A725	268
4A824	569	20A922	412	33AB724	667
4BC824	687	21A823	419	33A725	423
8A824	738	21B823	233	33BC922	531
5BC823	634	21A824	665	34AB723	646
5AB825	987	21B824	433	34A724	452
6A824	635	21A825	479	34A725	401
7A824	787	22A724	157	34A823	266
6B824	360	22B724	401	35AB724	707
6C824	111	22C724	319	35A821	305
6AB825	593	22A821	398	35BC821	521
6A923	480	22A823	387	35D821	587
6B923	284	22A824	327	35AB822	793
7AB922	931	22A922	135	35C822	160
8A823	425	23A724	314	35A823	475
9A921	318	23AB823	437	35B823	124
9B922	281	23A824	581	35C823	232
9C922	125	23AB825	971	35D823	103
10A823	175	24A821	120	**Total Acres**	**62,422**
10A824	536	24AB823	1,128		
10B824	229	24C823	355		
10C824	199	24A825	289		
11AB824	771	25A823	208		
11C824	268	26A724	384		
11A825	274	26B724	160		
11B922	232	26AB821	736		
11C922	280	26B823	408		
12AB823	621	26A824	535		
12CD823	735	27A725	128		
12A824	336	27A823	292		