

CHAPTER II IDAHO GROUNDWATER LAW

The discussion below focuses upon two issues: 1) How are rights to use groundwater acquired? 2) What legal constraints limit the exercise of groundwater rights?

Lay readers of the following analysis should be cautioned not to attempt to solve individual problems on the basis of the principles discussed herein. Since slight changes in fact situations may require a material variance in the legal result, the advice of an attorney should be sought regarding particular fact situations.

Acquisition of Groundwater Rights

Idaho has had a comprehensive Groundwater Act since 1951. That Act as currently amended is the major source of modern groundwater law in the state.^{1*} The Act declares that rights to groundwater "may be acquired only by appropriation,"² and this applies to "all water under the ground whatever may be the geological structure in which it is standing or moving."³ Thus, the Act makes no distinction between categories of groundwater. All groundwater is subject to the appropriation doctrine, according to which a water right is acquired by diverting water and applying it to beneficial use.⁴

The Idaho Department of Water Resources⁵ supervises the acquisition of groundwater rights by administering a permit system under which a person intending to appropriate water

*Footnotes for this chapter are presented at the end of the chapter.

applies for a permit prior to commencing work on his diversion and distribution facilities.⁶ Idaho's permit system, which applies both to groundwater and surface water appropriations, predates the Groundwater Act and traces all the way back to 1903⁷. Not surprisingly, the permit system has changed in detail over the years. The current statute authorizes the Department to deny a permit application, or grant it for a lesser quantity of water than requested, under the following conditions:

"where [the] proposed use is such that it will reduce the quantity of water under existing water rights, or that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or that the applicant has not sufficient financial resources with which to complete the work involved therein"

If the holder of a permit shows the Department that he has diverted water and applied it to beneficial use in accordance with his permit, he is entitled to a license from the Department which is prima facie evidence of a water right.⁹

In addition to the general permit statutes applicable to both surface streams and ground water, there are special provisions in the Groundwater Act governing water permits. The Act introduces the concept of the critical groundwater areas. A critical groundwater area is:

"any ground water basin, or designated part thereof, not having 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, as may be determined and designated, from time to time, by the state reclamation engineer [Director of the Department of Water Resources]."¹⁰

If an application is filed for a permit to appropriate water within a groundwater area which has been designated as critical and if the Director of the Department of Water Resources has reason to believe that there is insufficient water available subject to appropriation at the location of the proposed well, he may forthwith deny the application.¹¹

Prior to 1963, the permit procedure was not mandatory for groundwater. An appropriation of groundwater could be established simply by diverting water from the ground and applying it to beneficial use, without first obtaining a permit.¹² An appropriation established in this manner is as valid as one established pursuant to a permit, although the permit procedure traditionally has offered two advantages. First, a right acquired without a permit dates from the time water was first applied to beneficial use, while one acquired pursuant to a permit relates back to and dates from the time of application for the permit.¹³ Second, a permit holder who proceeds to obtain a license from the Department has prima facie evidence of priority date and quantity of water appropriated.¹⁴ Recently, the legislature has added a third advantage, at least for groundwater areas incorporated into water districts. A statute was enacted providing that a nonpermit right which has never been recognized in an adjudication shall be treated, for the purpose of distributing water during time of scarcity, as inferior to any adjudicated permit or licensed right within the water district.¹⁵

In 1963 the Groundwater Act was amended to make the permit procedure mandatory for groundwater appropriations,¹⁶ and five years later the mandatory system was sustained against constitutional

challenge by the Idaho Supreme Court.¹⁷ Since 1963, one diverting water and applying it to beneficial use without a permit acquires no right under the mandatory permit system.¹⁸ Several classes of wells are exempted from the requirement of a permit, however. These are 1) wells for domestic purposes,¹⁹ 2) wells for drainage purposes,²⁰ and 3) wells of owners of irrigation works which wells are "for the sole purpose of recovering groundwater resulting from irrigation under such irrigation works for further use on or drainage of lands to which the established water rights of the parties constructing the wells are appurtenant"21

Legal Constraints on Exercise of Groundwater Rights

Introduction

Section 237a(g) of the Idaho Groundwater Act empowers the Director of the Department of Water Resources to supervise and control the exercise of groundwater rights. It goes on to provide:

"[I]n the exercise of his power he may by summary order, prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available Water in a well shall not be deemed available to fill 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."

This statute is the most basic source of authority in the Act for controlling the adverse effects which the operation of a well can have. It lists two grounds for shutting down an existing well, partly or completely, within the framework of the

appropriation doctrine. The first is when a junior well affects a senior right contrary to the declared policy of the Act. The second is when withdrawals from an aquifer exceed the reasonably anticipated average natural recharge.

The initial part of the above quotation from section 237a(g) states that the Director of the Department of Water Resources "may" shut down a well if there is not water available to fill any water right in the well, i.e., when either of the two grounds mentioned exists. A later provision of section 237a(g), not quoted above, says that the Director "shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit, or prohibit further withdrawals of water under such right as herinabove provided..." (Emphasis added.) The Idaho court recently held, in Baker v. Ore-Idaho Food, Inc.²² that well closure is mandatory when the second of the two grounds stated in the statute is present, i.e., when withdrawals from an aquifer exceed the reasonably anticipated average natural recharge. There seems to be no basis for taking a different approach under the statute regarding the first of the two grounds. Thus, the word "may" near the beginning of the last quotation from section 42-237a(g) should be read as "shall."²³

The Average Natural Recharge Clause

As noted above, one clause of section 237a(g) empowers the Director of the Department of Water Resources to close a well when its operation would "result in the withdrawing the groundwater supply at a rate beyond the reasonably anticipated average rate of future natural recharge." In the Ore-Ida Foods case,

the Idaho court held that this clause forbids the mining of an aquifer. The court defined "mining" as "perennially withdrawing groundwater at rates beyond the recharge rate."²⁴ The court's definition of "mining" was taken from a widely cited article on groundwater mining²⁵ and is in accord with standard usage of the term to refer to permanent depletion of stored groundwater by withdrawals in excess of long term mean annual water supply to the basin.²⁶

The component parts of the average natural recharge clause of section 42-237a(g) bear close scrutiny. The clause prohibits "the withdrawing the groundwater supply at a rate beyond the reasonably anticipated average rate of future natural recharge." The statute does not define the word "withdrawing". If total discharge from an aquifer, including both 1) natural discharge by evaporation, transpiration, and seepage into streams, lakes or adjacent groundwater systems, and 2) artificial discharge through wells, exceeds total recharge, then water in storage is depleted and groundwater levels will drop. Since perennial overdraft of this nature would seem to violate the anti-mining holding of the Ore-Ida Foods case, the word "withdrawing" in the statute should be construed to include both natural and artificial discharge. This is so even though in ordinary language we might not speak of natural discharge from an aquifer as constituting the withdrawal of water. If the word "withdrawing" in the statute were interpreted as referring only to artificial discharge through wells and such withdrawals were allowed in a volume equal to total recharge, it is almost inevitable that total discharge from the aquifer i.e., the sum of artificial discharge and natural discharge,

would exceed total recharge and there would be a perennial overdraft. In other words, there would be mining. It is puzzling, therefore, that the decision in the Ore-Ida Foods case affirmed a trial court order which seems to allow artificial withdrawals alone to equal total recharge. This does not square with the court's statement in the same case that "(w)e now hold that Idaho's Groundwater Act forbids 'mining' of an aquifer."

Does it necessarily follow that every permanent depletion of stored groundwater should run afoul of the no mining policy of the Ore-Ida Foods case? When the extraction of groundwater by wells is commenced, total discharge may for a time exceed total recharge. Then later the resulting decline in water level may either increase recharge or, more likely, decrease natural discharge to the point that total discharge and total recharge come into balance and produce a new stable, but lower, water level. (This process will be described more fully by the quotation in the next paragraph.) It is possible, then, for a period of storage depletion to be followed by an equilibrium condition between total discharge and total recharge even though artificial discharge does not decrease.²⁷ If an overdraft situation is anticipated to be only temporary for this reason, arguably it would not constitute mining in the sense denounced in the Ore-Ida Foods case, i.e., perennial overdraft, even though the temporary condition is expected to continue for several years or longer. In the Ore-Ida Foods case there was no evidence that the overdraft would correct itself through an increase in recharge or a decrease in natural discharge; closure of some wells was the only

way to stop annual overdrafts. Thus, the court did not necessarily have in mind during its discussion the kind of disequilibrium just hypothesized.

Even if such a temporary overdraft, with permanent but carefully limited depletion of storage, it is not necessarily prohibited by the Ore-Ida Foods case, there is need to consider whether it is prohibited by the underlying statutory language i.e. the average natural recharge clause of section 237a(g). The clause itself does not further define the proscription against withdrawals in excess of recharge, but an earlier part of the same statute declares a policy "to conserve . . . groundwater resources." Arguably, it would be permissible to allow the limited permanent depletion of storage now being discussed when the stated policy of conserving groundwater resources is juxtaposed with these facts:

"When pumping from wells is started, it must be accompanied by a drop in water level . . . The drop increases the opportunity for recharge from influent streams. It reduces the area of seep lands and uneconomic losses through consumptive use and evaporation. It provides opportunity for penetration of rain falling on the valley floors, which under normal conditions did not happen because the groundwater levels were too high. It also increases the opportunity for underflow into the reservoir by increasing the gradient.

Extractions by pumping from wells at this state of groundwater development functions as a conservation measure by converting uneconomical losses to beneficial uses."28

Further indication that the legislature contemplated the possibility of reaching a new equilibrium after a period of storage depletion can be found by reference in the average recharge clause to "the reasonably anticipated average rate of future natural

recharge". Past recharge rates are not necessarily determinative under this language. Arguably, at least it would be permissible to look to expected future recharge at a new, lower water level where the net average natural recharge would be greater than at the present level.

If the foregoing analysis is accepted, then neither the average natural recharge clause of section 42-237a(g) nor the Idaho court's interpretation of it in the Ore-Ida Foods case would preclude all permanent depletion of water stored in an aquifer. Permanent depletion of storage could occur in the special kind of situation described above.

The next topic is the significance of the word "average" in the average natural recharge clause. Precipitation is a major factor in determining recharge. All other things being equal, recharge into a basin which is not already filled to capacity is likely to be greater in a wet year than in a dry year. The average natural recharge clause seems to contemplate computing the rate of recharge over a sufficiently long period that series of wet and dry years tend to average out. This would allow temporary depletion of storage during a dry year or series of dry years. The advantage of such a policy has been described as follows:

"(Such) lowering of the water table . . . creates a capacity for storing and carrying over the water that originates in wet periods for use during dry periods.

In that respect a groundwater reservoir is not unlike a surface reservoir. A reservoir that is maintained full or nearly full at all times is not being used to greatest advantage. Falling water tables during dry periods should not necessarily be viewed with alarm, because water placed in storage

during wet periods is being drawn upon and storage capacity is being created for the wet periods that follow."²⁹

The author of the above excerpt goes on to add that falling or even static water tables during wet periods are a "serious problem." It is this problem to which the average natural recharge clause of section 42-237a(g) seems to be directed, rather than the cyclical fluctuation from dry to wet years.

There is another aspect of the average natural recharge clause which requires close examination. The clause prohibits withdrawals in excess of average natural recharge. In some states the sustained yield capacity of certain groundwater basins has been increased through artificial recharge, i.e., by techniques such as injection wells, water spreading, and recharge pits.³⁰ The option of artificial recharge seems to be foreclosed by the language of the Idaho statute.

The exact scope of the statutory limitation to natural recharge is not clear, however, most groundwater diversions, when used on the surface, are not fully consumed. Some of the unconsumed water may return to the aquifer. As much as half of the water pumped for irrigation may return to the aquifer.³¹ Assume that recharge to an aquifer from precipitation and stream inflow averages 100,000 a.f. (acre feet) per year and that irrigation withdrawals average 100,000 a.f. per year, with fifty percent return flow to the aquifer. Is the "natural" recharge 100,000 a.f. per year or 150,000 a.f. per year? To state the same question differently, is the 50,000 a.f. of return flow "natural" recharge? The Idaho court did not have to face this question in the Ore-Ida Foods case because the water source there was

a confined aquifer which did not receive return flow recharge from the area of water use. While the no-mining policy of section 42-237a(g) would not be violated by treating return flow to an aquifer as natural recharge when computing the amount of water that may be withdrawn from it under the statute, this does not necessarily prove that return flow should be treated as natural recharge. The statute prohibits not only mining, but also the avoidance of mining through artificial recharge.

The answer to the question of how to treat return flow under the statute must, of course, lie in legislative intent. The extent to which a natural/artificial recharge dichotomy has a settled meaning in the field of hydrology is likely to be highly significant, however. A leading groundwater hydrology text defines artificial recharge as "augmenting the natural infiltration of precipitation or surface water into underground formations by some method of construction, spreading of water, or by artificially changing natural conditions".³² Another defines it as "the practice of increasing, by artificial means, the amount of water than enters a groundwater aquifer".³³ Insofar as the word "artificial" appears in the definitions, they are circular and not particularly helpful. Since the irrigation water was artificially withdrawn from the aquifer in the first place, it might be argued that return flow from the irrigation must be treated as artificial recharge. On the other hand, the return flow is an unintended by-product of irrigation due to the natural force of gravity. One text classified the practice of increasing infiltration into the ground in irrigated areas by irrigating with excess water during dormant, winter or non-irrigation

seasons as artificial recharge.³⁴ Could the difference between natural and artificial recharge implicit in the Idaho statute turn upon a distinction between return flow which is unintended and that which is deliberate and motivates the entire process? Although such a distinction may fall short of being a self evident truth and may generate classification difficulties in practice, support for the distinction may be found in a recent groundwater study prepared for the National Water Commission.³⁵ The study lists four sources of groundwater recharge, namely, 1) precipitation, 2) stream flow, 3) return flow to groundwater, and 4) artificial recharge. The study distinguishes the "intentional and purposeful use of aquifers to store water" from "recharge which is essentially unintentional and which is incidental to some other process". It states that "artificial groundwater storage normally is, and always should be used to describe only" the former situation.

There is some basis, then, in the language of hydrology for a distinction between intended and unintended return flow even though such a distinction has its arbitrary aspects. (Perhaps the true source of arbitrariness is the legislative decision to exclude artificial recharge in computing permissible withdrawals from an aquifer.) The advantage of making such a distinction is that it would enable greater utilization of groundwater under the Idaho statutory framework than would the classification of all return flow as artificial recharge. Furthermore, it would be in harmony with a legislatively announced policy, in the first section of the Idaho Groundwater Act, to promote the "full economic development of underground water resources."³⁶

The Adverse Effect Clause

The possible adverse consequences to others from the operation of a well previously may be divided into five classes:

- 1) interference with other wells, 2) interference with surface water rights, 3) compaction and land subsidence, 4) water quality impairment, and 5) depletion of storage to the detriment of future generations.

The average natural recharge clause of section 42-237a(g) prohibits the occurrence of any of these consequences to the extent that they are produced by groundwater mining--and mining may produce any or all of them. The first four types of consequences can occur, however, even without mining in the usual sense of the term, i.e., without permanent depletion of storage due to perennial overdrafts. The question for discussion here is the extent to which the adverse effect clause of section 42-237a(g) regulates such consequences.

It will be well to begin by repeating the precise language of the adverse effect clause:

"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 groundwater right . . ."

Since the clause forbids only those adverse effects which are "contrary to the declared policy of this act," identification of the declared policy of the Groundwater Act is essential. Section 42-237a(g) refers in an offhand fashion to "the policy of this state to conserve its groundwater resources". Section 42-226 includes the following statement of policy:

"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 groundwater 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 groundwater resources, but early appropriators of underground water shall be protected in the maintenance of reasonable groundwater pumping levels as may be established by the . . . [Director of the Department of Water Resources] as herein provided".* (The asterisk and italics are part of the statute.)

In addition to the formal declaration of policy at the beginning of the section, the italicized language implicitly declares a policy of promoting "full economic development of groundwater resources". The touchstone for interpreting this language is legislative intent, but the task is made difficult by the absence of any record of legislative history of the Groundwater Act. The Colorado legislature has enacted a similarly worded statute,³⁷ but there is nothing illuminating in the Colorado legislative history or judicial decisions.

One possible approach in seeking insight into the meaning of the "full economic development" language of section 42-226 of the Idaho Groundwater Act is to examine what was being said about the earlier law which the Act replaced. Apparently it was generally believed that Idaho pre-Ground Act cases protected a senior well owner's historic means of diversion, i.e., pumping level or artesian pressure, without regard to its reasonableness. Thus, the following criticism of Idaho groundwater law appeared in the Journal of the American Water Works Association in 1938:

"One feature of the doctrine of appropriation in certain cases deserves notice. Thus, in two Idaho cases (Bower v. Moorman, 27 Idaho 162, 147 Pac.

496, 1915; Noh v. Stoner, et al., 26 Pac. 2d 1112, 1933) where prior appropriators claimed harmful effects from wells of later nearby appropriators, the court awarded damages. There is no indication in the decisions that the defendants set up as their justification, that by the laws of nature it would generally be impossible for any subsequent user of groundwater to pump from the same water bearing formation without affecting to some degree the water level and yield of every well previously installed in the area. Carried to an ultimate conclusion, these decisions might mean that in many areas the first appropriator could require damages from all later appropriators, until the last one would have to pay tribute to all. If the doctrine of appropriation is to accomplish the desired end of making full use of the groundwater resources of the state, it must be recognized that some lowering of the water table or of the artesian pressure is a reasonable result of a reasonable method of diversion (pumping) of the water and should not constitute a basis for damages."³⁸

Immediately prior to adoption of the Groundwater Act, there was some uncertainty in the legal profession about the extent to which a senior well appropriator's means of diversion should be protected under the priority principle of the appropriation doctrine.³⁹ When the Groundwater Act was adopted in 1951, section 42-226 merely affirmed that the appropriation doctrine governed groundwater development. Two years later the legislature added the following phrase to it:

"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 groundwater pumping levels as may be established by the . . . [Director of the Department of Water Resources] as herein provided."

This amendment is consistent with and likely was motivated by the sentiment expressed in the above quoted excerpt from the Journal of the American Water Works Association.

The full economic development concept of section 42-226 has not been the subject of judicial comment except for dictum

in Baker v. Ore-Ida Foods, Inc. That case contains the following statement:

"Idaho's Groundwater Act seeks to promote 'full economic development' of our groundwater resources (The Groundwater Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest.) Idaho Const. Art. 15, S7. Full economic development of Idaho's groundwater resources can and will benefit all of our citizens. Trelease, F.J., Policies for Water Law: Property Rights, Economic Forces and Public Regulation, 5 Nat. Resources Journal 1 (1965): Hutchins, W.A., Groundwater Legislation, 30 Rocky Mountain L. Rev. 416 (1958)."40

The court's citation of the Trelease and Hutchins articles calls for examination of them to see what they say about the concept of full economic development of groundwater resources. Although neither of the articles discusses the exact phrasing of the Idaho statute, the Trelease article refers to the "maximization principle" in economics, under which the goal is to obtain the largest possible net social returns from the use of a resource. Trelease concludes that the maximization principle does not require compulsive development of water: "What is to be maximized is welfare from water use, not water use itself".⁴¹ He reports that economists have not yet devised any magic test for determining when maximization has been achieved:

"Some have attempted to take a given resource, a river with known potentialities of use, and discover that use or combination of uses producing the greatest economic product from a given expenditure of goods and services. In a more complicated fashion others have tried to determine by linear programming the point at which the optimum ratio between expenditures and benefits is reached, out of all possible combinations of 'inputs and outputs'. Some economists try to eliminate the dollar as a measuring device, since market values fluctuate, and since the value to society of the product of a water resource project may not be accurately reflected by money. By using the technique of 'indifference curves', they measure the relative welfare position of each combination of uses against other combinations and reach a

ranking or desirability of alternatives rather than a comparison based on the common denominator of the dollar."⁴²

The phrase "full economic development" in section 42-226 could mean any of these things. A recent groundwater study prepared for the National Water Commission says that the goal of economic efficiency in resource allocation is achieved by:

"that combination of resources which produces the maximum net benefits (i.e., total benefits less costs) to the owners, users and beneficiaries of the resource over time. Applied to groundwater and related resources this means that the total resource - water, storage capacity, transmission and treatment capability of the underground structures - should be used to achieve maximum net benefits."⁴³

This would seem to be a justifiable interpretation of the phrase "full economic development".

The policy of full economic development which is stated in section 42-226 is not to be pursued at all costs. It is qualified by the following language of the same section:

"but early appropriators of underground water shall be protected in the maintenance of reasonable groundwater pumping levels as may be established by the . . . [Director of the Department of Water Resources] as herein provided."

Thus, it is necessary to explore the concept of reasonable pumping levels.

The only other reference to the concept in the Groundwater Act appears in section 42-237a(g), sandwiched between a delegation of power to the Director to close any well for which he determines water "is not available" and the statement that water shall not be deemed available if operation of the well would "affect, contrary to the declared policy of this act, the present or future use of any prior surface or groundwater right or result in the withdrawing the groundwater supply at a rate beyond the reasonably anticipated average rate of future natural recharge."

The specific language is this:

"To assist the . . . [Director of the Department of Water Resources] in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a groundwater pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided."

Since section 42-237 a(g) empowers the Director to issue well closure orders either to prevent injury to a senior appropriator contrary to the declared policy of the act or to prevent mining, it might seem at first blush that, under the statutory language quoted immediately above, the Director might set a reasonable pumping level in a particular area and then, if existing pumping levels are above that, allow mining down to the reasonable level before issuing closure orders. Baker v. Ore-Ida Foods Inc., expressly rejects this interpretation, however. Thus, it is only in closing a well for creating an adverse effect contrary to the policy of the Act that the concept of reasonable pumping levels comes into play.

In dicta the Idaho court made these additional observations in the Ore-Idaho Food case about reasonable pumping levels:

1. "Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected."⁴⁴

2. "Because of the need for highly technical expertise to accurately measure complex ground water data the legislature has delegated to the I.D.W.A. [now the Department of Water Resources] the function of ascertaining reasonable pumping levels . . . Implicit in this delegation is the recognition that reasonable pumping levels can be modified to conform to changing circumstances."⁴⁵

In addition, the Court quoted the following statement by a commentator about the reasonable pumping level concept in the

Groundwater Act:

"If 'reasonable pumping levels' were interpreted by the court as requiring each appropriator to alter his means of diversion a little each year, or a little with each subsequent appropriator until full development was achieved, the statute would accomplish its purpose. (Emphasis supplied) Comment, Who Pays When the Well Runs Dry, 37 U. Colo. L. Rev. 402, 413 (1965)."⁴⁶

The references to reasonable pumping levels in the Act and the discussion in the Ore-Ida Foods case still leave a lot of questions unanswered and difficulties unresolved. Among them are the following.

First, does the statutory reference to protecting "reasonable pumping levels" imply that a means of diversion consisting wholly of artesian pressure (i.e., no pumping) is not entitled to protection?

Second, in determining the actual pumping level of an existing well, where are the beginning and ending points of the measurement? Should the beginning point be affected by whether a well is located on a hill or in a valley? How far downward should the measurement be continued -- to the water table, all the way down to the bottom of the cone of depression, or to some intermediate point? It might be argued that the measurement should include the drawdown caused by operation of a pump since section 42-226 refers to reasonable "pumping levels", not reasonable static water levels. Such an interpretation would generate complexity, however, since the drawdown of a well is in part a function of its efficiency, and taking drawdown into account would require a decision about permissible well efficiency. Also, localized differences in transmissivity within an aquifer can produce significant variations in drawdown. To what extent should that be taken into account?

Third, in furtherance of the policy of full economic development of groundwater stated in section 42-226, it would seem that economic, as well as physical factors should be taken into account in developing reasonable pumping level regulations. In doing so, to what extent should or can it be recognized that the land overlying a groundwater basin may encompass areas of varying climates, soil types, and crop yields? The only statutory guidance on this question is a clause in section 42-237a(g), which empowers the Director of the Department of Water Resources to:

"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."

If the work "area" refers to overlying land and the words "common ground water supply" refer to an aquifer, then the phrase "areas having a common ground water supply" would seem to imply that the land overlying an aquifer can be divided into various areas according to such factors as topography, climate, and soil type. Furthermore, the word "levels" seems to suggest that different pumping levels may be established for different areas.

The foregoing analysis depends upon defining the word "areas" in the above quoted clause of section 42-237a(g) as referring to land overlying an aquifer. This is not implausible in view of the following additional language in the same section:

"[The Director] shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district; and whenever it is determined that the ground water in an area having a common ground water supply does not affect the flow of water in any stream

in an organized water district, to incorporate such area in a separate water district"

The words "area" and "areas" here seem to refer to surface land area.

If the land overlying an aquifer may be subdivided into various areas according to economic factors such as topography, climate, and soil type, may other economic factors be considered also -- for example, the fact that a particular farmer may have just invested a lot of capital into a pumping plant, and if a reasonable pumping level is set lower than the physical capacity of his plant, he will suffer a significant economic loss? If the justification for considering economic factors is the policy of full economic development or a general concern with efficient resource allocation, the answer to this question should depend upon whether or not protection of the farmer's investment will help to promote full economic development or efficient resource allocation. At first blush, protecting an existing investment in a pumping plant may seem to run counter to a policy of full economic development. After all, section 42-226 provides that "while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources." A contrary argument can be made, however. Without investment in pumping plants by farmers and other water users, there will never be full economic development of Idaho's groundwater resources. If a farmer does not have a reasonable expectation that his investment in a pumping plant will yield a fair return, he will not make the investment. He can hardly have such an expectation if

his existing investment in a pumping plant is totally irrelevant to the setting of reasonable pumping levels.

One of the historic policies underlying the appropriation doctrine has been the promotion of investment needed for water resource development by giving security of use.⁴⁷ Since section 42-226 does affirm the appropriation doctrine for groundwater -- albeit modified by a policy against protecting historic means of diversion without regard to reasonableness in the event that prior Idaho case law had interpreted the appropriation doctrine as affording such protection -- concern about protecting existing investment in pumping plants and related capital outlays should not be totally irrelevant to setting reasonable pumping levels. Probably, it should be a relevant but not controlling factor.

Fourth, consideration of economic factors inevitably raises social issues as well. For example, there is evidence that due to economies of scale a large farm may be able economically to pump from a significantly greater depth than a small farm.⁴⁸ If pumping levels are set by reference to what is reasonable for large farms, small ones may be driven out of existence. Does the legislative delegation of power to regulate pumping levels really include a power to regulate farm size? If so, does the policy of full economic development compel a preference for larger farms if they are more efficient production units? Even among farms of the same size, the kind of crop produced will affect the reasonableness of a particular pumping level. Should the production of potatoes be favored over the production of some other crop? A reasonable pumping level for a small domestic user might be less than for an irrigator. What should be

done about the small domestic user?

Fifth, it is likely that the reasonable pumping level statute was aimed at well interference disputes.⁴⁹ As noted earlier, the operation of a well may have other adverse effects even in the absence of a general condition of groundwater mining. There may be interference with surface water rights, compaction and land subsidence, or water quality impairment. To what extent may, or must, these potential adverse effects be taken into consideration in the setting of reasonable pumping levels? Section 42-237a(g) empowers the Director of the Department of Water Resources to prohibit groundwater withdrawals which "would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right." Section 42-231 directs him "to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act." The full economic development policy of section 42-226 would seem to authorize an accounting for all costs -- including not only costs in terms of interference with senior surface water rights expressly mentioned in section 42-237a(g) but also compaction and land subsidence costs -- in seeking to achieve an optimum allocation of the groundwater resource through the tool of reasonable pumping levels.⁵⁰

As the foregoing discussion indicates, the Groundwater Act does not give very clear or specific guidance for the resolution of a number of questions or difficulties that must be faced in the development of reasonable pumping level regulations. The

questions posed above are hardly more than the tip of the iceberg, and the analysis of the questions is more in the nature of arguments-that-can-be-made rather than hard and fast conclusions. Perhaps of major significance is the language in section 42-231 which empowers the Director "to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act." (Emphasis added.)⁵¹

It might be argued that this constitutes an implied delegation of authority to resolve these questions and difficulties which are not very well covered explicitly in the Groundwater Act in any way that would make sense in view of hydrologic, economic, and social considerations. In other words, the argument would be that the Director can consider factors and make distinctions, which are reasonably necessary to accomplish the public policy expressed in the Act. Some support for this implied powers approach may be found in the Ore-Ida Foods case, where the court did not hesitate to find an implicit delegation of authority to the Director to modify reasonable pumping levels from time to time to conform to changed circumstances.⁵² The court did not explain its rationale for this conclusion but the justification would seem to be that it is reasonably necessary for the Director to have the power of modification.

Perhaps the most serious difficulty with the implied powers approach lies in the rule that an attempted legislative delegation of rule making power to a state agency is invalid unless the delegation is limited by legislatively prescribed standards to guide the agency, directing and channeling its discretion.⁵³ In

upholding a delegation of rule making power to the State Tax Commission, the Supreme Court of Idaho phrased the limitation this way:

"It is an accepted rule of judicial decision that the legislative function has been complied with, where the terms of the statute are sufficiently definite and certain to declare the legislative purpose and the subject matter meant to be covered by the act; and that the legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose, and to that end may prescribe suitable rules and regulations."⁵⁴

The central difficulty in applying the legislative standards requirement is to determine how tight the standards must be.⁵⁵ For example, it was noted earlier that the power to set pumping levels may entail a power to determine (and require a decision upon) minimum farm size.⁵⁶ Is this delegation of power adequately circumscribed by the statutory reference to the policy of full economic development of the state's groundwater resources? It probably would be unwise to try to predict how the Idaho court would answer this question in view of the following two observations by Frank Cooper in his authoritative treatise on state administrative law:

1. "[W]hile the doctrine [of legislatively prescribed standards] has proved a useful tool and has provided a means of imposing workable controls on administrative discretion, nevertheless it cannot be relied upon as a basis for predicting judicial decision."⁵⁷
2. "The courts soon came to recognize that the test must necessarily vary with the nature of the power conferred. It is quite all right to insist, with exactly measurable precision, that a liquor control commission may not license a dramshop within 500 feet of a church or school; but when the question is how many customers a contract motor carrier may serve, a greater measure of

discretion must be accorded the agency, to permit it to fulfill the purpose for which it was created.

"It has been recognized that loose and imprecise standards - referable to such elusive concepts as 'adequacy' of a service, or 'appropriateness' of a bargaining unit, or other criteria, not susceptible of proof or disproof by objective tests - are valid whenever it is impracticable to lay down more precise controls. This concession has meant that the legislature may delegate such measure of discretionary power as the court considers wise and proper in the circumstances of a particular case. Thus, determinations of the validity of the delegation are governed not by jurisprudential analysis of the sufficiency or precision of the standard selected by the legislature, but rather by ad hoc assessment of variable and imponderable desiderata."⁵⁸

After disclaiming the existence of any "logical basis" for determining how far the nature of a situation permits or prohibits the legislative fashioning of specific standard, Cooper seeks to identify practical considerations which have seemed to motivate judicial decisions on delegation questions.⁵⁹ He concludes that courts have been unwilling to sustain vague standards where the arbitrary exercise of an agency's discretionary powers could have calamitous effects on substantial rights of property. This consideration seems to cut against the validity of the Groundwater Act delegation of power to develop pumping level regulations, at least insofar as there is a risk that some small farmers may be driven out of business by the regulations. On the other hand, he notes that broad delegations tend to be sustained when judicial review is readily available to correct abuses (as it is under section 42-237e of the Groundwater Act), when there is an obvious need for agency expertise, and when there is a genuine and substantial need for administrative regulation. All these factors seem

to cut in favor of the validity of the delegation in the Groundwater Act. It is impossible, however, to say with certainty how a court would weigh the competing considerations.

The statutes of a number of other western states which apply the appropriation doctrine to groundwater either refer to protecting senior appropriators in the maintenance of reasonable pumping levels or contain equivalent language.⁶⁰ There is little on the face of these statutes which would aid in construing the Idaho Groundwater Act, however.

Some Problems of Administration

Selection of Wells for Closure

In Baker v. Ore-Ida Foods, Inc.⁶¹ a groundwater basin was being depleted in violation of the prohibition against mining in section 42-237a(g). To correct the situation, the court simply applied the appropriation doctrine principle that priority in time gives priority in right and ordered wells closed in inverse order of priority until the overdraft was stopped. Would the same solution fit if junior wells had been interfering with the pumping level of a senior well owner but there was no general mining of the aquifer? Section 42-237a(g) provides:

"[E]arly 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."

The Director has not yet issued pumping level regulations, but let us suppose that such regulations have been issued and a senior well owner's rights under those regulations are being violated. Which wells will be shut down--all those in the aquifer with

priority dates junior to his or only some of them; and if only some are to be closed, which ones?

At the outset, it should be observed that application of the appropriation doctrine principle that priority in time gives priority in right to groundwater allocation presents difficulties not encountered in the application of that principle to surface water allocation. Groundwater moves much slower than surface water, typically at rates ranging from five feet per day to five feet per year.⁶² If a junior appropriator who is interfering with the flow of a senior's well is shut down, it may be years before the senior's flow is restored.⁶³ Also, because groundwater is not readily observable and most groundwater does not flow in confined channels, there may be greater difficulty in predicting the effect of shutting down a junior. To take a specific example, assume there are 30 pumpers in a basin and number 26's pumping level protection is violated. Number 27 is close to number 26, and closing his well would restore number 26's pumping level in a relatively short time. Number 28 is farther away from number 26. Closure of his well would, by itself, restore number 26's pumping level, but would take several years for this to happen. Number 29 is still farther away and closing his well might help number 26, but there is considerable uncertainty about that. Number 30 is situated so that it is inconceivable closing his well would have any noticeable effect upon number 26's well or the wells of numbers 27, 28, and 29. Which well or wells should be shut down.

Generally, a junior appropriator who wishes to divert water has the burden of proving, by clear and convincing evidence, that

his diversion will not injure any senior appropriator. Most of the Idaho cases applying this principle have been surface water cases,⁶⁴ but the court has applied it in the groundwater context as well,⁶⁵ although perhaps not consistently. Even if number 30 has the burden of proof of not interference, he should be allowed to continue to operate his well. A possible solution as to number 27, 28 and 29 would be to shut down 27 and 28 but to allow 29 to continue to operate. Closure of number 27 would restore number 26's reasonable pumping level as promptly as possible. Closure of number 28 would, after several years, enable number 27 to resume operation of his well. For that reason, number 27 should be able to insist upon closure of number 28 at the same time his well is closed.⁶⁶ Under the rule that puts the burden of proof upon the junior to show that his diversion of water will not harm any senior, it would appear at first blush that number 29 should also be closed. If that were done, however, it would not necessarily enable number 28 to resume pumping after some length of time. The reason is that absent strong evidence number 26's pumping level would be protected, allowing number 28 to resume operation may later interfere with number 26's pumping level and then number 26 could insist on closure of number 27 to get the situation corrected promptly. Thus, number 27 ought to be able to insist that number 28 remain closed absent clear and convincing evidence that number 26 would not be harmed by number 28's operation. If number 28 must remain closed and that, in itself, will protect number 26, there would seem to be no point in also closing number 29. Arguably, number 29 could be allowed to continue to operate, even under the rule that puts the burden of proof of no injury

on him, upon the ground that if number 28 must remain closed it then becomes clear that number 29's operation won't injure numbers 26, or 27 (it is assumed), or 28.

Turning away from the above hypothetical, let us assume a situation in which closure of a junior would restore a senior's protected pumping level but, due to the slow movement of groundwater, this will not occur for about 40 years. Should the time lag make the priority principle of the appropriation doctrine inoperative? In favor of an affirmative answer is the fact that by the time the senior's reasonable pumping level is restored, he may well have gone broke and lost the investment in facilities which is protected by the reasonable pumping level concept. This would not necessarily happen, however, especially if the junior is held liable in damages to the senior for increased pumping costs until the reasonable level is restored. Although not squarely in point, a recent Colorado decision is worth noting in connection with the time lag problem. In Hall v. Kuiper,⁶⁷ the Colorado Court affirmed the denial of applications to drill two wells into a groundwater source that was hydrologically connected with the Cache LaPoudre River some 13 miles away. Operation of the proposed wells would not have materially affected other wells or surface rights in the area, but the permits were denied because operation of the wells would have reduced the amount of groundwater flowing into the Cache LaPoudre River. Since the groundwater was moving toward the Cache LaPoudre at a rate of only 3/10 of a mile per year, it is evident that there would have been a considerable time lag between commencement of operation of the wells and any impairment of appropriations from the Cache LaPoudre.

FOOTNOTES

1. The current Groundwater Act consists of Idaho Code Ann. §§42-226 to -231, 42-233a, 42-237 to -239.
2. Idaho Code Ann. § 42-229 (Supp. 1973).
3. Idaho Code Ann. § 42-230(a) (Supp. 1973).
4. E.g., Silkey v. Tiegs, 51 Idaho 344, 5 P.2d 1049 (1931). Intent to make an appropriation is also necessary, e.g., State ex rel. Reynolds v. Miranda, 493 P.2d 409 (N.M. 1972), but that is so seldom lacking that it usually is not even listed as an element of an appropriation.
5. The agency used to be called the Department of Water Administration, and before it was called the Department of Reclamation. Most of the statutes in the Idaho Code referring to the Department of Reclamation have never been amended on an individual basis to reflect the changes in name of the agency. Idaho Code Ann. § 42-1801a instead provides: "Wherever the words Department of Reclamation or Department of Water Administration appear in the Idaho Code they shall mean the Department of Water Resources, and wherever the words State Reclamation Engineer or Deputy State Reclamation Engineer appear in the Idaho Code they shall mean the Director of the Department of Water Resources or the Deputy Director of the Department of Water Resources, respectively."
6. Idaho Code Ann. §§ 42-202, -229 (Supp. 1971). An application for a permit must contain certain information about the proposed project and be accompanied by a plan and map of the facilities and payment of a fee which varies with the size of the appropriation. Idaho Code Ann. §§ 42-202, -221 (Supp. 1973). The Department then publishes notice and, if anyone files a protest against approval of the application, a hearing is held. Idaho Code Ann. § 42-203 (Supp. 1973.)
7. H.B. No. 146, §1 [1903] Idaho Sess. Laws 223.
8. Idaho Code Ann. § 42-203 (Supp. 1973). See also section 42-233a regarding denial of permits for wells in areas designated as critical groundwater areas.
9. Idaho Code Ann. §§ 42-219, -220 (Supp. 1973).
10. Idaho Code Ann. § 42-233a (Supp. 1973).
11. Id.
12. Silkey v. Tiegs, 51 Idaho 344, 5 P.2d 1049 (1931).

13. Silkey v. Tiegs, note 20 supra says that a priority under the permit procedure "dates from the date of the permit." 51 Idaho at 353, 5 P.2d at 1053. This appears to be loose language in view of prior analogous surface water cases which say that a permit procedure appropriation dates from the time of filing an application for a permit. Reno v. Richards, 32 Idaho 1, 10-11, 178 P. 81, 84 (1918). Crane Falls Power and Irrigation Co. v. Snake River Irrigation Co., 24 Idaho 63, 81-82, 133 P. 655, 661 (1913).
14. Idaho Code Ann. § 42-220 (1948).
15. H.B. No. 121, § 2 (1973) Idaho Sess. Laws 537.
16. Ch. 216, § 1, (1963) Idaho Sess. Laws 623.
17. State ex rel. Tappan v. Smith, 92 Idaho 451, 444 P.2d 412 (1968).
18. See State ex rel. Tappan v. Smith, 92 Idaho 451, 444 P.2d 412 (1968).
19. Idaho Code Ann. § 42-227 (Supp. 1973). Section 42-230(d) defines "domestic purposes" as follows: "Water for household use or livestock and water used for all purposes including irrigation up to one-half ($\frac{1}{2}$) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day. For the purpose of the exception in, section 42-227, Idaho Code, 'domestic purpose' shall not include water for multiple ownership subdivisions, mobile home parks, commercial or business establishments."
20. Idaho Code Ann. § 42-228 (Supp. 1973).
21. Id.
22. 513 P.2d 627 (Idaho 1973).
23. See also Baker v. Ore-Ida Foods, Inc., 513 P.2d 627, 637 (Idaho 1973).
24. 513 P.2d at 629.
25. Bagley, Water Rights Law and Public Policies Relating to Groundwater "Mining" in the Southwestern States, 4 J. Law and Economics 144, 145 (1961).
26. C. Todd, Groundwater Hydrology 201 (1959); Walton, Groundwater Resource Evaluation 608 (1970).

27. It is even possible that total recharge could come to exceed total discharge by this process even though there is no reduction in the operation of wells.
28. Muckel, Pumping Groundwater so as to Avoid Overdraft, U.S.D.A. the Yearbook of Agriculture - 1955 (House Doc. No. 32, 84th Congress, 1st Session) 294, 295. See also D. Todd, Groundwater Hydrology 212-213 (1959); W. Walton, Groundwater Resource Evaluation 607 (1970).
29. Ibid.
30. See W. Walton, Groundwater Resource Evaluation 364-68 (1970).
31. C. Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6 at 58 (1971).
32. D. Todd, Groundwater Hydrology 251 (1959).
33. W. Walton, Groundwater Resource Evaluation 364 (1970).
34. D. Todd, Groundwater Hydrology 256 (1959).
35. J. Crosby, A Layman's Guide to Groundwater Hydrology in C. Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6, at 56-60 (1971).
36. Idaho Code Ann. § 42-226 (Supp. 1973).
37. Colo. Rev. Stat. Ann. § 148-18-1 (Supp. 1965).
38. Thompson and Fiedler, Some Problems Relating to Legal Control of Groundwaters, 30 J. of American Water Works Assn. 1049, 1075 (1938). See also W. Hutchins, Selected Problems in the Law of Water Rights in the West 179 (1942).
39. See 22 Idaho State Bar Proceedings 52 (1948); 23 Idaho State Bar Proceedings 19 (1949).
40. 513 P.2d 627, 636 (Idaho 1973).
41. Trelease, Policies for Water Law: Property Rights, Economic Forces and Public Regulation, 5 Nat. Res. J. 1, 4 (1965).
42. Id. at 4
43. C. Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6 at 129 (1971).
44. 613 P.2d at 636.
45. Id.
46. Id. at 635.

47. C. Meyers, A Historical and Functional Analysis of the Appropriation System, Legal Study No. 1, at 6 (1971).
48. See Cheline, An Economic Approach to the Agricultural Use of Groundwater in the Oakley Fan Area of Cassia County, Idaho, (unpublished master's thesis, University of Idaho 1968); see also Von Bernuth, Factors Affecting Irrigation Pumping Costs (unpublished master's thesis, University of Idaho 1969).
49. See text accompanying notes 38-39, supra.
50. See the quotation, supra, indicated by footnote 43.
51. In *Hart v. Stewart*, 519 P.2d 1171 (Idaho 1974). The court held that the Department is authorized to issue rules of practice or procedure before the Director or a local groundwater board constituted under section 42-237d of the Groundwater Act by section 42-406, which empowers the Directors "to make such rules and regulations as may be necessary . . . to the proper administration . . . of this chapter." The result seems sound but the implied delegation theory would have been a more appropriate rationale since section 42-406, upon which the court relied for its rationale, appears in a chapter of the Idaho Code which deals exclusively with appropriations for use outside the state.
52. 513 P.2d 627, 636 (Idaho 1973). The implied powers approach would be entirely consistent with the following attitude expressed in *Keller v. Magic Water Co.*, 92 Idaho 276, 282-83, 441 P.2d 725, 731-32 (1968), a surface water case:

"It is seldom that a court will interfere with the discretionary action of the state engineer (Now the Director of the Department of Water Resources) upon matters involving the administration of the water laws of the state . . . As stated by Mr. Justice Holmes, the state engineer is the 'expert on the spot', *Mayer v. Peabody*, 212 U.S. 78, 85 S. Ct. 235, 237, 53 L. Ed. 410, 416 (1909), and we are constrained to realize the converse, that 'judges are not super engineers' . . . The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state, and we must extend to his determinations and judgment, weight on appeal."

53. For modern Idaho cases on the delegation of rule making authority to state agencies, see *Abbot v. State Tax Commission*, 88 Idaho 200, 398 P.2d 221 (1965); *State v. Heitz*, 72 Idaho 107, 238 P.2d 439 (1951); *State ex rel. Taylor v. Taylor*, 58 Idaho 656, 78 P.2d 125 (1938). See also 1 Cooper, *State Administrative Law* 54-61 (1965) for discussion of cases from other states.
54. *Abbot v. State Tax Commission*, 88 Idaho 200, 205, 398 P. 2d 221, 223 (1965).
55. 1 F. Cooper, *State Administrative Law* 61 (1965).
56. See text accompanying note 47, supra.
57. 1 F. Cooper, *State Administrative Law* 55, (1965).
58. Id. at 61-62.
59. I F. Cooper, *State Administrative Law* 71-91 (1965).
60. Alaska Sta. §46.15.050 (1966); Colo. Rev. Stat. Ann. 148-18-1, 148-18-10(b), 148-18-6(4), (5) (Supp. 1965); Kan. Gen. Stat. Ann. §82a-711a (1969); Nev. Rev. Stat. § 534, 110(4) (1967); Wash. Rev. Code Ann. §90.44.070 (1961).
61. 513 P. 2d 627 (Idaho 1973).
62. J. Crosby, *A Layman's Guide to Groundwater Hydrology in C. Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6 at 42 (1971); C. Meyers and A. Tarlock Water Resource Management 562 (1971).*
63. Ellis, *Water Rights: What They Are and How They Are Created*, 13 Rocky Mtn. Min. L. Inst. 451, 470 (1967).
64. E.g. *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904).
65. *Silkey v. Tiegs*, 54 Idaho 126, 28 P. 2d 1037 (1934); see *Martiny v. Wells*, 91 Idaho 215, 419 P.2d 470 (1966); but see *Hart v. Stewart*, 519 P.2d 1171 (Idaho 1974).
66. See *Jones v. Vanausdeln*, 28 Idaho 743, 156 P. 615 (1961); *Bower v. Moorman*, 27 Idaho 162, 147 P. 496 (1951), see also *Hart v. Stewart*, 519 P.2d 1171 (Idaho 1974).
67. See *Martiny v. Wells*, 91 Idaho 215, 419 P.2d 470 (1966).

