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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF RANGEN, INC.'S WATER RIGHT NOS. 36-02551 & 36-07694	Docket No. CM-DC-2011-004 **RANGEN, INC.'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SOURCE**

COMES NOW, Rangen, Inc. ("Petitioner" or "Rangen"), by and through its attorneys of record, Robyn M. Brody of Brody Law Office, P.L.L.C.; J. Justin May of May, Browning & May, P.L.L.C.; and Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C., and hereby submits this Reply Brief in Support of Rangen's Motion for Partial Summary Judgment Re: Source.

I. INTRODUCTION

IGWA opens its Response in Opposition to Rangen's Motion for Partial Summary Judgment by stating that the Director must administer Rangen's water rights as groundwater

based on "hydro-geologic reality." *IGWA's Response*, p. 3. IGWA's claim carries little credibility because the organization crafts "hydro-geologic reality" based on what it perceives as the best legal position at the moment.

Nearly twenty years ago in Musser v. Higginson, 125 Idaho 392, 871 P.2d 809 (1994), the Idaho Supreme Court adjudicated water rights involving the Martin-Curren Tunnel. IGWA filed a brief with the Idaho Supreme Court as a "friend of the court." In that brief, IGWA unambiguously argued that the water emanating from the Martin-Curren Tunnel is spring water – NOT groundwater. IGWA argued:

> The Court also failed to address the threshold question of whether the Mussers were ground or surface water diverters (which would be relevant if the Court concluded that section 42-226 applies only in contests among ground water users). Nor was this question addressed below (because section 42-226 was not in issue). ***The Court apparently assumed, without the benefit of an adequate factual record or legal analysis, that the Mussers' spring-fed tunnel is a ground water right. This conclusion, however, is probably wrong. Idaho's water code lumps springs and lakes together with surface rights. I.C. § 42-201. Ground water is made subject to appropriation by the separate provision in I.C. § 42-226. This distinction is discussed in Branson v. Miracle, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984), which declared that water from an underground mine tunnel was ground water, not spring water: "The water flow did not issue naturally from the surface of the earth; thus it was not a spring." In contrast, the Mussers' water source is a natural spring (albeit one which has been improved with an artificial tunnel).***

See Amicus Curiae Brief of Idaho Ground Water Association (March 30, 1994), p. 9 fn 7 (emphasis added) (attached hereto as Appendix 1). IGWA also attached to its Amicus Brief the affidavit of Keith E. Anderson, IGWA's expert engineer and professional geologist. Mr. Anderson unambiguously characterizes the water that comes from the Martin-Curren Tunnel as spring water. See, e.g., p. 4 of Appendix A to Amicus Brief in which Anderson describes Musser as a spring diverter.

The "hydro-geologic reality" of the Martin-Curren Tunnel has not changed since Musser was decided. What has changed is that the Idaho Supreme Court has since rejected IGWA's full economic development argument – the argument that IGWA was advancing when it argued that the Martin-Curren Tunnel is spring water. See Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011). Now that one of IGWA's defenses has been rejected, IGWA is trying to change "hydro-geologic reality" by arguing that the water from the Martin-Curren Tunnel is groundwater. This position should be rejected because: (1) Rangen's partial decrees unambiguously decree the source of its rights as surface water; (2) to the extent there is any ambiguity it is resolved by the Idaho Supreme Court's decision in Branson v. Miracle, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984); and (3) IGWA should be estopped from introducing any expert testimony/evidence or arguing in any manner that the source of Rangen's water rights is groundwater.

II. ARGUMENT

A. Rangen's Partial Decrees Unambiguously Decree the Source of its Water Rights as Surface Water.

IGWA claims that "[t]he issue of whether the Martin-Curren Tunnel should be administered as a surface water or ground water source was not adjudicated in the SRBA, but is a matter within the Director's discretion when responding to a delivery call." IGWA's claim is without merit. The Director has no discretion to readjudicate the source of Rangen's water rights. Rangen's partial decrees unambiguously decree that the source of Rangen's water rights is surface water which means that they must be administered as such by the Director.

The partial decrees entered in Rangen's favor in the SRBA do not declare the source of Rangen's water rights as "groundwater." This is an important point to understand because if the source of Rangen's water rights were groundwater and were to be administered as groundwater,

it would have been decreed as such. See e.g., IDAPA 37.03.01.060.02.c (providing that groundwater source be labeled as "groundwater"). Indeed, IGWA explained to the Idaho Supreme Court in its Amicus Brief in the Musser case that groundwater appropriations are subject to an entirely different appropriation statute than surface water:

> ***The Court apparently assumed, without the benefit of an adequate factual record or legal analysis, that the Mussers' spring-fed tunnel is a ground water right. This conclusion, however, is probably wrong. Idaho's water code lumps springs and lakes together with surface rights. I.C. § 42-201. Ground water is made subject to appropriation by the separate provision in I.C. § 42-226.*** This distinction is discussed in Branson v. Miracle, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984), which declared that water from an underground mine tunnel was ground water, not spring water: "The water flow did not issue naturally from the surface of the earth; thus it was not a spring." In contrast, the Mussers' water source is a natural spring (albeit one which has been improved with an artificial tunnel).

IGWA's Amicus Brief, p. 9 fn 7 (emphasis added). IDAPA 37.03.01.060.02.c also makes it clear that surface water and groundwater were each identified in unique, separate ways in the Director's Reports to the SRBA that ultimately became the decrees that were entered. Groundwater is labeled as "groundwater" and surface water sources are identified with their proper geographic names or local regional identifiers like the Martin-Curren Tunnel. There is no way to confuse the two types of sources in an SRBA decree.

IGWA argues that IDAPA 37.03.01.060.02.c must give way to I.C. § 42-230. This is not the case. IGWA fails to recognize that the time for challenging the source of Rangen's water rights was in the SRBA – not twenty years after the fact. IGWA actively participated in the Musser case in 1994 and told the Supreme Court that there was an issue as to whether the Martin-Curren Tunnel was surface water or groundwater. Despite its knowledge, IGWA did nothing to object to Rangen's partial decrees that were entered in 1997[1]. Rangen's partial

[1] IGWA may not have had any objection at the time Rangen's partial decrees were being entered since it had just argued to the Idaho Supreme Court that water from the Martin-Curren Tunnel is surface water.

decrees unambiguously decree the source of its water rights as surface water. As such, the Director has no discretion to administer Rangen's water rights as groundwater. Rangen respectfully requests that judgment as a matter of law be entered in its favor on this issue.

B. The Miracle Decision Resolves any Ambiguity Concerning the Source of Rangen's Water Rights.

Pocatello argues that Rangen's partial decrees are ambiguous as to whether Rangen's water rights are groundwater, but that judgment should ultimately be entered against Rangen on this issue after a hearing. While Rangen contends its partial decrees unambiguously decree the source of its water rights as surface water, the Idaho Supreme Court's decision in Branson v. Miracle, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984) resolves any ambiguities that may exist and makes it clear that judgment should be entered in Rangen's favor as a matter of law.

IGWA cited and discussed the Miracle case in its Amicus Brief in Musser. IGWA cited the same decision in its recently-submitted Response Memorandum, but cited it as "In Re General Determination of Rights to Use of Surface & Ground Waters of Payette River Drainage Basin ("Birthday Mine"), 107 Idaho 221, 224 (Idaho 1984)." See IGWA's Response Memorandum, p. 6. Although IGWA uses two different names, the Miracle case and the Birthday Mine case are the same case. IGWA's two interpretations of the case, however, could not be more at odds with each other. IGWA got the Miracle decision right the first time that it cited it.

The Miracle case involved competing claims to an open flow of water coming from the Birthday Mine. Miracle, 107 Idaho at 224, 687 P.2d at 1351. The Bransons owned the mine and made two claims for water – a claim for domestic purposes and a claim for mining purposes. The Miracles also made a claim for the water – a claim for domestic purposes. There was enough water for the two domestic uses, but there was not enough water for the mining claim.

The Bransons challenged the Miracles' claim, arguing that the water coming from the mine was non-appropriable private water. The Court framed the issue presented as: ". . . whether an open flow of water emanating from a mine portal **which would not exist absent development of the mine** is non-appropriable private water or appropriable public water." Miracle, 107 Idaho at 224-25, 687 P.2d at 1351-52 (emphasis added).

To answer the question presented, the Miracle Court addressed the differences between surface water in I.C. § 42-101 and ground water in I.C. §42-226. The Miracles argued that the water coming from the mine was groundwater and subject to their appropriation. The Bransons, on the other hand, argued that the water was private spring water and not subject to public appropriation under I.C. § 42-212. The Idaho Supreme Court rejected the Bransons' claim that the water was private spring water. The court explained:

> The Bransons' argument that the mine water is a spring similarly is not persuasive. As the Oregon Supreme Court stated in Beisell v. Wood, 182 OR 66, 185 P.2d 570 (1947), "[a] 'spring' is a place where the water issues naturally from the earth." See Holman v. Christensen, 274 P. 460 (Utah 1929), for the same rule. There was no dispute but that the water flow emanating from the mine was created as a result of the mining operations. See Findings of Fact VIII, R., p. 53. **The water flow did not issue naturally from the surface of the earth; thus it was not a spring.**

Id. (emphasis added).

IGWA recognized in 1994 that the water coming from the Birthday Mine and the water coming from the Martin-Curren Tunnel are fundamentally different. The water coming from Birthday Mine existed only because of the mine; the mining brought it to the surface. In contrast, the Martin-Curren Tunnel only enhances existing, natural spring flows. IGWA explained to the Idaho Supreme Court that:

> The Court apparently assumed, without the benefit of an adequate factual record or legal analysis, that the Mussers' spring-fed tunnel is a ground water right. This conclusion, however, is probably wrong. Idaho's water code lumps springs and

> lakes together with surface rights. I.C. § 42-201. Ground water is made subject to appropriation by the separate provision in I.C. § 42-226. ***This distinction is discussed in Branson v. Miracle, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984), which declared that water from an underground mine tunnel was ground water, not spring water: "The water flow did not issue naturally from the surface of the earth; thus it was not a spring." In contrast, the Mussers' water source is a natural spring (albeit one which has been improved with an artificial tunnel).***

IGWA's Amicus Brief, p. 9 fn 7 (emphasis added).

IGWA now rejects its prior analysis of the Miracle case and claims:

> The Idaho Supreme Court has already treated water emanating from a tunnel as groundwater. In the case of In re General Determination of rights to [the] Use of Surface & Ground Waters of Payette Drainage Basin ("Birthday Mine"), 107 Idaho 221, 224 (Idaho 1984), the court determined that a stream emanating from a mining tunnel constituted groundwater. Water emanating from the Martin-Curren Tunnel is no different.

IGWA's Response Memorandum, p. 5.

IGWA interpreted the Miracle case correctly when it presented its view to the Idaho Supreme Court in its Amicus Brief. The Martin-Curren Tunnel enhances existing spring flows. As such, the source of Rangen's water rights must be administered as surface water. Judgment as a matter of law should be entered in Rangen's favor on this issue.

C. IGWA Should Be Estopped from Presenting Any Expert Testimony/Evidence or Arguing That the Source of Rangen's Water Rights is Groundwater.

IGWA should be estopped from presenting any expert testimony or evidence or otherwise arguing in any fashion that the source of Rangen's water rights is groundwater. "Quasi-estoppel is a broad remedial doctrine, often applied *ad hoc* to specific fact patterns." Keesee v. Fetzek, 111 Idaho 360, 362, 723 P.2d 904 (Ct. App. 1996). "Quasi estoppel is distinguished from equitable estoppel 'in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient.'" Willig v. Dept. of Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995) (quoting Evans v. Idaho State Tax

Comm., 97 Idaho 148, 150, 540 P.2d 810, 812 (1975)). "The doctrine of quasi-estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position." Id. (citation omitted).

There is no way to resolve the two very different positions that IGWA has taken in the Musser case and this case. In the Musser case IGWA argued that the water coming from the Martin-Curren Tunnel was spring water and in this case IGWA argued that it is groundwater. There is no justification for the switch in positions other than to conclude that it has been done for tactical reasons. It would be unconscionable to allow IGWA to assert that Rangen's water rights are groundwater rights when it argued the exact opposite in the Musser case. As such, the doctrine of quasi-estoppel should be applied, and the Director should enter an order prohibiting IGWA from introducing any evidence or testimony at the hearing or otherwise arguing that Rangen's water rights are groundwater.

III. CONCLUSION

For the foregoing reasons Rangen respectfully requests that its Motion for Partial Summary Judgment Re: Source be granted and that the Director enter an Order as a matter of law that: (1) Rangen's decreed source for Water Right Nos. 36-02551 and 36-07694 is surface water -- not ground water; and (2) that Rangen's delivery call is not limited to water that would flow from the mouth of the Martin-Curren Tunnel itself.

DATED this 29th day of March, 2013.

BRODY LAW OFFICE, PLLC

By _____
Robyn M. Brody

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 29th day of March, 2013 she caused a true and correct copy of the foregoing document to be served by email and first class U.S. Mail, postage prepaid upon the following:

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Robyn M. Brody

APPENDIX 1 TO RANGEN'S REPLY BRIEF IN SUPPORT

OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SOURCE

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System	
J. ALVIN MUSSER; TIM MUSSER; AND HOWARD "BUTCH" MORRIS, Petitioners-Respondents, v. R. KEITH HIGGINSON, in his official capacity as Director of the Idaho Department of Water Resources and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents-Appellants.	Supreme Court No. 20807

AMICUS CURIAE BRIEF OF IDAHO GROUND WATER ASSOCIATION, INC.

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, County of Twin Falls. Honorable Daniel C. Hurlbutt, Jr., Presiding.

John C. Hepworth, John T. Lezamiz and Patrick D. Brown of Hepworth, Nungester & Lezamiz, Chtd., Twin Falls, Idaho, attorneys for J. Alvin Musser, Tim Musser and Howard "Butch" Morris, Petitioners-Respondents.

Hon. Larry EchoHawk, Attorney General, and Clive J. Strong, Phillip J. Rassier and Peter R. Anderson, Deputy Attorneys General, for R. Keith Higginson and the Idaho Department of Water Resources, Respondents-Appellants.

Jeffrey C. Fereday, Christopher H. Meyer and Michael C. Creamer of Givens Pursley & Huntley, Boise, Idaho, and Louis F. Racine, Jr. and Randall C. Budge of Racine, Olson, Nye, Cooper & Budge, Chtd., Pocatello, Idaho, attorneys for Idaho Ground Water Association, Inc., Amicus Curiae.

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STATEMENT OF THE CASE

This brief is filed by amicus curiae Idaho Ground Water Association, Inc. ("IGWA") both in support of the motion for rehearing filed by the Attorney General in this matter and as IGWA's opening brief on rehearing should the petition be granted. IGWA's statement of interests is set out in its accompanying application for leave to appear as amicus curiae in this matter.

On February 28, 1994, this Court affirmed the District Court's issuance of a writ of mandate issued to the Director of the Idaho Department of Water Resources (the "Director") and to the Department itself (collectively "IDWR" or the "Department") ordering the Department to distribute water in accordance with the Doctrine of Prior Appropriation.

As briefed and argued before the District Court and the Supreme Court, this case addressed the appropriateness and timeliness of the issuance of a writ of mandate to enforce I.C. § 42-602, as well as certain threshold and procedural issues. IGWA will address none of these questions. Instead, IGWA files this amicus curiae brief on an issue which was unexpectedly implicated in this Court's opinion of last month, namely the authority of the Department to consider a range of factors in addition to priority of use in the administration of water under the Prior Appropriation Doctrine, as mandated under I.C. § 42-226 and the common law.

This case arose out of a demand made in the summer of 1993 by petitioners

below, landowners Alvin and Tim Musser and their tenant farmer, Howard "Butch" Morris (collectively, the "Mussers"), to the watermaster for District 36A and to the IDWR that water be delivered to them. The Mussers' demand referenced an earlier letter which stated:

> You are to shut off all water supplies being delivered to junior appropriators from all sources above and below my clients' points of diversion, including those drawing from the Snake Plain Aquifer, until such time as Mr. Crandlemire and Mr. Crandlemire and Mr. Candy are receiving their decreed rights.

Letter from Hepworth law firm to George Lemmon (the watermaster) dated May 25, 1993, R. Vol. 3, p. 15.[1]

The Mussers asked the Department to shut off up-gradient (and, strangely, down-gradient) junior wells in an effort to increase the flow of a tunnel extending into the basalt canyon wall in the Hagerman area, which picks up or enhances the discharge from the Snake Plain Aquifer. This gravity discharge supplies irrigation water to the Mussers' farm. The Department responded to the call by ordering distribution within Water District 36A according to priority, but declined to curtail diversions outside the water district until the legal and hydrological relationship between the Mussers and the ground water users was determined.

The Mussers sued for a writ of mandate to compel the IDWR to deliver their full decreed water rights and to control distribution of water from the aquifer

---

[1] The May 25, 1993 demand letter was made by the Hepworth firm on behalf of farmers nearby the Mussers. A similar demand, referencing the May 25, 1993 letter, was made on June 16, 1993 on behalf of the Mussers. R. Vol. 3, p. 21.

according to the priority date of the decreed water rights. The trial court, Honorable Daniel C. Hurlbutt, Jr., issued a writ of mandate which was somewhat different from that sought by the Mussers. The trial court ordered the IDWR "to immediately comply with I.C. § 42-602 and distribute water in accordance with the Constitution of the State of Idaho and the laws of this state commonly referred to as the Doctrine of Prior Appropriation. . . ."

IDWR appealed, and this Court affirmed. In so doing, the Court addressed a question of law which was not briefed by the parties, but which is of enormous consequence to IGWA and to water users throughout the state. The Court stated in its opinion that, at the hearing before Judge Hurlbutt:

> The director defended his refusal to honor the Mussers' demand by claiming that a "policy" of the department prevented him from taking action. In his testimony at the hearing to consider whether the writ would issue, the director referred to I.C. § 42-226 and stated that "a decision has to be made in the public interest as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource."

Musser, slip op. at 5.

The full text of the entire discussion in the record below is as follows:

> Q. [by counsel for the Director]. Mr. Higginson, could you describe what the complexities in determining what the shortfall at the well in question might be?
> A. [by the Director] The well in question?
> Q. I'm sorry. At the Martin-Curren Tunnel. Maybe I could have you illustrate that on the board, if that would be helpful.
> A. I will be happy the [sic] try to illustrate it. The policy issue that we have to deal with in the

> management of a surface-groundwater interconnected resource is the policy set forth in 42-226 with regard to --
>
> MR. HEPWORTH: Objection . . . .
>
> . . .
>
> Q. [by counsel for the Director]. What information do you need to make your determination under Idaho Code 42-226?
>
> A. [by the Director]. 42-226 is the section that says that, while first in time is first in right, a reasonable exercise of this right shall not block full economic development of groundwater resources. And a decision has to be made in the public interest as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource.

Tr., Vol. 1, pp. 86, 91 (July 8, 1993)

This is all that was said by the Director about section 42-226. He did not address the statute's scope. He simply answered a question about the complexity of the decision-making process and identified section 42-226 as a source of policy and one of the many factors to be sorted through in the course of conjunctively managing the resource.

During the course of the one-day hearing before Judge Hurlbutt, there were two passing references by counsel for the Director to section 42-226, but never a suggestion, much less any pleading or argument, that the scope, meaning or effect of section 42-226 was in issue. Tr., Vol. 1, p. 30, 86 (July 8, 1993). The Department's brief in support of its motion to dismiss mentioned section 42-226, but only in the context of showing why this was not a proper proceeding to decide such complex and difficult questions. R., Vol., p. 70. The trial court did not address section 42-226 except to note that the Director's implementation of it was

a mere "policy" and therefore not a controlling rule of law. R., Vol. 3, p. 714 7; R. Vol. 5, p. 158. The section was not mentioned by any of the attorneys in their closing arguments at the hearing. The section was not mentioned in the complaint, in the answer, or in the notice of appeal. Section 42-226 was referenced only in passing in footnote 9 of the Director's opening brief to this Court. It was not referred to in the Musser's appeal brief. Nor was it mentioned in the Director's reply brief. In short, the scope, meaning and effect of section 42-226 was not placed in issue before the trial court or this Court.

Moreover, the extent to which the trial court would reach such questions was probed by another party, Idaho Power Company, in its *Motion for Clarification, or Alternatively, Motion for Leave to Intervene* (July 7, 1993), R. Vol. 5, p. 74. At the trial court's hearing, Idaho Power was assured by the parties and by Judge Hurlbutt that the proceeding would not address the broader questions of how to conjunctively manage surface and ground water nor the legal validity of various possible defenses to a call for water (such as those arising under section 42-226 and the common law). Based on those assurances, Idaho Power Company withdrew its motion. Tr., Vol. 1, p. 11. In sum, non-parties to the action, such as IGWA and its members, had every reason to believe that the decision in this case would not affect their ability to raise and litigate these issues later.

In its opinion, the Court assumes that the Director's reference to the policy reflected in section 42-226 provided the basis for his refusal to take more immediate action to deliver water to the Mussers, despite the fact that this was

never plead, briefed or argued as the basis for the Director's position. The Court then announced that section 42-226 was inapplicable to pre-1951 water rights, such as the Musser's, and therefore could not serve as a basis for denying the relief sought.

IGWA wishes to underscore that it does not address the Court's conclusion that the Department has a responsibility to take action to deliver water in accordance with the Prior Appropriation Doctrine. IGWA's concern is limited to its desire for clarification that the Court, in making its brief statement about section 42-226, was not attempting to declare how to conjunctively manage surface and ground water or what common law principles might apply. IGWA acknowledges that such a declaration in the Court's opinion could be divined only by implication. Indeed, the Court itself emphasized the discretion retained by the Department, noting that "the details of the performance of the duty are left to the director's discretion." *Musser*, slip op. at 5. Nevertheless, many water users,[2] as well as the Governor,[3] the legislature,[4] and, apparently, the Department,[5] may

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[2] Water users in a recent hearing before the Department have relied on the Court's opinion in this case for the proposition that pre-1951 ground water rights are not subject to any reasonable pumping level requirement. In the Matter of Transfer Application Nos. 4281 and 4282 in the name of Blaine Larsen and Blaine Larsen Farms, Inc. before the Idaho Department of Water Resources (hearing of March 8-9, 1994).

[3] Letter from Cecil D. Andrus to Larry EchoHawk (March 18, 1994) (attached to the Department's *Petition for Rehearing*.

[4] House Concurrent Resolution No. 61 (1994) (attached to the Department's *Petition for Rehearing*).

[5] In response to the Court's decision, the Department issued notices to all junior ground water pumpers in the Eastern Snake River Plain warning that they may be shut down this

(continued...)

have understood the Court to have altered the substantive law under the Prior Appropriation Doctrine. IGWA contends that these reactions are based upon an overly broad reading of the Court's decision in this case. But this simply points up the need for clarification.

IGWA seeks two things from the Court.

First, it urges the Court to reconsider and withdraw that portion of its decision in which it stated that the "full economic development" criterion of section 42-226 applies only to water users with post-1951 priority dates. IGWA suggests that this issue was not properly raised or briefed to the Court. As a proper briefing in an appropriate fact-specific contest would show, to apply the criterion to some ground water irrigators and not to others will render the entire statute unworkable, and is not consistent with the legislative intent.[6]

Second, IGWA seeks clarification that in its comment about section 42-226, the Court did not intend to alter or render inapplicable the great body of common law governing the rights to distribution of the public's water resource under the Prior Appropriation Doctrine including, among other cases, *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) and its progeny. (See discussion of these cases *infra* at pp. 15-19.) Specifically, IGWA seeks clarification that in instructing

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[5] (...continued)
summer. Even if this were not to occur, the very issuance of the notices has had an impact on the ability of many farmers to obtain critical financing.

[6] IGWA's interests are not directly affected by the issuance of the writ of mandate, so long as the Court clarifies its opinion as urged in this brief. Consequently, IGWA takes no position on the Department's request that the Court reconsider the writ's affirmance.

the Department to deliver water in accordance with the Prior Appropriation Doctrine, the Court did not intend to constrain the Department to regulate water rights on the sole basis of priority without consideration of other factors which have always been a part of the doctrine and which, together with priorities, determine the extent and enforceability of water rights. These factors include: (1) whether the user making the call has forfeited or abandoned his or her water right, (2) whether the water right claimed is in excess of the duty of water or involves waste, (3) whether the call would be futile, and (4) whether the user making the call has employed a reasonable means of diversion in order to ensure the maximum utilization of the resource. Each of these criteria is an essential component of the Prior Appropriation Doctrine, every bit as much as the priority system itself.

The contours of these criteria are best defined in the context of fact-specific litigation, which this is not. Consequently, IGWA does not seek from the Court a detailed elaboration of each of them. Rather, in order to resolve any uncertainty about what precedent the Court intended to set, IGWA simply seeks a declaration by the Court, preferably by appropriate amendment to a final opinion, that its decision in this case is not intended to set precedent on any of these matters.

ARGUMENT

I. The "full economic development" criterion in section 42-226 governs the administration of the Mussers' water right.

A. Section 42-226 was intended to apply to all water rights affected by ground water.

IGWA contends that, as a matter of statutory interpretation, the "full economic development" criterion spelled out in section 42-226 applies to all water rights affected by ground water pumping.[7] Indeed, it would be unworkable for the statute to apply to a sharply limited set of ground water rights. The entire thrust of the Ground Water Act is to integrate the management of all ground water rights (except for those excepted under the domestic well exemption, I.C. § 42-227) in order to maximize the yield and public benefit from the public's resource and achieve the goal of "full economic development."

Requiring a reasonable means of diversion for some irrigation, industrial

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[7] The Court did not address the question of whether section 42-226 and the rest of the Ground Water Act is applicable to the allocation and administration of water rights between ground and surface water users, or whether it is limited to contests among ground water users. IGWA contends that the Act was intended to remove any distinction between ground and surface users to ensure that all are treated alike under the Prior Appropriation Doctrine. That is, the Act simply codified the great body of common law which had reached that conclusion that ground and surface waters must be regulated conjunctively when they are hydrologically joined.

The Court also failed to address the threshold question of whether the Mussers were ground or surface water diverters (which would be relevant if the Court concluded that section 42-226 applies only in contests among ground water users). Nor was this question addressed below (because section 42-226 was not in issue). The Court apparently assumed, without the benefit of a an adequate factual record or legal analysis, that the Mussers' spring-fed tunnel is a ground water right. This conclusion, however, is probably wrong. Idaho's water code lumps springs and lakes together with surface rights. I.C. § 42-101. Ground water is made subject to appropriation by the separate provision in I.C. § 42-226. This distinction is discussed in *Branson v. Miracle*, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984), which declared that water from an underground mine tunnel was ground water, not spring water: "The water flow did not issue naturally from the surface of the earth; thus it was not a spring." In contrast, the Mussers' water source is a natural spring (albeit one which has been improved with an artificial tunnel).

and municipal wells but not others within the same aquifer (based solely on their priority date) would render the statute unworkable. The physical nature of ground water aquifers—whose variable rates of transmissivity and inherent reservoir-like attributes—requires that regulation of ground water rights reflect a comprehensive approach to the resource based on our increasingly sophisticated understanding of hydrology.

For instance, if hydrological data showed that the aquifer could sustain a particular level of pumping, but that the ground water level would be expected to reach a new, lower level of equilibrium, everyone using the aquifer should be expected to deepen wells or lower pumps to that level in order to continue to use his or her water right. Regulation is complicated by the fact that "everyone" evidently does not include pre-1978 small domestic well owners who, according to *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), may force other ground water users to pay the cost of their well deepening. That is a transaction cost which the legislature has seen fit to impose and will have to be absorbed by other water users, even if it slows the achievement of the Act's goal of full economic development.

The scope of the pre-1978 domestic well exemption, however, is quite limited in practical terms. On the other hand, the prospect of requiring junior users to shoulder the cost of bringing every senior irrigation, industrial and municipal user into line with current standards of reasonable efficiency is another matter. It is one thing for the legislature to carve out a limited exception for

small domestic wells whose limited household needs may be met by alternate supplies provided by junior users. It is quite another to allow the hundreds of larger scale users whose rights were obtained prior to 1951 (or 1953—see discussion below) to play dog in the manger to the vast Eastern Snake Plain Aquifer. If the legislature intended to ensure the comprehensive and coordinated management of our ground water reserves, which it plainly did, it could not have intended to exempt a large segment of ground water users from the effort. To do so would ensure the failure of the Act's goal of full economic development.

Moreover, there is no indication that the legislature did intend this result. Section 42-226 of the Ground Water Act, as enacted in 1951, began with the words:

> It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined.

1951 Idaho Sess. Laws, ch. 200, p. 423 (emphasis supplied). That traditional policy was articulated more fully in the 1953 amendment to the act, but again, the legislature used the word "traditional" to emphasize that it was not overriding contrary common law, but, rather, codifying it. As amended, the first sentence of the section now reads:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of

> this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.

I.C. § 42-226 (emphasis supplied).

These are not the sort of words one would expect to be employed if the legislature intended an abrupt change in the course of law. Nor are they the words one would expect if the legislature intended to treat pre-1951 water rights differently than post-1951 water rights. The more reasonable conclusion is that the legislature believed it appropriate to caution all ground water users—including those holding senior rights—that state water law seeks to avoid monopoly of the resource by a few users. In other words, it expressed in statute what already was the law in Idaho (and throughout the West). Such legislative articulations should be encouraged by the courts, and not used as a justification to undermine the very policy the legislature sought to advance.

B. The "shall not affect" clause in section 42-226 was not adopted until 1987, when pre-1951 water rights already were on notice of the "full economic development" language.

The Court's order suggests that the "full economic development" criterion applies only to post-1951 water rights.[8] It appears that the Court has misstated

[8] "We note that the original version of what is now I.C. § 42-226 was enacted in 1951. 1951 Idaho Sess. Laws, ch. 200, § 1, p. 423. Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before enactment of the statute." *Musser*, slip op. at 5.

the effective date.

The Ground Water Act, 1951 Idaho Sess. Laws, ch. 200, pp. 423-29, was enacted in 1951. However, the "full economic development" language was not added until 1953. 1953 Idaho Sess. Laws, ch. 182, p. 278. More importantly, the provision upon which the Court presumably relied ("This act shall not affect the rights to the use of ground water in this state acquired before its enactment.") was not adopted until 1987. 1987 Idaho Sess. Laws, ch. 347, p. 743.

By that time, the "full economic development" criterion had been in place without any "grandfather clause" for thirty-four years.[9] If the legislature wished, beginning in 1987, to exempt pre-1951 (or pre-1953 or pre-1987) water rights from the full economic development criterion, it would require something more than a "shall not affect" clause.

The 1987 "shall not affect" clause, which was part of an act dealing primarily with low temperature geothermal water, is more reasonably understood as intending to exempt pre-1987 low temperature geothermal wells from new requirements in the 1987 Act. In other words, the term "this Act" may be read as referring to the 1987 Act, rather than the 1951 or 1953 Act (or, for that matter,

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[9] Prior to 1987, the statute provided: "All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed." 1951 Idaho Sess. Laws, ch. 200, p. 424. By its plain terms, this provision did not exempt pre-1951 water rights from the regulatory provisions of the act. Instead it merely confirmed that the rights remained valid despite the fact that they were acquired prior to enactment of the ground water statute. In contrast, section 2 of the 1951 act provided a complete exemption for domestic wells: "The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act; . . . ." *Id.* Thus, the legislature knew how to exempt pre-1951 wells from the act. It did so for domestic wells (in section 2), but did not do so for all other wells (in section 1).

the 1963,[10] 1978,[11] and 1980[12] Acts, which also amended the 1951 Act). Admittedly, this may be unartful drafting on the legislature's part. But this is the only sensible construction of the 1987 provision.

Accordingly, the Court should re-visit its conclusion regarding the inapplicability of the "full economic development" language of the Ground Water Act to pre-1951 water rights. The 1987 "shall not affect" clause is too weak a reed to support a reading that would retroactively "grandfather" a large class of ground water rights which for thirty-four years had been subject to regulation under section 42-226. In short, it is an insufficient basis for rendering the entire statute unworkable.

II. Irrespective of section 42-226, the Department has an obligation to regulate all ground and surface water supplies in accordance with the Maximum Utilization Doctrine.

A. The Maximum Utilization Doctrine is woven into the common law fabric of the Prior Appropriation Doctrine.

The debate over the applicability of section 42-226 is, to a large extent, academic. The reason is that the "full economic development" requirement in the statute simply reiterates long standing common law.[13] This Court made a

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[10] 1963 Idaho Sess. Laws, ch. 216, pp. 623-26.

[11] 1978 Idaho Sess. Laws, ch. 324, p. 819.

[12] 1980 Idaho Sess. Laws, ch. 186, pp. 413-14.

[13] The concept was repeated in the 1964 constitutional amendment mandating a state water plan: "[T]he State Water Resource Agency [the Department's governing board] shall have power to (continued...)

similar observation (on the redundancy of other language in the water code) in the context of the law of abandonment: "A failure to put water to beneficial use or to comply with the conditions of the permit, is an abandonment of the use, and this would be true whether or not there was a statute containing such a provision." *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 36, 147 P. 1073, 1076 (1915).

In Idaho, as in other western states, the Maximum Utilization Doctrine is part and parcel of the Prior Appropriation Doctrine.[14] Indeed, the Maximum Utilization Doctrine, whose currents permeate water law across the entire American West, was described forcefully early on, in a case arising here in Idaho along the Snake River.

This case is *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), a seminal water law decision handed down by the U.S. Supreme Court, applying Idaho water law. Schodde owned a small tract of land along the Snake River in which he held a senior water right to divert 25 cfs (1,250 miners inches). He built

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[13] (...continued)
formulate and implement a state water plan for optimum development of water resources in the public interest." Idaho Const. art. XV, § 7 (emphasis supplied). As the discussion below explains, the Maximum Utilization Doctrine also has constitutional roots in the earlier provision respecting the Prior Appropriation Doctrine adopted in 1890. Idaho Const. art. XV, § 3. See text *infra* accompanying footnotes 17 and 18 at page 22.

[14] IGWA employs the term "Maximum Utilization Doctrine" because it has come to predominate among courts and commentators on the subject. Grammarians such as H.W. Fowler probably would suggest changing it to Maximum Use Doctrine. H.W. Fowler, *Modern English Usage* at 670 (1965) (describing the term "utilization" as "pretentious diction"). Others have objected to the single-mindedness of the term "maximum," suggesting that "Optimum Use Doctrine" would better describe the balancing process involved. See discussion *infra* at page 25. These distinctions are purely semantic. The Court may call the doctrine what it likes.

several water wheels in the river to lift the water to the banks where it was used for agricultural and mining purposes. In 1903, Twin Falls Land & Water Company began building the Milner Diversion Dam nine miles downstream on the Snake, which would supply water to 5,000 people on 300,000 acres of farm land. When it began to fill in 1905, the dam backed up water and stilled Schodde's water wheels, thereby rendering his diversion inoperable. Schodde sued, arguing that his senior use was interfered with by the junior Milner project.

The Court found, under Idaho law, that Schodde's water right did not guarantee him a particular means of diversion, and it did not include an entitlement to the flow of the river necessary to operate his water wheels. To appropriate the entire flow for such "meager beneficial enjoyment," said the Court, "is not reasonable" and would bring about "disastrous results." *Schodde,* 224 U.S. at 117-120.

Schodde's claim rested, in part, on the claim that the law of riparian rights coexists in Idaho with the Prior Appropriation Doctrine, a claim which the Supreme Court quickly rejected:

> We say this because it may not be doubted that the application here sought to be made of the doctrine of riparian rights would be absolutely destructive of the fundamental concepts upon which the theory of appropriation for beneficial use proceeds, since it would allow the owner of a riparian right to appropriate the entire volume of the water of the river, <u>without regard to the extent of his beneficial use</u>.

Schodde, 224 U.S. at 122 (emphasis added). Thus, Schodde's claim of a right to

call out junior users to maintain an inefficient (though senior) means of diversion is repugnant to the Prior Appropriation Doctrine and its concept of "beneficial use." The Court declared in no uncertain terms that the Prior Appropriation Doctrine, unlike the Riparian Rights Doctrine, demands the full utilization of the resource.

The Court quoted from an earlier U.S. Supreme Court decision to demonstrate that the Prior Appropriation Doctrine does not rest on the blind application of priorities:

> [T]he right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.

Basey v. Gallagher, 20 Wall. 670 (1875) (quoted in *Schodde,* 224 U.S. at 121).

The *Schodde* court also quoted from a decision of the Idaho Supreme Court which reflected the need to apply the priority rules flexibly so as not to undermine the maximum utilization of the resource:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water, in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres, at a loss of enough water to surface irrigate ten times as much by proper application.

Van Camp v. Emery, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (quoted in *Schodde,* 224 U.S. at 124-25). Thus, the water user in *Van Camp* was not entitled to his

supra at page 9, these longstanding principles are reiterated and codified in Idaho's Ground Water Act: "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." Idaho Code § 42-226 (emphasis added). Whether or not this provision applies to pre-Act water rights, however, does not change the basic rule. Senior water users seeking to call out juniors are subject to the requirement of a reasonable means of diversion and the Doctrine's root policy of maximum utilization. In the case of surface users, these requirements may prohibit, in some instances, reliance on inefficient means of diversion (such as those which "command the flow" of an entire stream), and it may require the improvement or deepening of headgates and the repair of excessive canal leaks. For ground water users, it may mean deepening a well at their own expense (except where exempted under the limited domestic well

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[15] (...continued)

A variation on this theme is the downstream user on a "gaining" stream. This is the situation on the Boise River, where downstream juniors are "in priority" while upstream seniors are cut off. Henry Koelling, Watermaster, *Report on Canal Deliveries from Boise River and Different Features Affecting these Deliveries for the Irrigation Season of 1984.*

Another example that illustrates the sometimes anomalous results achieved under the prior appropriation system (though not an actual departure from the principle of priority of use) is the "rebound call." It is elementary that a user on one tributary cannot place a call on a user on another tributary (even though junior), because the water bypassed by one would never reach the other. In the rebound call, however, a senior user on one tributary may dry up a junior user on the main stem downstream who, in turn, places a "rebound call" on an even more junior user on a separate tributary upstream. Thus a senior on one tributary has the indirect effect of calling out a junior on another tributary, even though the senior could not have placed a direct call on the junior user.

These examples are meant to show that even within the priority system, the principle of first in time cannot be applied literally and absolutely in every instance, nor was it ever intended to be. Wooden application of the first in time rule would upset an intricate and complex system of interrelations—reflecting both legal and physical constraints—that have evolved over a hundred years under the Prior Appropriation Doctrine.

exemption). For water rights supplied by springs, such as those involved in this case,[16] it may mean installing a well or extending a tunnel rather than relying on the essentially "artesian" delivery provided by aquifer head or pressure.

This Doctrine of Maximum Utilization, which has its source squarely in Idaho law, has been articulated fully and forcefully in recent years by the Colorado Supreme Court. In *Fellhauer v. People,* 167 Colo. 320, 447 P.2d 986 (1968), the court faced a situation not unlike that posed in the Musser application. There the Colorado State Engineer (equivalent to Idaho's Director) had sought to shut down junior ground water wells which were tributary to the Arkansas River on the basis that they were causing injury to senior surface diverters downstream.

The Colorado Supreme Court overruled the State Engineer's action, holding that such curtailment should not be undertaken in the context of an *ad hoc*, knee-jerk application of the priority system, but rather only after a full evaluation of the basin in order to bring about the "maximum utilization" of the resource. Simply shutting down junior wells by rote in order of their priority, without a careful evaluation of less harmful alternatives and conditions, would frustrate the full development of the state's water resource and undermine the ultimate objective of the Prior Appropriation Doctrine. In an oft-quoted passage, the court stated:

> It is implicit in these constitutional provisions that, along with *vested rights,* there shall be *maximum utilization* of the water of this state. As administration

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[16] See footnote 7 at page 9 for a discussion of whether springs are surface or ground water.

> of water approaches its second century the curtain is opening upon the new drama of *maximum utilization* and how constitutionally that doctrine can be integrated into the law of *vested rights*. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it.

Fellhauer, 447 P.2d at 994 (emphasis original). The constitutional provisions to which the Colorado court referred[17] are essentially the same as Idaho's constitutional provisions governing water.[18]

Fellhauer, in turn, cited *City of Colorado Springs v. Bender,* 366 P.2d 552 (1961), as "the signal that the curtain was about to rise." *Fellhauer,* 447 P.2d at 994. *Bender* involved the owner of a senior irrigation well who brought an action to shut down junior wells operated by the City of Colorado Springs and others. The court rejected the claim, holding that a senior appropriator could not demand maintenance of an unreasonably high water table in order to satisfy his senior right. In another now famous passage, that borrows from Idaho's *Schodde*, the *Bender* court stated:

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[17] "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose;" Colo. Const. art. XVI, § 6.

[18] "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes." Idaho Const. art. XV, § 3.

> The plaintiffs cannot reasonably "command the whole" source of supply merely to facilitate the taking by them of the fraction of the entire flow to which their senior appropriation entitles them. On the other hand, plaintiffs cannot be required to improve their extraction facilities beyond their economic reach, upon a consideration of all the factors involved.

Bender, 366 P.2d at 556. This conclusion—that the administration of water under the Prior Appropriation Doctrine requires something more than the mechanical application of priority dates to the exclusion of other relevant factors—formed the basis of the Maximum Utilization Doctrine.

In a third case, *Alamosa-La Jara Water Users Protection Ass'n v. Gould,* 674 P.2d 914 (Colo. 1984), the state engineer's action again was invalidated because he proposed to curtail junior wells in order to satisfy senior surface diverters without consideration of alternatives. The court specifically ruled that the state engineer has the authority to consider requiring senior surface diverters to augment or replace their surface supplies (at their own expense) by drilling new wells before calling out junior well operators, if to do so was within the seniors' economic reach. Curtailment of the juniors, said the court, should be allowed only "after full consideration of the available alternatives." *Alamosa* at 934. The court continued, "The prior appropriation doctrine is not a legal barrier to the concurrent consideration by the state engineer of the various methods of implementing the state policy of maximum utilization . . ." *Id.* (citing an Idaho case, *Baker v. Ore-Ida Foods, Inc.,* 95 Idaho 575, 513 P.2d 627 (1973), discussed below).

The *Alamosa* case is yet another example of the principle that material injury is neither determined (nor necessarily solved) by simple reference to a list of priorities. Rather, the existence of material injury is a conclusion of law which must be made in the broader context of the Prior Appropriation Doctrine and all of its parts. The surface diverters in *Alamosa* certainly would suffer some "cost" or "harm" from being required to improve their diversion structures or, in some cases, convert to tributary wells. But that harm did not constitute legal injury justifying a call against junior pumpers. The Prior Appropriation Doctrine demands that the state administer water rights in order to maximize the use of the public resource. Under the priority system, senior users are entitled to obtain water in an appropriate and reasonable manner before junior rights are satisfied. But before the Director curtails junior water rights to satisfy a senior's call, the Prior Appropriation Doctrine enjoins him to consider alternatives, including those which have some cost to senior diverters.

Colorado has continued to embrace and expand upon the doctrine. *E.g., A-B Cattle Co. v. United States,* 196 Colo. 539, 589 P.2d 57 (1979) (The court cited the maximum utilization doctrine in support of its conclusion that an appropriator is not entitled to the historical quantity of silt in his water as part of his appropriation. The court was motivated by the concern that such a rule would interfere with new water development.); *City of Florence v. Board of Waterworks of Pueblo, Colorado,* 793 P.2d 148, 155 (Colo. 1990) ("The doctrine of prior appropriation does not operate in a fixed and immutable manner.")

The common theme in each of these cases is that the state must implement the Prior Appropriation Doctrine consistent with the public interest objective of maximizing use of the state's water resources rather than allowing a few users, no matter how senior, to monopolize the resource with an inefficient means of diversion.[19] That does not mean that junior water right holders always win. The point is that, before curtailing juniors in response to a call, the Director must weigh the alternatives and evaluate the beneficial use and efficiency of the diversion and use which the senior seeks to protect. This would appear to be particularly true in those situations where a call has never been made before, and the rights therefore have not been scrutinized with regard to their consistency with the Maximum Utilization Doctrine and other requirements of the Prior Appropriation Doctrine. As the Colorado Supreme Court said:

> We note that the policy of maximum utilization does not require a single-minded endeavor to squeeze every drop of water from the valley's aquifers. . . . [T]he objective of "maximum use" administration is "optimum use." Optimum use can only be achieved with proper regard for all significant factors, including environmental and economic concerns.

Alamosa-La Jara v. Gould, 674 P.2d at 935 (footnote omitted). This balancing of interests is reflected as well in the Idaho Constitution, art. XV, § 7, which calls for "optimum development of water resources in the public interest."

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[19] "It is easy to see that, if persons by appropriating the waters of the streams of the state became the absolute owners of the water without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state." *Fitzpatrick v. Montgomery*, 50 P. 416, 417 (Mont. 1897).

It bears repeating that these cases are no Colorado peculiarity. Indeed, *Bender, Fellhauer* and *Alamosa* each specifically relied on Idaho authority, *Schodde v. Twin Falls Land & Water Co.,* 224 U.S. 107 (1912) and (in the case of *Alamosa*) *Baker v. Ore-Ida Foods, Inc.,* 95 Idaho 575, 513 P.2d 627 (1973), as the basis for the Maximum Utilization Doctrine. *Fellhauer* at 994; *Bender* at 555; *Alamosa* at 934.

The Oregon Supreme Court also followed Idaho authority (*Van Camp v. Emery*) in reaching the same conclusion. *Hough v. Porter*, 95 P. 732, *modified* 98 P. 1083 (1908), *aff'd on rehearing* 102 P. 728 (Or. 1909).[20] That case raised the question of whether an inefficient senior appropriator could be required, at his own expense, to adopt a more efficient (and expensive) means of diversion, before calling out junior appropriators. The facts were described by the court thus:

> It is also argued that since, under the old methods in use before the substantial depletion of the flow by subsequent appropriators, Hough and some others, by reason of the excessive water supply, with the aid of a few dams in the channels and soughs, could irrigate with but little trouble or expense, the recognition by this court of the appropriations made by subsequent locators will thrust upon Hough and others, in order to avail themselves of the quantity awarded them, the necessity of changing their methods of application and use of the water by the construction of ditches, etc., at great expense, all of which would be avoided, were it not for the interference of such subsequent claimants.

Hough, 98 P. at 1102. The court promptly rejected the suggestion that Hough's

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[20] Other aspects of the case are reported in *Hough v. Porter*, 95 P. 732 (1908) and *Hough v. Porter*, 102 P. 728 (Or. 1909)

seniority entitled him to command such unreasonable quantities of water. Citing Idaho authority, the Oregon court concluded:

> In this arid country such manner of use must necessarily be adopted as will insure the greatest duty possible for the quantity available. The wasteful methods so common with early settlers can, under the light most favorable to their system of use, be deemed only a privilege permitted merely because it could be exercised without substantial injury to any one; and no right to such methods of use was acquired thereby.

Id. Water users may have a "right" to water, but their means of diversion must adjust with the times: "[O]f recent years improved means throughout the West have come into use, and a scarcity of the supply has made a more economic use necessary." *Id.*

Viewed another way, the goal of maximum utilization is reflected in the public interest analysis which undergirds the Prior Appropriation Doctrine. Its integration is clearly shown in the following quotation from Dean Frank Trelease in reference to the Alaska statute upon which the Idaho Supreme Court relied in the more recent case of *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985):

> The balancing of benefits against cost must be performed by the exercise of judgment. All the law can do is direct the water administrators to consider all factors, to give each its proper weight, and to reach an informed judgment that will tend to put the state's resources to *the maximum use consistent with the public interest,* for the maximum benefit of all its people.

Frank Trelease, *Alaska's New Water Use Act,* 2 Land & Water L. Rev. 1, 27-28 (1967) (emphasis added).

In *Shokal*, this Court ordered the Department to undertake a more thorough public interest review of an application for a water right to supply a fish propagation facility and hydropower project in the Hagerman area. Although the case dealt primarily with the construction of a public interest statute adopted in 1978, this Court noted that protection of the public interest has long been a part of the Prior Appropriation Doctrine:

> As observed long ago by the New Mexico Supreme Court, the "public interest" should be read broadly in order to "secure the greatest possible benefit from [the public waters] for the public." *Young & Norton v. Hinderlider*, 15 N.M. 666, 110 P. 1045 (N.M. 1910).

Shokal, 109 Idaho at 338, 707 P.2d at 449 (brackets in original). See also the Court's footnote on the relationship between the statutory obligation and the common law based Public Trust Doctrine. *Shokal*, 109 Idaho at 336-37, n.2, 707 P.2d at 447-48, n.2.

Both the Maximum Utilization Doctrine and the principle of public interest review flow from the same constitutional principle: recognition of the public's ownership of water in Idaho. Idaho Const. art XV, § 1 ("The use of all waters . . . is hereby declared to be a public use . . . ."); I.C. § 42-101 ("All the waters of the state . . . are declared to be the property of the state . . . ."); *Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 447, n.2 (1985) ("The state holds all waters in trust for the benefit of the public . . . ."); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 36, 147 P. 1073, 1076 (1915) ("The state is the sovereign owner of the right to appropriate and use all of the stream waters which are within the

jurisdiction of the state."). A water right is, after all, a usufruct or a right only to use—not to own or control—the public's water. Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 6-7 (1968).

Both the Maximum Utilization Doctrine and public interest review empower the courts to evaluate the use of water in order to protect the public resource and further the public interest. Both condemn inefficient use of the public's resource. Both compel appropriators who have acquired private rights in this public resource to employ reasonably efficient means of putting the resource to work. Both favor the full development of Idaho's water resources for beneficial uses.

Consequently, even if the Mussers can show some effect by junior rights on flows at the Mussers' point of diversion, the Director is *not* obligated immediately to shut down all up-gradient pumpers, without consideration of, among other factors, the economic devastation such action would bring, and without evaluation of the Mussers' means of diversion and alternatives available to them. To the contrary, the Director is obligated, under the Idaho Constitution and the common law of the Prior Appropriation Doctrine, to consider these very factors before taking such drastic action.

Recall that it was the construction of Milner Dam that was enabled by the litigation in *Schodde*. Large-scale irrigated agriculture in Idaho would have been impossible without the Court's recognition that the Doctrine of Prior Appropriation embodies the principles of efficiency in diversion and full use of the public's resource. Otherwise, the irrigation of 300,000 acres of land would have been

blocked by an inefficient senior diversion of 25 cfs. The same principle demands that the Department, as the custodian of the public's water resource, be able to consider whether the Mussers' senior 4.8 cfs diversion should be entitled to curtail irrigation of as much as a million acres of Idaho farm ground in the Eastern Snake River Plain.[21] In order to reach such a determination, parties to any proposed shut-down must be permitted to put on their evidence as to whether there is available to the Mussers another economical means of diverting their water. In the words of *Schodde,* the "disastrous result" of curtailing pumping on the entire Eastern Snake River Plain may be "unreasonable" in light of the "meager beneficial enjoyment" to be gained by the Mussers continuing an arguably inefficient means of diversion.

Of course, there is no evidence as of yet on the efficiency or inefficiency of the Musser's diversion. The point here is simply that the Department must be permitted to consider such evidence in administering the Musser's call. See discussion *infra* in Part IV at page 42.

B. Idaho's "reasonable pumping level" cases are not contrary to the Maximum Utilization Doctrine.

Four Idaho decisions have spoken to the issue of reasonable pumping levels in ground water allocation. Because the concept of reasonable pumping levels is the reasonable means of diversion mandate as applied to those rights dependent upon wells, these cases deserve careful attention.

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[21] Affidavit of Keith E. Anderson, ¶ 9 at p. 9 (Appendix A).

The first was *Nampa & Meridian Irrigation Dist. v. Petrie*, 37 Idaho 45, 223 P. 531 (1923), in which maintenance of the ground water level was an issue in a proceeding to confirm an apportionment of benefits and assessments by an irrigation district. The Court concluded that one landowner was properly charged for water supplied even though he owned other ground water rights. The Court's analysis is instructive:

> If it should be conceded that appellant Blucher's use of the subterranean waters as shown by the evidence gave him a valid water right, nevertheless the additional water right furnished for his land under the contract would be a sufficient benefit to the land to justify the assessment made. We conclude, however, that <u>he had no right to insist the watertable be kept at the existing level in order to permit him to use the underground waters</u>. There is no proof that he secured water from a natural subterranean stream. The evidence tends to show that he secured it from water collected beneath the surface of the ground due to seepage and percolation. <u>To hold that any land owner has a legal right to have such a water-table remain at the given height would absolutely defeat drainage in any case, and is not required by either the letter or spirit of our constitutional and statutory provisions in regard to water rights.</u>

Nampa, 37 Idaho at 50-51, 223 P. at 532 (emphasis supplied). The Court's conclusion in *Nampa* is on all fours with the Court's identical conclusion with respect to surface water in *Schodde*. In short, a senior water right does not confer on its holder a right to command the entire river or the entire aquifer.

In the following three ground water level cases, the Court ruled in favor of the senior seeking to maintain his historic ground water level. As explained below, however, these cases can be reconciled with *Schodde*, *Nampa*, and the other

cases supporting the Maximum Utilization Doctrine.

In *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933), the Court upheld an injunction forbidding a junior well owner from interfering with a senior's appropriation. The Court rejected the junior well operator's argument that the senior should be required to deepen his well. This case should not be seen, however, as a rejection of the doctrine of reasonable pumping levels in general.

Rather, the case was premised upon a peculiar fact setting and, probably, an inaccurate understanding of hydrology reflecting the primitive state of knowledge on the subject in 1933.[22] In short, it was assumed that there was not enough water to serve both the senior and the junior. The Court quoted for fully three pages from expert testimony on the hydrologic connection between the two wells. 53 Idaho at 655-57, 26 P.2d at 1113-14. The Court described the situation as a "race to the bottom of the artesian belt," 53 Idaho at 656, 26 P.2d at 1114, and a "tug of war," 53 Idaho at 657, 26 P.2d at 1114 (quoting the witness), between the two appropriators in which only one could win. This wasteful race would require the senior to deepen his well, only to have the junior deepen his further, continuing back and forth "alternating until there is no limit—a man's finances would be the limit," 53 Idaho at 657, 26 P.2d at 1114. Once all was done, the winner would find the "efficiency of the pump would be decreased and the cost of pumping would be increased." *Id.* The Court concluded that exercise would have been pointless and counter-productive.

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[22] Affidavit of Keith E. Anderson, ¶ 10 at pp. 9-10 (Appendix A).

Two things should be plain at once. First, the Musser situation bears no resemblance to the facts in *Noh*. In that case, due to the particular placement of the wells, the Court was persuaded, rightly or wrongly, there was the ability to supply only one user or the other, not both. In this case, there certainly is enough water to supply Musser's 4.8 cfs while still meeting existing uses on approximately one million acres of up-gradient farm land.[23] The only question is whether the aquifer will be put to its full use (which could entail, for example, requiring the Mussers to sink a well, install a river pump, or lengthen their tunnel), or whether the Mussers will be able to shut down the bulk of irrigation pumpers in Idaho in order to maintain a diversion that relies on the artesian pressure of the aquifer.[24]

Second, the *Noh* case itself was premised on the issue of efficiency. The Court's rejection of the junior's suggestion that the senior deepen his well was based on the Court's belief that, on these facts, to do so would be inefficient. Thus, *Noh* does not stand in opposition to the rationale behind reasonable pumping levels or reasonable means of diversion. Rather, the case is yet another in which the Court has looked to the overall efficiency of the system in applying the Prior Appropriation Doctrine.

Another Idaho case to examine reasonable pumping levels was *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973). In that case, Baker sued Ore-Ida and others to enjoin pumping of junior irrigation wells. The parties were all

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[23] Affidavit of Keith E. Anderson, ¶ 10 at p. 10 (Appendix A).

[24] Affidavit of Keith E. Anderson, ¶¶ 5-9, at pp. 3-5 (Appendix A).

with the statute is but one problem with *Noh*. Moreover, this Court's displeasure with the *Noh* decision (strongly expressed in *Baker*) should not been seen a confession that, but for the Ground Water Act, there is no reasonable pumping level requirement. Rather, *Baker's* discussion of *Noh* should be viewed as indicative of the same frustration with the primitive understanding of hydrology which led the legislature to articulate the "full economic development" criterion in the Ground Water Act of 1951. The point is that the *Noh* case reflects bad hydrology, not bad law. The Prior Appropriation Doctrine from its earliest days has required a reasonable level of efficiency in diversion. This was just as true before *Baker* and before the Ground Water Act as it is today.

The last reasonable pumping level case was *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). This case also rejected a suggestion by a junior irrigation pumper (appropriately named "Junior Wallentine") that a senior domestic user deepen his well rather than call out the junior. The case, however, should be viewed in the context of its peculiar facts. Footnote 1 of the case states, "The modification in the conditions contained in the temporary injunction resulted because it was determined that the Parker domestic well could not be deepened due to its proximity to the Parker house." 103 Idaho at 508, 650 P.2d at 650, n.1. Because the senior domestic well in *Parker* physically could not be deepened, the Court's decision in that case is fully consistent with the Maximum Utilization Doctrine's principle that senior users are expected to improve their means of diversion only to the extent of their "economic reach." *Bender*, 366 P.2d at 556

("On the other hand, plaintiffs cannot be required to improve their extraction facilities beyond their economic reach, upon a consideration of all the factors involved.").

Thus, both *Noh* and *Parker* dealt with situations in which the competing uses could not both be satisfied simply by lowering the senior's pump. In both cases, if the junior was allowed to operate his well, the senior was shut off and had no recourse. Thus, neither case is inconsistent with the principle urged by IGWA that the common law of appropriation always has required that senior users employ a reasonable means of diversion.

Parker is special in another respect. It dealt with a senior domestic well, and the Court found that the legislature intended, at least until 1978,[25] to provide a special exemption for domestic wells from the reasonable pumping level requirement. Even this rule is consistent with the general principle of reasonable means of diversion. One of the aspects of reasonableness is the economic wherewithal of the senior. Irrigation and industrial pumpers apply water to produce a stream of income which, in turn, may be used to improve the efficiency of their means of diversion from time to time. Domestic wells, in contrast, produce no income and are often a means of bare survival. Thus, for the legislature to declare as a matter of state policy that domestic well owners should not be required to suffer the expense of deepening their wells is consistent with

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[25] As this Court explained in *Parker v. Wallentine*, the exemption of domestic wells from the reasonable pumping level requirement was eliminated by the legislature in 1978.

the general framework of the maximum utilization concept.

In sum, it would be a mistake to view any of Idaho's ground water cases as standing in the way of recognition of the principle of requiring some measure of reasonableness in a senior's means of diversion as a precondition to his or her placing a call on junior users. Individual statements taken out of context from those cases might suggest that to some. A more careful reading, however, illustrates that the Court has never strayed from its commitment to efficiency and reasonableness as fundamental components of the Prior Appropriation Doctrine.

In addition to the four reasonable pumping level cases discussed above, three early ground water interference cases deserve mention, if only to explain their inapplicability to the present case. None are on point because none involved the question of whether a well operator can be compelled to deepen a well or otherwise improve his or her means of diversion.

In *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931), *on petition to continue provisional jurisdiction*, *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037 (1934), the court shut down junior geothermal wells to protect two senior geothermal wells operated by Mrs. Silkey near the Soldier's Home in Boise. The facts in the case were hotly disputed. Three junior well operators argued that there was enough water to go around, and "that not to permit such withdrawal is to permit such excess to be wasted by not being put to a beneficial use, with no corresponding benefit to respondent." *Silkey*, 54 Idaho at 128, 28 P.2d at 1037-38. This legal principle was never doubted by the Court. Instead, the case was decided on the

facts, with the Supreme Court deferring to the trial court's assessment of the conflicting evidence. In other words, the *Silkey* case should be understood as one in which there was not enough water for both junior and senior. Moreover, no issue of pumping levels or the efficiency of the means diversion was presented. Both the juniors and the seniors in the case sought to use artesian pressure. Under these facts, it is hardly surprising that the senior would prevail.

The case of *Jones v. Vanausdeln*, 28 Idaho 743, 156 P. 615 (1916), presented another dispute between two owners of artesian wells. This one, too, was decided on the facts, this time in favor of the junior with the Court upholding a finding that there was no hydrological connection between the wells.

Likewise, the case of *Bower v. Moorman*, 27 Idaho 162, 147 P. 496 (1915), dealt with well interference between two artesian wells. Here, too, the Court denied the senior appropriator a permanent injunction, because the facts failed to show that there would be insufficient water for both. The Court stated:

> No doubt, in many instances, it can be positively demonstrated that underground waters exist in large quantities, and where that can be done, a solution of the difficulties incident to the right to the use of percolating waters might be readily arrived at.

Bower, 27 Idaho at 179, 147 P. at 502. The *Bower* court stated in dictum that if upon remand it was shown that there were sufficient water for both, but it was "necessary to destroy the [senior's] cement tank or basin," then an injunction would not issue, but the junior appropriator would be "liable in damages." *Bower*, 27 Idaho at 183, 147 P. at 503. It is unclear what the Court had in mind here. In

any event, the question of what defenses would be available to the junior in such a case was clearly not before the Court.

In sum, in each of the ground water cases in which seniors have prevailed over juniors, it has been in the context of a situation in which there was only enough water (or water pressure) for one. In that circumstance, other things being equal, the rule of priority favors the senior. None of these cases address the question presented here: Where facts show that the total quantity of water is sufficient for many users if efficiently accessed, may the Department consider the efficiencies of diversion and use employed by a senior appropriator before curtailing junior rights? The answer, found throughout other Idaho case law discussed above, is in the affirmative.

III. Recognition of the principles embodied in the Maximum Utilization Doctrine provides Idaho with protection against federal interference with its water rights.

Although the federal government largely defers to state law when it comes to the allocation of water resources, federal law controls water allocation disputes among states (equitable apportionment cases) and the operation of federal dams (federal reclamation law). Where federal courts have spoken on these subjects, the results have been consistent: Courts have ruled that the Prior Appropriation Doctrine embodies more than strict adherence to the order of priority.

For instance, in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), the Supreme Court commended Nebraska's aggressive ground water management

measures "adapted to conserving and equalizing the natural flow." *Wyoming*, 259 U.S. at 484. The Court concluded:

> Both States recognize that conservation within practicable limits is essential in order that needless waste may be prevented and the largest feasible use may be secured. This comports with the all-pervading spirit of the doctrine of appropriation.

Wyoming, 259 U.S. at 185-86.

Federal law governing the operation of federal water projects (a subject of vital importance to Idaho's future, particularly given the recent attention to the survival of the salmon) is similarly imbued with the principle of maximum utilization. For instance, in *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126, 1133 (10th Cir. 1981), the Tenth Circuit declared, "Maximum utilization then is a fundamental requirement which prevents waste of water." In order to block beneficial use of the water in downstream states, the city of Albuquerque sought to divert water for which it had no use into a reservoir where it would evaporate. When the city sought to justify this diversion on the basis of a recreational use 150 miles downstream of the city, the court invalidated the use in the name of maximum utilization.

To be sure, when it comes to declaring the law of conjunctive management in Idaho, the Idaho Supreme Court is not bound by these federal pronouncements on water allocation. By the same token, these cases strongly reinforce and give added depth to the longstanding precedent from this Court that the Prior Appropriation Doctrine is not built on principles of seniority alone. Moreover, as

these cases demonstrate, Idaho's continued and consistent commitment to the principles of full and efficient use of water in the public interest will serve her well when it comes to fending off (1) claims by other states to Idaho's water and (2) intrusive federal policies affecting Idaho water rights.

IV. The issue of which defenses are available to water users subject to call should be postponed until those defenses are raised on a proper proceeding.

The most troubling aspect of the Court's opinion is that, despite a bare-bones factual record, it could be read as going beyond the relief sought by the Mussers and undercutting long-established law with respect to defenses available in an action to enforce a call. Were the Department to seek to shut down junior water rights in order to satisfy a call for water by the Mussers (or by anyone else), the affected water users are entitled to their day in court to present their defenses to the proposed action. Those defenses would likely include: (1) abandonment and forfeiture, (2) waste and duty of water, (3) futile call, and (4) reasonable means of diversion. As IGWA has sought to illustrate in this brief (focusing on the latter of the four), these are real defenses which have long been part of the fabric of the Prior Appropriation Doctrine. To the extent the Court's decision can be read as limiting one or more of them, it will have modified the law substantially in the absence of hard facts and without an opportunity for advocacy by the parties directly affected.

There is little doubt that these defenses will present challenging questions

of fact. They typically do. Their outcome will help to determine the viability of irrigated agriculture, as well as municipal and industrial users throughout Idaho, which rely to a great extent on ground water that is tributary to surface rights. Likewise, the determination of these questions will significantly affect the rights of industrial and municipal users relying on junior ground water rights. If Idaho is to depart from the principle of maximum utilization, it should do so only in the context of a case or controversy in which the affected parties have an opportunity to develop a full factual record and to be heard on these fundamental questions of law. To hamper these defenses by the precedential effect of the Court's decision in this action, to which only the Mussers and the Department are parties, in which neither argued nor briefed the question of law, and in which there is no factual record respecting the opportunities available to Musser to improve his means of diversion, would substantially prejudice IGWA and other water users.

CONCLUSION

Water is not like land. Nor is the law of water rights to be confused with the law of land ownership. A farmer may elect to idle a thousand acres of cropland, yet he or she will continue to own every square inch of the farm. The same farmer quickly will lose his or her water right, however, if the farmer stops using the water, or uses it wastefully.

This simple example illustrates that, unlike "a man's castle," there are few absolutes when it comes to the ownership of water rights. When a person applies

water in excess of the duty of water, his or her right to the excess is no good. When a person seeks to command the flow of an entire river to lift water to irrigate a single farm, the law will still his waterwheel rather than block efficient irrigation on a far broader scale. To command an entire aquifer to supply a single user may be equally inconsistent with the Prior Appropriation Doctrine.

This principle of maximum use is not a recent statutory construct. It is not a special rule for ground water, nor for conjunctive management. It is a rule of universal applicability premised on the constitutional fact that Idaho's water is a public resource. Without it, efficiency is punished and waste is rewarded; efficient irrigation by potentially thousands of other users is blocked to satisfy an inefficient few.

Thankfully, the rule of reasonable means of diversion is a part of our law, as this Court repeatedly has stated, and has been since the earliest days of Idaho's history. That principle must now be employed as the Department moves to conjuctively manage the state's ground and surface water.

IGWA urges the Court to clarify that its decision in this case is consistent with these principles.

Respectfully submitted this 30th day of March, 1994.

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APPENDIX A

Affidavit of Keith E. Anderson

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System	
ALVIN MUSSER; TIM MUSSER; AND HOWARD "BUTCH" MORRIS, Petitioners-Respondents, v. R. KEITH HIGGINSON, in his official capacity as Director of the Idaho Department of Water Resources and the IDAHO DEPARTMENT OF WATER RESOURCES, Respondents-Appellants.	Supreme Court No. 20807

AFFIDAVIT OF KEITH E. ANDERSON
ON BEHALF OF AMICUS CURIAE
IDAHO GROUND WATER ASSOCIATION, INC.

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, County of Twin Falls. Honorable Daniel C. Hurlbutt, Jr., Presiding.

John C. Hepworth, John T. Lezamiz and Patrick D. Brown of Hepworth, Nungester & Lezamiz, Chtd., Twin Falls, Idaho, attorneys for Alvin Musser, Tim Musser and Howard "Butch" Morris, Petitioners-Respondents.

Hon. Larry EchoHawk, Attorney General, and Clive J. Strong, Phillip J. Rassier and Peter R. Anderson, Deputy Attorneys General, for R. Keith Higginson and the Idaho Department of Water Resources, Respondents-Appellants.

Jeffrey C. Fereday, Christopher H. Meyer and Michael C. Creamer of Givens Pursley & Huntley, Boise, Idaho, and Louis F. Racine, Jr. and Randall C. Budge of Racine, Olson, Nye, Cooper & Budge, Chtd., Pocatello, Idaho, attorneys for Idaho Ground Water Association, Inc., Amicus Curiae.

STATE OF IDAHO)
) ss.
County of Ada)

KEITH E. ANDERSON, being first duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the matters herein.

2. I am a registered professional engineer and professional geologist in the State of Idaho with 53 years of professional experience as a hydrologist and hydrogeologist. During that time I have been employed by the U.S. Bureau of Reclamation, the Iowa Geological Survey, the Missouri Geological Survey, and the U.S. Geological Survey. From 1957 to 1990 I was employed in Idaho as a private consultant and with the consulting engineering firms of Anderson & Kelly, and James M. Montgomery, Consulting Engineers.

3. I am familiar with the hydrology and hydrogeology of the Snake River Basin, the Snake Plain Aquifer, and the general characteristics of the Aquifer's discharge in the "Thousand Springs" area. I have gained this familiarity in part through my employment and my review of, and participation in, various reports and studies concerning Snake Plain Aquifer hydrogeology. I have previously served on various technical committees dealing with groundwater and surface water relations in the Snake River Basin, including serving as Chairman of the Snake River Technical Advisory Committee in connection with the Swan Falls

controversy, and serving on the Upper Snake Technical Advisory Committee. Through my professional experience, I am familiar with the administration of ground and surface water rights under the prior appropriation system in the western states.

4. I am generally familiar with the issues raised in this matter, the Mussers' water rights, and their means of diversion through the Martin Curran Tunnel at the head of Billingsley Creek. Flows in the Martin Curran Tunnel derive from the Snake Plain Aquifer, or a portion of it, and generally can be expected to be influenced by the same factors that influence other spring flows in the Thousand Springs area near Hagerman, Idaho.

5. In comparison with other aquifer systems that I am familiar with, the Snake River Basin and the Snake Plain Aquifer are complex and unique. This is true as to the aquifer hydrogeology and its relation to surface flows in the Snake River, and as to the relationship, nature and location of ground and surface water rights situated in the Basin.

6. I am not aware of another hydrogeologic system in the United States where spring waters are available, or have been appropriated, in the quantities existing in the Hagerman Valley area. In the Hagerman Valley, a significant number of water rights have been established on the gravity-induced outflows from the Aquifer, for use in areas elevated above the Snake River. Similarly, the points of diversion of these water rights are located on the springs in a position well above the level of the Snake River. In other hydrologic systems that I am

familiar with, regulation of water rights on the basis of priority, and mitigation of groundwater diversion impacts to surface water rights through recharge projects and delivery of alternate surface water supplies, is relatively simple from a physical and practical standpoint. In these cases, there are essentially two groups of users from the common supply: those whose water is diverted directly from the stream, and those whose water is diverted from wells tapping into the aquifer. In these situations, recharge projects, or substitution of other surface supplies are possible means of mitigating the impacts of groundwater pumping on surface supplies which would not necessarily require water levels in the aquifer to be maintained at their current position. However, because of the reliance of spring diverters like Musser on flows taken directly from the springs on the wall of the Snake River Canyon, and because of the complex hydrogeology upgradient of the springs, curtailment of ground and surface water rights on the basis of priority may not provide any appreciable relief in the way of additional water to such springs. For the same reasons, traditional forms of mitigation such as artificial recharge or substitution of spring flows with surface supplies also may be infeasible, or have limited or no beneficial results, for spring users such as Musser.

7. Three primary factors can reduce the quantity of water discharging from the Snake Plain Aquifer into the Snake River: 1) decreases in natural aquifer recharge resulting from tributary underflow and precipitation; 2) decreases in aquifer recharge from irrigation seepage and return flows as a result of improved

surface irrigation efficiencies and changes in irrigation methods; and 3) increases in consumptive use of tributary groundwater on the Snake River Plain.

8. Since the mid-1970's, and in part because of improved efficiencies of diversion and changes in irrigation methods, surface water irrigators in the Snake River Basin above Milner Dam have significantly reduced diversions of surface water for irrigation on the Snake River Plain. This reduction in surface water diversions is a substantial contributing factor to the declines in recharge to the Snake Plain Aquifer, and consequently, to the declines in aquifer discharges to the Snake River.

9. I am familiar with the 1933 Supreme Court opinion in *Noh v. Stoner*, and have reviewed the facts and testimony recited in the reported decision. My opinion is that it is unlikely that lowering of the senior's pump in that case would have resulted in a "tug of war" between the competing users, as suggested by Stoner's witness, unless the artesian aquifer in that case was being overdrafted. In most cases, including the Snake Plain Aquifer, and assuming that the withdrawals do not exceed the average annual recharge, lowering of one or both of the pumps in two competing wells to some deeper level will allow each water user to fully exercise his or her water right.

10. It also is my opinion that, with regard to the Snake Plain Aquifer generally, a sufficient water supply should be available from the Aquifer to satisfy the Mussers' senior spring right and most if not all existing groundwater uses,

provided each water user employs a reasonable means of diversion to obtain the water.

Further your Affiant saith not.

DATED this 30th day of March, 1994

Keith E Anderson

SUBSCRIBED AND SWORN To before me this 30th day of March, 1994.

Sherrie Rodgers
Notary Public For Idaho
Residing at Boise, Idaho
My commission expires: 5/15/95

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