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Supreme Court Docket No. 38403-2011
(consolidated with nos. 38421-2011 and 38422-2011)

IN THE SUPREME COURT FOR THE STATE OF IDAHO

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

A&B IRRIGATION DISTRICT,

Petitioner-Appellant,

v.

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

Defendants-Respondents,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC.; CITY OF POCA TELLO,

Respondents-Cross Appellants,

and

FREMONT MADISON IRRIGATION DISTRICT; ROBERT & SUE HUSKINSON; SUN-
GLO INDUSTRIES; VAL SCHWENDIMAN FARMS, INC.; DAVID SCHWENDIMAN
FARMS, INC.; DARRELL C. NEVILLE; SCOTT C. NEVILLE; STAN D. NEVILLE;

District Court Intervenors.

IDWR DEFENDANTS-RESPONDENTS' BRIEF

On Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for
the County of Minidoka, Docket No. 2009-647

Honorable Eric J. Wildman, District Judge, Presiding

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I. STATEMENT OF THE CASE

This case involves the Director of the Idaho Department of Water Resources' ("Department" or "Director") application of the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 *et seq.* ("CM Rules"), in response to a ground water to ground water delivery call filed by the A&B Irrigation District ("A&B"). The Director's Final Order, which was affirmed by the district court on nearly all points, found that A&B was not materially injured. On appeal, A&B contends the Director and district court erred in their analyses. Appeals by the City of Pocatello ("Pocatello") and the Idaho Ground Water Appropriators, Inc. ("IGWA") allege the district court erred by requiring that the Director's finding of no material injury must be supported by clear and convincing evidence, rather than preponderance of the evidence.¹

II. FACTUAL AND PROCEDURAL BACKGROUND

1. The Hydrogeologic Setting and the A&B Irrigation District

The A&B Irrigation District is located near the town of Rupert in south-central Idaho. Ex. 215. Underlying A&B is the Eastern Snake Plain Aquifer ("ESPA"), which serves as the project's water source. The ESPA is predominately composed of fractured Quaternary basalt having an aggregate thickness that may, at some locations, exceed several thousand feet, decreasing to shallow depths in the Thousand Springs area. R. at 1107.

¹ All citations to the record created before the agency will be referred to as "R. at ____." All citations to the transcript from the hearing created before the agency will be referred to as "Tr. Vol. ____, p. ____, ln. ____." All citations to the record created before the district court will be referred to as "Clerk's R. at ____." On May 16, 2011, the district court lodged a supplemental record that contained inadvertently omitted material. The supplemental record was not bated-stamped. References, therefore, will be to the specific document and page number for that specific document. The supplemental record will be referred to as "Clerk's Supp. R., [specific document] at [specific page number]."

A&B lands overlay a geologic “transition zone” which directly impacts its ability to pump ground water. Ex. 121 at 6 (A&B 1077). While the northern two-thirds of the project is dominated by basalt, the southern third of the project is composed of layers of basalt interrupted by layers of sediment. Ex. 121 at 6-7 (A&B 1077-78). “Snake River basalt is the principal water-bearing formation, and it yields water copiously to wells.” *Id.* at 8 (A&B 1079). “Where flow sheets are made up of dense, and massive basalt and/or is covered, penetrated, or innerbedded with fine sediment, the water yield is small to moderate. One such area is in the southwest part of Unit B located mostly in T9S/R22E” *Id.* at 8 (A&B 1079).

The transition between basalt to the north and sediment to the south is attributed to the pre-historic damming of the Snake River by lava flows near A&B. *Id.* at 7-8 (A&B 1078-79). When lava would dam the Snake River, a body of water referred to as Lake Burley would form and extend inland, inundating A&B lands. *Id.* The slack water created by Lake Burley would deposit layers of lake bed sediments on top of existing layers of basalt. *Id.* Eventually, the Snake River would find a new course, only to be dammed again by a subsequent lava flow. *Id.* This reoccurring sequence of events resulted in thick, continuous sedimentary layers beneath the southwestern area of the A&B project. *Id.*

With an understanding of the hydrogeologic environment, R. at 1128, 3091, the United States Bureau of Reclamation (“USBR”) constructed the North Side Pumping Division of the Minidoka Project. R. at 3083. The project, constructed in the 1950s and early 1960s, irrigates approximately 78,000 acres of land. *Id.* Of those acres, approximately 15,000 are designated Unit A (Snake River surface water) and approximately 62,604 are designated Unit B (ESPA ground water). R. at 1112. “Unit B was the first large-scale ground-water pumping project on the Snake Plain.” Ex. 113 at 3.

The project was begun in the early 1950s. Ex. 200 at 2-3. Aquifer levels peaked about this time. Ex. 121 at 13 (A&B 1084). The project was completed by 1963, “during a water level decline period.” R. at 1133. Consequently, by 1965, approximately half of the project’s wells were redrilled. Exs. 402 & 404. Due to inherent geology in the southwestern area of the project, which compromised certain wells and was documented by the USBR during the construction phase, some wells in that area were abandoned. *See e.g.*, Tr. Vol. IX, pp. 1762-77 (discussion of USBR letters). Operation of the project was transferred from the USBR to A&B in 1966 under a repayment agreement. R. 3080.

The project was originally designed as an open discharge system where water was pumped from the ground into surface ponds and delivered through open lateral systems to the user. Clerk’s R. at 50. Irrigation was initially accomplished by gravity flow, *id.*, with conveyance loss estimated at 8 percent, Ex. 113 at 58; R. at 1116. The original conveyance system included 109.71 miles of laterals and 333 miles of drains. Clerk’s R. at 50.

In the early 1980s, A&B began a steady process of converting its gravity flow system to sprinkler irrigation, R. 1115, Fig. 4, and reducing conveyance losses to 5 percent, Ex. 1113 at 58; R. 1115. By 2007, 96 percent of A&B was irrigated by sprinkler, Ex. 200 at Tbl. 4-6, with conveyance losses reduced to 3 percent, Ex. 200 at 4-4. The current system includes 51 miles of laterals, 138 miles of drains, and 27 miles of distribution piping. Clerk’s R. at 50. Due to conversions, less water is needed today by A&B for irrigation than was needed when the project was originally developed. R. at 1113-1119.

2. A&B’s Senior Water Right, 36-2080

While A&B holds beneficial use and subordinated enlargement rights, its delivery call is based solely on its senior water right, 36-2080. Ex. 200 at 2-9; R. at 1112. Water right no. 36-

2080 was licensed by the Department in 1965 and authorized the diversion of 1,100 cfs from 177 individual points of diversion for irrigation of 62,604.3 acres. Ex. 157 at 538 (bate-stamp 4308). Unlike most water rights, the A&B water right does not identify a specific place of use with each diversion point. The unique structure of A&B's water right was intentionally sought by the USBR: "We emphasize that the project is one integrated system, physically, operationally, and financially. . . . Therefore, it is impractical and undesirable to designate precise land areas within the project served by each of the specific wells on the list." Ex. 157D. On review, the district court found, "The legal effect is that up to the full rate of diversion can be diverted from any combination of the 177 points of diversion . . . and applied to any of the lands . . ." Clerk's R. at 84.

In 2003, A&B's water right was partially decreed by the Snake River Basin Adjudication ("SRBA") district court and substantially mimics the 1965 license. Ex. 139. One difference between A&B's licensed water right and its right as decreed is that A&B, pursuant to a transfer, is authorized to divert water from 188 points of diversion. R. at 3081; Ex. 157 at 2-31 (bate-stamp 3772-3801).

At the hearing, it was established that, despite claiming it was water short, A&B diverts water from only 177 points of diversion, not 188. R. at 3081. It was also established that A&B does not limit irrigation under its senior water right to its decreed 62,604.3-acre place of use. R. at 1148. Instead, A&B uses its senior right to irrigate an additional 4,081.9 junior and subordinated enlargement acres. *Id.* A&B's junior and subordinated enlargement water rights are not part of this delivery call. Ex. 200 at 2-8-9. A&B admitted it currently has no means to ensure it only irrigates senior acres with its senior right. Tr. Vol. III, p. 605, lns. 18-25; p. 606, lns. 1-4; Tr. Vol. IV, p. 742, lns. 8-25; p. 743, lns. 1-6.

3. A&B's 1994 Delivery Call, 2007 Motion to Proceed, and the Department's Response

On July 26, 1994, A&B filed a petition for delivery call, seeking administration of junior-priority ground water rights diverting from the ESPA, as well as designation of the ESPA as a ground water management area ("GWMA"). R. at 12. On May 1, 1995, A&B, the Department, and other participants entered into an agreement that stayed the petition for delivery call until such time as a Motion to Proceed was filed with the Director.² R. at 669; 1105. On March 16, 2007, A&B filed a Motion to Proceed seeking administration of junior-priority ground water rights, as well as the designation of the ESPA as a GWMA, for the benefit of its senior water right, 36-2080. R. at 830.

Following a September 20, 2007 status conference on the Motion to Proceed, the Director notified the parties that the Director was lifting the 1995 stay governing A&B's 1994 delivery call, and stated that the call would proceed "under IDWR's Rules for Conjunctive Management of Surface and Ground Water Resources." R. at 1106. Gerald F. Schroeder was appointed by the Director to serve as independent hearing officer ("hearing officer") and to "conduct a hearing and issue a recommended order pursuant to IDAPA Rule 37.01.01.410 and -413 and the provisions of chapter 52, title 67, Idaho Code." *Id.*

On October 29, 2007, the Honorable John K. Butler, in and for the County of Minidoka, ordered the Director "to make a determination of material injury, if any, in accordance with Rule

² In its Opening Brief, A&B states that, contrary to the terms of the stay, the Department "did not 'develop a plan for management of the ESPA.'" *Opening Brief* at 6. A&B made the same accusation against the Department in its opening brief before the district court. Clerk's Supp. R., *A&B Irrigation District's Opening Brief on Appeal* at 7. Just as before the district court, A&B has provided no record citation to support its position. "While this issue is not part of this proceeding on review, the Department responded to this same argument in A&B's writ of mandamus action in Minidoka County Case No. CV-07-665. In its *Brief in Support of Motion to Dismiss Petitioner's Alternative Writ of Mandate and the Verified Petition for Peremptory Writ of Mandate* ("Brief in Support") filed September 21, 2007, the Department presented the court with the numerous steps it has taken to address administration of the ESPA. See *Brief in Support* at 8-15 (completion of hydrogeologic studies of the ESPA; adoption of the CM Rules; creation of water measurement districts; creation of ground water management areas; filing of Director's reports in the Snake River Basin Adjudication in basins that overlay the ESPA; creation of water districts; and long-term planning through the Comprehensive Aquifer Management Plan)." Clerk's Supp. R., *IDWR Respondent's Brief* at 2, fn. 1.

42 of the Conjunctive Management Rules” *Id.* On November 16, 2007, the Director issued an *Order Requesting Information*, in accordance with CM Rule 42, requesting that A&B provide the Department with specifically identified information the Director deemed relevant in making his determination of material injury. R. at 1107. On January 29, 2008, following receipt of information from A&B, the Director issued a final order (“January 2008 Final Order”) finding that A&B was not materially injured and denied its request to designate the ESPA as a GWMA. *Id.*

4. Hearing on the A&B Delivery Call, the Hearing Officer’s Recommended Order, and the Director’s Final Order

On December 3, 2008, the hearing on the A&B delivery call commenced. The hearing ran for a period of approximately eleven days in which testimony and evidence were presented by the participating parties. The Department provided witnesses to explain the background of the Department’s action and the administrative record relied upon by the Director in entering the January 2008 Final Order and to assist the parties and the hearing officer.

On March 27, 2009, the hearing officer issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* (“Recommended Order”). R. at 3078. Pertinent to this appeal, the Hearing officer determined that: (1) the Ground Water Act applies to A&B’s 1948 irrigation water right, 36-2080;³ (2) the inherent hydrogeologic setting in which A&B is located hinders its ability to pump water in certain locations; (3) A&B has sufficient water with which to irrigate crops; (4) A&B is not materially injured and its reasonable pumping levels had not been exceeded; (5) the Director properly analyzed A&B’s water right as an integrated system; and (6) it

³ A&B moved for a declaratory ruling on the applicability of the Ground Water Act prior to the hearing. R. at 1451, 1423. In a written decision, the hearing officer held that the Ground Water Act applied to A&B’s calling water right, 36-2080. R. at 1630.

was proper to require reasonable interconnection of A&B's water right prior to curtailment. *See generally* R. at 3087.

On June 30, 2009, the Director issued his *Final Order Regarding the A&B Irrigation District Delivery Call* ("Final Order"). R. at 3318. In the Final Order, the Director accepted the substantive recommendations of the hearing officer. In addition, based on the evidence presented, the Director further clarified the hearing officer's recommendation that A&B had not exceeded reasonable pumping levels. R. at 3320-21. A&B sought review of the Final Order before the district court.

5. The District Court's Memorandum Decision

On May 4, 2010, the district court issued its *Memorandum Decision and Order on Petition for Judicial Review* ("Memorandum Decision").⁴ Clerk's R. at 45. The district court affirmed the Final Order on all substantive issues, but remanded the Director's material injury analysis because the Final Order was silent on which standard of review he applied to the evidence—clear and convincing or preponderance.

On November 2, 2010, in response to petitions for reconsideration filed by IGWA and Pocatello regarding the evidentiary standard of review, the district court issued its *Memorandum Decision and Order on Petitions for Rehearing* ("Memorandum Decision on Rehearing") in which it affirmed its previous ruling and added additional clarification. Clerk's R. at 106.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. Idaho Code § 42-

⁴ The Memorandum Decision was signed on May 4, 2010; however, due to errors in service, the district court treated "the date of entry of the *Memorandum Decision* at May 20, 2010." Clerk's R. at 95.

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

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

IV. SUMMARY OF ARGUMENT

The Ground Water Act and controlling case law establish that A&B’s irrigation water right is protected in the maintenance of a reasonable pumping level. Thus, the hearing officer and district court agreed that the Director properly examined the record to determine if A&B’s reasonable pumping levels had been exceeded. In his review of the evidence, the Director found A&B’s reasonable pumping levels were not exceeded, and that specific problems in the

southwestern area of the project were caused by the inherent hydrogeologic environment. The Director's findings are supported by substantial evidence in the record and are binding on appeal.

The hearing officer and the district court also agreed that because of the way in which A&B's water right was licensed and decreed, A&B must take reasonable steps to modify its historic means of appropriation prior to pursuing a delivery call. The findings of the Director show that, without altering its historic means of appropriation, A&B patrons, with the current water supply, raise crops to maturity with yields greater than the Minidoka County average. These findings, which are supported by substantial evidence, are binding on appeal.

Because the Final Order is legally sound and there is substantial evidence to support the Director's findings of fact, the Director respectfully requests that this Court affirm his decision denying A&B's delivery call. Additionally, the Director requests that the Court affirm the district court's holding that the evidentiary standard of review to apply in conjunctive administration is clear and convincing.

V. RESPONSE TO ISSUES RAISED BY A&B

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

A&B seeks to overturn independent decisions made by the hearing officer, Director, and district court, that its 1948 irrigation water right is subject to Idaho's Ground Water Act ("Act"), Idaho Code §§ 42-226 *et seq.* To support its theory that its irrigation right is exempt from administration, A&B relies on a single sentence from Idaho Code § 42-226, as amended in 1987: "This act shall not effect the rights to the use of ground water in this state acquired before its enactment." *Opening Brief* at 14 citing Idaho Code § 42-226 (2010) (amended 1987) (emphasis in

original). A&B cites to this single sentence in Idaho Code § 42-226 to show that the tenets of the Act do not apply retroactively to its 1948 irrigation water right.

Read in a vacuum, this single sentence in Idaho Code § 42-226 might appear to support A&B's position. However, as correctly observed by the district court, "Statutory provisions should not be read in isolation, but must be interpreted in the context of the entire document." Clerk's R. at 57 citing *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). "The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings." *Id.* citing *Farber* at 310, 208 P.3d at 292. "A statute is passed as a whole and not in parts or sections. Each part or section therefore should be construed in connection with every other part or section so as to produce a harmonious whole." *Id.* Based on these well-established principles of statutory construction, the district court held, "When construed in its entirety, it is clear the legislature intended the [Act] to apply to the administration of all rights to the use of ground water whenever and however acquired." *Id.* (emphasis in original). As will be explained below, the district court's decision is in accord with the entirety of the Act and should be affirmed.

A. The 1951 Ground Water Act Applies To the Administration of All Non-Excepted Ground Water Rights

In 1951, the legislature passed the Ground Water Act. Section 1, which is codified today as Idaho Code § 42-226, affirmed the traditional policy of beneficial use and recognized pre-existing ground water rights for which there was no record:

SECTION 1. GROUND WATERS ARE PUBLIC WATERS—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. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and

allotment to those diverting the same for beneficial use. **All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.**

1951 Idaho Sess. Laws, ch. 200, § 1, p. 423-24 (approved March 19, 1951) (emphasis added).

It was necessary to “validate and confirm” pre-existing ground water rights because the Act also incorporated an application, permitting, and licensing process for appropriation of ground water. *See* 1951 Idaho Sess. Laws, ch. 200, §§ 7-11 (approved March 19, 1951). This would include rights appropriated under the constitutional method of diversion and application to a beneficial use.⁵ As held by the district court: “[I]t is clear that the last sentence of I.C. § 42-226 governs the applicability of the [Act] to rights to the use of ground water acquired before its enactment” Clerk’s R. at 59.

Section 4 of the Act, which is codified today as Idaho Code § 42-229, discussed how ground water could be appropriated and, most importantly, how ground water would be administered:

SECTION 4. METHODS OF APPROPRIATION—The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of diversion and application to beneficial use or by means of the application permit and license procedure in this act provided. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of chapter 2 of title 42, Idaho Code, may be completed under the provisions of said chapter 2 and rights to the use of ground water may be thereby acquired. **But the administration of all rights to the use of ground water, whenever or however acquired, shall unless specifically excepted therefrom, be governed by the provisions of this act.**

⁵ This is consistent with statements made by R.P. Parry, during a presentation at the twenty-third annual Idaho State Bar meeting in McCall. Parry, “a leading authority on Idaho water law,” Douglas L. Grant, *Reasonable Groundwater Pumping Levels Under the Appropriation Doctrine: The Law and Underlying Economic Goals*, 21 Nat. Resources J. 1, 24 (1987), helped draft the Act and stated: “The next point we thought was fundamental in preparing any underground water bill was that assuredly we should not take any existing rights away from anyone. All presently existing rights should be confirmed and validated. There are many of them in Idaho of which there is no record. We thought a simple and easy procedure should be set up whereby every man claiming underground water rights could go in and make a filing and have the right made a matter of record.” R.P. Parry, *An Underground Water Code*, 23 Idaho State Bar Proceedings 19, 23 (1949). An excerpted copy of the 1949 Idaho State Bar Proceedings is attached hereto as an addendum.

1951 Idaho Sess. Laws, ch. 200, § 4, p. 424 (emphasis added).

As held by the district court: “[B]y its plain language then, the [Act] applies to the administration of all rights to the use of ground water ‘whenever and however’ acquired. I.C. § 42-229.” Clerk’s R. at 59 (emphasis in original). The district court’s reasoning is consistent with statutory construction.

The legislature’s use of the phrase “whenever or however acquired” unquestionably proves that the Act applies to the administration of all ground water rights, regardless of priority, unless “specifically excepted.” As explained by this Court, the legislature does not need to say “This statute is to be deemed retroactive” in order to make it so. *Peavy v. McCombs*, 26 Idaho 143, 151, 140 P. 965, 968 (1914). A statute is retroactive “if the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared” *Id.*

Consistent with *Peavy*, Section 4 of the Act makes clear the intent of the legislature that all rights, regardless of when or how they were acquired, were to be governed by the Act. In Section 4, the legislature could not have been more clear in requiring that the Act apply to all existing and future ground water rights, “unless specifically excepted.” 1951 Idaho Sess. Laws, ch. 200, § 4, p. 424. Where a statute is plain and unambiguous, courts must follow that meaning and neither add to the statute nor take away by judicial construction. *Rule Sales and Service, Inc. v. U.S. Bank Nat. Assoc.*, 133 Idaho 669, 672, 991 P.2d 857, 860 (2000).

The only classification of rights that were “specifically excepted” from the administration requirements of the Act were wells for “domestic” and “drainage or recovery purposes.” 1951 Idaho Sess. Laws, ch. 200, §§ 2 & 3, p. 424 *now codified as* Idaho Code §§ 42-227 & -228. Critically, irrigation wells, like A&B’s calling water right, 36-2080, were not excepted from administration under the Act.

Sections 1, 2, 3, and 4 of the Act make sense when read as a whole and explain that the Act applies to non-excepted ground water rights. Section 1 confirms the validity of A&B irrigation right; sections 2 and 3 make clear that A&B's irrigation right is not excepted from the requirements of the Act; and Section 4 makes clear that because A&B's irrigation right is not excepted, the Act applies and its right is subject to administration. "The rule that statutes *in pari material* should be construed together applies with peculiar force to statutes passed at the same session of the Legislature." *Peavy* at 149, 140 P. at 967 (emphasis added).

B. The 1953 Amendments to the Ground Water Act Protect A&B's Irrigation Right in the Maintenance of Reasonable Pumping Levels, as may be Established by the Director

In 1953, the Act was amended. Most notably, the legislature amended Section 1 by adding the following italicized language, which described State policy as it related to ground water:

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

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

According to A&B, the amended language in Section 1 cannot be applied retroactively because "the same declaration of retroactive intent is required for an amendment to a statute as well. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614 (1987)." *Opening Brief* at 16

(emphasis in original). A&B's misreads *Nebeker*. In that case, the Court denied a surviving spouse's claim under Idaho's Uniform Probate Code (Idaho Code §§ 15-2-102 & -103) to make retroactive a 1984 amendment to Idaho's wrongful death statute (Idaho Code § 5-311). *Nebeker* at 612-14, 747 P.2d at 21-23. Unlike the wrongful death statute in *Nebeker*, Section 1 is part of an act that must be construed in its entirety and was expressly made retroactive in Section 4: "In construing legislative acts it is . . . our duty is to ascertain, if possible, from a reading of the whole act, and amendments thereto, the purpose and intent of the legislature and give force and effect thereto." *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539, 797 P.2d 1385, 1387 (1990) (emphasis added).

In construing the Act as a whole, Section 1 recognized that ground water rights would be administered according to the prior appropriation doctrine, but that prior ground water rights should not prevent the full economic development of the ground water resources of the State, and that ground water appropriators would be required to pump from a "reasonable pumping level" "as may be established" by the Director. Section 4, which was unaltered by the 1953 amendments, remained the only provision that spoke directly to "administration" of ground water rights. 1951 Idaho Sess. Laws, ch. 200, § 4, p. 424. *Farber* at 313, 208 P.3d at 295 ("the more specific statute controls"). Sections 2 and 3 were also unaltered by the 1953 amendments. 1951 Idaho Sess. Laws, ch. 200, §§ 2 & 3, p. 424. Therefore, unless a ground water right was "specifically excepted" from Section 4, it was subject to Section 1 and the Act's requirement that, for purposes of administration, it was subject to "reasonable ground water pumping levels," so as to ensure "full economic development" of the State's ground water resources. 1953 Idaho Sess. Laws, ch. 182, § 1, p. 278. Consequently, under the 1953 amendments to the Act, A&B's irrigation right was subject to the reasonable pumping level requirement in Section 1.

As recognized by the district court, acceptance of A&B's argument would render other portions of the 1953 amendments meaningless and "lead to an absurd result" Clerk's R. at 59. "[T]he argument results in the conclusion that pre-existing water rights are insulated from all administrative provisions enumerated in the [Act], including but not limited to provisions regarding the equipping of wells with flow valves, rights of inspection by IDWR, maintenance of casings, pipes, fittings, etc. *See* Idaho Code § 42-237a.g." *Id.* (emphasis in original). *See* 1953 Idaho Sess. Laws, ch. 182, § 15, p. 284 (approved March 12, 1953) (referring to "Powers of the State Reclamation Engineer"). The district court therefore held that "the Director has the authority under the [Act] to administer rights to the use of ground water 'whenever or however acquired.'" Clerk's R. at 59. The district court's holding is in accord with well-established principles of statutory construction and should be affirmed.

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

In 1987, the legislature amended the Act to address concerns involving the use of low temperature geothermal ground water resources, 1987 Idaho Sess. Laws, ch. 347, p. 741-42, most specifically to restrict its use for non-heating purposes by the addition of Idaho Code § 42-233, 1987 Idaho Sess. Laws, ch. 347, § 3, p. 744 (approved April 6, 1987). The 1987 amendments also amended what originally was the last sentence of Section 1 of the 1951 Act, to read as follows:

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

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

Despite A&B's argument to the contrary, this single sentence does not have the effect of exempting its pre-1951 irrigation water right from administration under the Act. By its plain

terms, the amendment to Idaho Code § 42-226 impacts “rights of use,” not administration. Also, as well-reasoned by the district court:

[T]he more plausible justification behind the amendment and its choice of language was to avoid confusion in the forthcoming SRBA. Namely, that the validated and confirmed language could be construed as a legislative determination of the validity of pre-existing rights. Accordingly, this Court concludes that both the original language and the 1987 amendment were not intended to exempt pre-existing rights from the application of the [Act] but rather to establish that pre-existing rights were acknowledged as valid and not supplanted by the operation of the [Act].

Clerk’s R. at 66.⁶

Despite numerous chances to amend Section 4, the legislature has never done so, thereby evidencing its intent that only a very narrow classification of ground water rights be excepted from the Act’s reasonable pumping level requirement. *Farber* at 313, 208 P.3d at 295 (“the more specific statute controls”). Irrigation rights, like A&B’s, are not and have never been excepted from the Act.

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

i. *Baker v. Ore-Ida Foods, Inc.*

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

⁶ The district court’s reasoning is consistent with statements made by R.P. Parry, *supra*. As explained above, Parry opined that the phrase “validate and confirm” would allow water users to make a record of previously unrecorded ground water rights. If a previously unrecorded water right is not claimed in the SRBA and decreed by the court, it will not be recognized as a valid appropriation. Therefore, removal of the phrase “validated and confirmed” avoids ambiguity between the Act and the SRBA.

pumping until such time as the senior wells resumed normal production.⁷ *Id.* at 577, 513 P.2d at 629. During trial, it was established that ground water pumping by juniors resulted in withdrawals from the aquifer in excess of the annual rate of recharge, thereby mining the aquifer. *Id.*

Accordingly, the district court entered an order enjoining junior ground water irrigators from pumping and assigned further administration to the Department. *Id.* at 578, 513 P.2d at 630. In affirming the district court, the Idaho Supreme Court framed two issues on appeal:

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

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

In response to the issue of annual rate of recharge, the Court first examined its prior decisions on maintenance of water table levels, particularly *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933), which found "that a senior appropriator of ground water is forever protected from any interference with his method of diversion." *Id.* at 581, 513 P.2d at 633. In analyzing the Act, the Court stated that it "forbids 'mining' of the aquifer." *Id.* at 583, 513 P.2d at 635. Therefore, ground water withdrawals by juniors are permitted under the Act, provided that the "reasonably anticipated rate of future natural recharge" is not exceeded. *Id.* "Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law. We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public

⁷ Inexplicably, just as it did before the district court, A&B argues that *Baker* "was not asked to address the scope of the [Act] as it relates to pre-enactment ground water rights." *Opening Brief* at 22 (emphasis added). As stated previously, the Act was originally passed in 1951. Two of the irrigation rights at issue in *Baker* pre-date 1951. *Baker* at 577, 513 P.2d at 629, fn. 1. Therefore, the Court had before it "pre-enactment ground water rights." The district court agreed, stating, "the plaintiffs who made the delivery call had priorities pre-dating the enactment of the [Act]. Consequently the Court did in fact apply the reasonable pumping provision to pre-existing rights." Clerk's R. at 62.

interest. *Noh* is further inconsistent with the Ground Water Act.” *Id.* (emphasis added) (internal citations omitted).⁸

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

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

In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote full economic development of the resource. The legislature has said that when private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is the promotion of the welfare of all our citizens. See Clark, 5 Water and Water Rights, § 446 at 474 (1972). We conclude that our legislature attempted to protect historic water rights while at the same time promoting full development of ground water. Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.

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

Despite the clearly framed issues on appeal, the fact that it had pre-1951 ground water rights before it, and its thorough analysis of the Act’s reasonable pumping level provision, A&B

⁸ A&B argues that *Baker* “did not, however, overrule *Noh*.” *Opening Brief* at 25 (emphasis in original). A&B’s characterization is misleading. According to KeyCite, *Noh* was “Superseded by Statute as Stated in *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (Idaho Jul 26, 1973).” Even if *Baker* did not “overrule” *Noh*, but simply recognized that *Noh* had been “Superseded by Statute,” it is clear that *Noh* is no longer good law for the proposition that pre-enactment, non-excepted ground water rights—like A&B’s irrigation right—are protected in their historic pumping level. As will be discussed below, *Noh*’s historical pumping level requirement may still be applied to domestic wells drilled prior to 1978.

argues *Baker* “did not address the scope of the ‘reasonable ground water pumping level’ provision of section 42-226 and to which water rights it applies.” *Opening Brief* at 21. To the contrary, *Baker* clearly holds that full economic development of Idaho’s underground water resources is required. In order to ensure full economic development, all holders of non-expected ground water rights (i.e., irrigation wells), regardless of priority, are protected in the maintenance of reasonable pumping levels. Because A&B holds an irrigation water right, it is protected in the maintenance of its reasonable pumping levels.

ii. *Parker v. Wallentine*

Following its decision in *Baker*, the Court was asked to examine the impact of a 1978 amendment to Section 2 of the Act, now codified as Idaho Code § 42-227. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). A&B argues its appeal “is directly on point with *Parker*” and that the historic pumping level doctrine established in *Noh* controls the outcome in this case. *Opening Brief* at 18. A&B is wrong.

In *Parker*, the Court had before it the holder of a domestic well that was drilled in 1964 and the holder of an irrigation well that was drilled in 1976. When the irrigation well was pumped, it immediately dried up the nearby domestic well. At issue was whether the amendment protected the domestic user in the maintenance of his historic pumping level, or whether the reasonable pumping level standard applied.

The 1978 amendment exempted domestic wells from the permit requirements of Idaho Code § 42-229, and read in pertinent part: “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~~ subject to the permit requirement under section 42-229, Idaho Code” 1978 Idaho Sess. Laws, ch. 324, § 1, p. 819 (approved March 29, 1978).

Parker clearly established that holders of excepted water rights (i.e., pre-1978 domestic wells) are protected in the maintenance of historic pumping levels under the common law doctrine: “*Noh* is applicable in circumstances such as these in which I.C. § 42-226 does not apply.” *Id.* at 513, 620 P.2d at 655. *Parker* like *Baker* confirmed that non-excepted ground water rights (i.e., irrigation wells) were protected in the maintenance of reasonable pumping levels: “this Court in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 581-83, 513 P.2d 627, 633-35 (1973), held that *Noh* is not applicable to cases determined under the reasonable pumping level provisions of the Ground Water Act.” *Id.* at 513, 650 P.2d at 655.

As stated by the district court, because *Baker* and *Parker* had different classes of senior ground water rights before them, “the holding in *Parker* is consistent with *Baker* for purposes of applying the [Act] to water rights that are not expressly exempt from its application.” Clerk’s R. at 63. Furthermore, as recognized by the hearing officer, four of the justices who concurred in *Parker* also concurred in *Baker*, including Justice Shepard, who wrote the *Baker* opinion, yet made no mention of any inconsistency between the two cases.⁹ R. at 1634.

⁹ In its Opening Brief, A&B quotes from an “Amended Preliminary Order” issued by the Department in a contested case involving the City of Eagle and holders of pre-1951 ground water rights. *Opening Brief* at 20. A&B attached excerpted pages from the amended preliminary order to its Reply Brief before the district court. Clerk’s Supp. R., *Petitioner A&B Irrigation District’s Reply Brief* at Attachment B. A&B uses the amended preliminary order, along with a quote from former Director Ken Dunn, to show that the Department previously viewed the Ground Water Act as not retroactive. What A&B fails to explain is that exceptions to the amended preliminary order were filed with the Director, which resulted in the issuance of a final order, concluding, consistent with the Department’s position in this appeal, that the Act is retroactive. See http://www.idwr.idaho.gov/Browse/Water_Mngmt/Orders-Archive/2008/02-26-2008%20City%20of%20Eagle%20Final%20Order.pdf (last visited August 22, 2011). The final order was taken up on judicial review by the holder of a pre-1951 ground water right who raised the exact same legal issue regarding retroactivity of the Act as A&B raises on appeal. On review, the district court held that the Act was retroactive in its application and does not protect senior ground water users in the maintenance of historic pumping levels. The decision is included as Addendum A to *Cross-Appellant Idaho Ground Water Appropriators, Inc.’s Opening Brief and Response Brief*.

iii. *Musser v. Higginson*

In spite of this Court’s two previous rulings that squarely addressed the scope and applicability of the Act between excepted and non-excepted ground water users, A&B argues that the decision in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) is controlling. In *Musser*, the Court was asked to review whether the district court properly issued a writ of mandate commanding the Director to immediately comply with Idaho Code § 42-602 and distribute water to Musser, the holder of a “spring” right from the “Martin-Curran Tunnel.” *Id.* at 394-95, 871 P.2d 811-12. After analyzing Idaho law concerning writs of mandamus, the Court upheld the district court’s decision to issue the writ, despite the Director’s testimony that, pursuant to Idaho Code § 42-226, “a decision has to be made as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource.” *Musser* at 396, 871 P.2d at 813. In response, the Court stated, “Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute.” *Id.*

A&B’s reliance on *Musser* is misplaced for two critical reasons. First, the issue in *Musser* was whether the Director had a duty to take administrative action on a delivery call by the holder of a spring-fed surface water right from the Martin-Curran Tunnel, such that the issuance of a writ of mandate was proper; not whether the Ground Water Act was applicable to water rights existing prior to its enactment. The Court ruled that the Director’s duty was clear and executive, and that he could indeed be compelled to act by writ of mandate. There is no citation or discussion in *Musser* to Idaho Code § 42-229 or the ground water delivery call precedents established in *Baker* and *Parker*. Both the hearing officer and district court agreed in this case that *Musser* does not apply. R. at 1636; Clerk’s R. at 65.

Second, the Court’s recent discussion in *Clear Springs Foods, Inc. v. Spackman* regarding the scope of Idaho Code § 42-226 shows that the applicability of the Act, let alone its retroactivity, could not have been at issue in *Musser*. 150 Idaho 790, 252 P.3d 71 (2011). There, the Court was asked to review the Director’s actions in a conjunctive management delivery call between senior spring-fed surface water users against junior ground water users.¹⁰ Like the senior water users in *Clear Springs*, *Musser* also appropriated spring-fed surface water.

According to *Clear Springs*, in delivery calls between senior spring users and junior ground water users, “Idaho Code § 42-226 has no application” *Clear Springs* at ____, 252 P.3d at 89 (emphasis added). Despite the Court’s clear holding in *Clear Springs*, and A&B’s agreement that *Musser* appropriated surface water, *Opening Brief* at 15, A&B makes no mention of *Clear Springs* and the non-applicability of the Act between senior spring users and junior ground water users. Consistent with the holding in *Clear Springs*, *Musser* did not have proper parties before it to reach a holding on retroactivity of the Act. Consequently, there is no basis in law for A&B’s contention that *Musser* controls the outcome in this case.

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

The requirement that all pre-enactment, non-excepted ground water rights are subject to the reasonable pumping level requirements of the Act is sound public policy, which was supported by A&B’s predecessor, the USBR. At the 1949 State Bar meeting in McCall, Howard R. Stinson, Regional Counsel for the USBR, engaged in the following discussion with R.P. Parry:

[Mr. Parry:] To the extent I can, if any of you have question[s], I will try to answer them.

¹⁰ Rangen, Inc. (“Rangen”), a named party in *Clear Springs*, diverts water from the Martin-Curran Tunnel under water right no. 36-02551. *Musser* also diverts water from the Martin-Curran Tunnel under water right no. 36-00102. Both the *Musser* and *Rangen* rights from the Martin-Curran Tunnel were decreed by the SRBA district court on December 29, 1997.

....

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

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

....

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

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

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

R.P. Parry, *An Underground Water Code*, 23 Idaho State Bar Proceedings 19, 26-27 (1949) (emphasis added).

The USBR, like any other later-in-time appropriator, was concerned that the common law doctrine established in *Noh* would hinder its development of the A&B project. “In many areas the first appropriator could require damages from every subsequent appropriator and each subsequent appropriator, in turn of priority, could require damages from all later appropriators, until the last one would have to pay tribute to all.” Grant, 21 Nat. Resources J. at 24. See *Baker* at 582, 513 P.2d at 634 “(Apparently our Ground Water Act was intended to eliminate the harsh doctrine of *Noh*”). If tribute were not required, later-in-time appropriators, such as the USBR, would be

able “to take stored ground water that was providing lift for senior appropriators and use it more productively on the surface.” Grant, 21 Nat. Resources J. at 26. According to Douglas L. Grant, former professor of law at the University of Idaho, the 1953 amendment to Section 1 recognizes:

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

Grant, 21 Nat. Resources J. at 25 (emphasis added).

By protecting appropriators in their reasonable pumping levels, the Act prevents monopolization of ground water resources. Passage of the Act with its protection of reasonable pumping levels therefore was essential to development of the ESPA and the A&B project. Interestingly, A&B now seeks to undo the efforts of its predecessor by advocating against reasonable pumping levels to require tribute from all later-in-time appropriators. This result cannot be reconciled with the Act’s stated purpose of furthering full economic development of the State’s ground water resources.

2. A&B’s Reasonable Pumping Levels Have Not Been Exceeded

A&B argues that the Director erred by failing to set a reasonable pumping level, arguing the Director is required to set a reasonable pumping level any time a delivery call is filed. A&B ignores the plain meaning of the law governing ground water administration and the substantial evidence that supports the findings of facts in the Final Order.

A. The Establishment of Reasonable Pumping Levels is Left to the Discretion of the Director

Citing Idaho Code § 42-226, A&B asserts it is “entitled to the protection of an identified ‘reasonable ground water pumping level.’ I.C. § 42-226.” *Opening Brief* at 28 (emphasis added). “[T]he Director does not have the discretion to not set a pumping level when administration is requested by a senior water right holder.” *Id.* at 29. However, neither Idaho Code § 42-226 nor Idaho Code § 42-237a.g., which are permissive statutes, state that a reasonable pumping level must be “identified” by the Director, or that A&B is “entitled” to the setting of a reasonable pumping level by virtue of its delivery call. As the district court correctly held, “the [Act] does not mandate that the Director establish ground water levels as a matter of course in conjunction with a delivery call by a ground water pumper.” Clerk’s R. at 67.

Notwithstanding the plain wording of Idaho Code §§ 42-226 and 42-237a.g., A&B attempts to create conflict by directing the Court’s attention to Idaho Const. Art. XV, § 3. Article XV, § 3 states, “Priority of appropriation shall give the better right as between those using the water.” A&B ignores the purpose of the Ground Water Act, as described in Idaho Code § 42-226, and the fact that *Baker* and *Clear Springs* held that the Act applies between ground water users. Clearly, there is no conflict between the Act and the Constitution.

A&B also argues that the Director’s mandatory duty to administer water rights under Idaho Code § 42-607 conflicts with the permissive nature of the Act. Certainly, the Director must administer water rights, but the Director is not mandated to curtail junior ground water users simply by virtue of a conjunctive management delivery call. In this case, the Director undertook his mandatory administrative duty by responding to A&B’s delivery call, analyzing the evidence, and finding, based on the evidence presented, that A&B was not materially injured. While A&B

disagrees with the Director's finding of no material injury, it cannot be argued that the Director shirked his administrative duties.

B. The Average Annual Rate of Future Natural Recharge for the ESPA Exceeds Withdrawals by Ground Water Pumping

In the January 2008 Final Order, the Director found as follows: "There is no indication that ground water levels in the ESPA exceed reasonable ground water pumping levels required to be protected under the provisions of Idaho Code s 42-226." R. at 1109. A&B argues this particular finding is not supported by the record because there was no disclosure of "the actual depth of the reasonable pumping level of the ESPA" *Opening Brief* at 25. As explained above, there is no basis in law to support A&B's position that the Director must identify a reasonable pumping level depth as a matter of course when a delivery call is filed by a senior ground water user.

The facts in the record, which A&B ignores, and controlling law, which A&B fails to cite, unequivocally support the Director's decision. Idaho Code § 42-237a.g states that the Director may establish a reasonable ground water pumping level if ground water is pumped "at a rate beyond the reasonably anticipated average rate of future natural recharge." *See* CM Rule 10.19 (defining "Reasonably Anticipated Average Rate of Future Natural Recharge"). If withdrawals from an aquifer by ground water pumping outpace natural recharge, the result is mining. "Idaho's Ground Water Act forbids 'mining' of an aquifer." *Baker* at 583, 513 P.2d at 635.

The uncontradicted facts in this record establish that the average annual rate of natural recharge for the ESPA is "approximately 7.5 million acre-feet" R. at 1107. The average annual rate of withdrawal from the ESPA by ground water pumping is "nearly 2.0 million acre-feet" *Id.* Therefore, the average annual rate of natural recharge for the ESPA greatly outpaces average annual withdrawals by ground water pumping. The hearing officer and district court

agreed. R. at 3113; Clerk's R. at 51. Because the ESPA is not being mined, the Director properly exercised his discretion in concluding that reasonable pumping levels were not exceeded.

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

On appeal, A&B uses aquifer decline to support its argument that the Director erred by not establishing a reasonable pumping level. A&B fails to acknowledge that aquifer levels are still in excess of pre-irrigation development levels, R. at 1109; that ESPA declines are primarily due to climate, then conversion from gravity to sprinkler irrigation, then pumping. Ex. 121 at 5 (A&B 1076); and that significantly more water enters the ESPA on an annual basis than is withdrawn by pumping, R. at 1107. More importantly, A&B fails to acknowledge, let alone address, how its inherent hydrogeologic setting impacts pumping and water levels. The importance of understanding the hydrogeologic environment, which is supported by substantial evidence, cannot be overstated in the Director's determination that reasonable pumping levels have not been exceeded. As described below, the inherent hydrogeologic environment is the biggest impediment in the A&B project.

The fact that the hydrogeologic setting of A&B is varied was known at the time of its development, R. at 1127-29 (discussing published reports from 1948 and 1956 that detail the area's hydrogeology), and was understood by the hearing officer, R. at 3089-92. The A&B project is "located in a transition zone where the subsurface consists mostly of basalt to the north and northwest and mostly sediment to the south and southeast." Ex. 121 at 6 (A&B 1077) (emphasis added).¹¹ Importantly, "The geologic formations in the area differ markedly in their water bearing properties. The materials range from highly permeable to nearly impermeable. Permeability

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

influences the rate at which the materials accept recharge, transmit water, and yield water to wells.” R. at 1128 (emphasis added). According to a 1956 USBR report: “In Minidoka County and most other parts of the Snake River Plain the Snake River basalt is the principal water-bearing formation and it yields water copiously to wells. Inter-tongued sedimentary beds are saturated below the water table but yield little or no water to wells.” *Id.* (emphasis added).

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

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

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

Similar to specific capacity, hydraulic gradient can be used to understand aquifer transmissivity and well yield. Figure 14 from the January 2008 Final Order is a 1952 water table contour map that was prepared for the USBR. R. at 1129; Ex. 113D (A&B 729A). In the eastern two-thirds of the project, the water table is higher and the contour lines are spread out. Tr. Vol. IX, p. 1740, Ins. 18-25; p. 1741, Ins. 1-25; p. 1742, Ins. 1-8. In the southwest, depth to water is

¹² Dr. Ralston prepared a report for the Department entitled a "Hydrogeologic Analysis of the A and B Irrigation District Area." Ex. 121. The objectives of the report were: "1) develop a hydrogeologic conceptual model of . . . the general vicinity of the A&B Irrigation District with an emphasis on the presence of low hydraulic conductivity sedimentary strata interbedded with the basalt of the aquifer, 2) analyze the significance of [the] hydrogeologic conceptual model with respect to the ability of the A&B Irrigation District wells to obtain water from the aquifer, and 3) evaluate the impacts on A&B Irrigation District production wells from declining ground-water levels in the aquifer." *Id.* at 4 (A&B 1075). Dr. Ralston's *Curriculum Vitae* may be found at Exhibit 156.

greater and the contour lines are closely spaced. *Id.* The contour map shows that transmissivity in the southwest is lower because of the steeper hydraulic gradient. *Id.*

Steeper hydraulic gradient leads to decreased transmissivity, which directly impacts specific capacity and results in reduced yields. Tr. Vol. IX, p. 1742, lns. 9-25; p. 1743, lns. 1-7. Because drawdown is “inversely proportional to transmissivity,” Tr. Vol. IX, p. 1743, lns. 16-17, steeper cones of depression develop in low transmissivity environments, which results in greater well interference. Tr. Vol. IX, p. 1742, lns. 9-25; p. 1743, lns. 1-25; p. 1744, lns. 1-25; p. 1746, lns. 1-14. These factors are not experienced to the same degree in the rest of the project (pumping in Township 8 accounts for approximately 67% of total discharge). Tr. Vol. I, p. 80, lns. 22-25; p. 81, lns. 1-12.

Because of the varied hydrogeologic environment, Dr. Ralston stated that the likelihood of obtaining additional yield is “low” in the southwest, but is “high” throughout the rest of the project. Ex. 121 at 18 (A&B 1089); Tr. Vol. I, p. 89, lns. 15-25; p. 90, lns. 1-25; p. 91, ln. 1. However, even though the probability of obtaining additional yield is low in the southwest, Dr. Ralston stated during cross-examination by counsel for A&B that water is available in the southwest, just not at A&B’s desired yield under its historic system. Tr. Vol. I, p. 133, lns. 9-25; p. 134, lns. 15-24 (“it isn’t a question of not being able to get the water, because you can get the water.”). *See* CM Rule 42.01.a (“amount of water available in the source”)

D. The Inherent Hydrogeologic Environment in the Southwest Explains A&B’s Problem Wells

In its Opening Brief, A&B attempts to refute the Director’s finding that reasonable pumping levels have not been exceeded by pointing to the presence of “abandoned” wells and wells that have been drilled in excess of “800 feet.” *Opening Brief* at 26. The inherent

hydrogeologic environment of the southwest, which A&B ignores, and is supported by substantial evidence, explains these wells. As recognized by the hearing officer: “Protection of A&B’s water right cannot be based on its poorest performing wells.” R. at 3113.

i. A&B’s Abandoned Wells

According to A&B’s 2007 Motion to Proceed, “7 wells have been abandoned because they no longer provide adequate water.” R. at 1131. These wells are located on Exhibit 215A with green dots. As was stated in the January 2008 Final Order, R. at 1131, and further explained by Mr. Vincent during the hearing, five of the abandoned wells are located in Township 9, Range 22; one is located in Township 10, Range 22;¹³ and one is located in Township 8, Range 25.¹⁴ Tr. Vol. IX, p. 1753, Ins. 17-23. Both the 700- and 1,000-foot wells specifically referenced by A&B in its Opening Brief as “abandoned” are located in Township 9, Range 22.¹⁵ *Opening Brief* at 26. Using a red marker, Mr. Vincent circled the abandoned wells on Exhibit 215A.

The problems that A&B experiences today in the southwest have plagued it since the 1950s. Nevertheless, the USBR believed that lands in Township 9, particularly those in Range 22, were highly desirable for irrigation and “should therefore be irrigated if at all possible.” Ex. 152BB at 1. Due to the inherent hydrogeologic environment, reclamation of lands in Township 9,

¹³ In his direct examination, Mr. Vincent, in referring to cross-section G-G’ in Exhibit 106, stated that the same hydrogeologic problems that exist in Township 9, Range 22 are present in Township 10, Range 22. Tr. Vol. IX, p. 1775, Ins. 7-13.

¹⁴ This is the only well identified by A&B that is not located in the southwest. “According to A&B records, the seventh abandoned well (15B825) was replaced because it had a crooked borehole.” R. at 1131. A crooked borehole evidences a problem with the initial well drilling. Tr. Vol. IX, p. 1752, Ins. 18-25; p. 1753, Ins. 1-12.

¹⁵ As found by Dr. Ralston, “The 1,000-foot well . . . penetrates a 199-foot thick [sedimentary] interbed in the elevation range of 3,703 to 3,902 feet and a 55-foot interbed in the elevation range of 3,521 to 3,576 feet with several additional thin sedimentary units.” Ex. 121 at 18 (A&B 1089). The 1,000-foot well is visually depicted in cross-section H-H’. Ex. 106 (A&B 92). The 700-foot well and its multiple sedimentary interbeds is visually depicted in cross-section G-G’, Ex. 106 (A&B 91). Both the 700- and 1,000-foot well are visually depicted in cross-section C-C’, Ex. 106 (A&B 86). The cross-sections show clearly the layers of sediment that impact these wells.

Range 22 proved to become a “problem area.” Ex. 152P. *See also* Exs. 152Q, 152II, and 152TT. When the A&B project was developed, water level elevations were at their peak. Clerk’s R. at 51. As noted by the USBR on October 9, 1961, “The downward trend in pumping water levels is readily apparent and the absence of any tendency of ground water levels to stabilize is of considerable concern.” Ex. 152BBB. Tr. Vol. IX, p. 1777, lns. 9-20. Using Exhibit 215A, Mr. Vincent circled the locations of the wells in the above-cited letters with a silver marker. Tr. Vol. IX, p. 1173; lns. 11-18.

At the hearing, Mr. Vincent explained that the reason the wells in the southwest were abandoned was because of the inherent hydrogeologic problems that exist in that area (presence of thick layers of sediment, greater initial depth to water, lower transmissivity, lower specific capacity, lower initial yield, and greater well interference). These are inherent problems that exist independent of ground water pumping. “Basically, everything that you want a well to do, is more difficult in the southwest area. . . . The greatest problem with the water supply system at A&B is, and has always been, A&B’s inability to effectively deal with the sediment layers.” Tr. Vol. IX, p. 1756. lns. 21-25; p. 1757, lns. 10-13.

The abandoned wells in the southwest, circled with a red marker on Exhibit 215A, are in and around the area in which A&B is currently importing surface water. While A&B would lead this Court to believe that importation of surface water is a recent measure taken to deal with a recent problem, this is not the case. As stated by the hearing officer, given the problems that were occurring with development of the lands in Township 9, Range 22, the “idea of importing water into an area of desirable agricultural land with limitations on the productivity of wells in that area was expressed by the Regional Director to the Construction Engineer in a letter dated March 15, 1961. Exhibit 152QQ.” R. at 3092; Ex. 152QQ; Tr. Vol. IX, p. 1765, lns. 2-25; p. 1766, lns. 1-25; p. 1767, lns. 1-20 (discussion of Ex. 152QQ).

ii. Wells with Reduced Yield, Replacement Wells, and Unused Used Wells

After A&B filed its 2007 Motion to Proceed, the Director requested information from A&B. In response to the Director’s request, A&B provided, among other things, a map “showing the locations of seven wells that did not yield additional water despite having been deepened.” R. at 1131.

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

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

E. A&B’s Unreasonable Means of Diversion in the Southwest do not Justify Curtailment

As framed by the 21 wells circled on Exhibit 215A, the substantial evidence in the record establishes a clear link between the inherent hydrogeology in the southwest and water production. The hearing officer understood this relationship: “The problem of water production is primarily in

the southwest portion of Unit B. The greatest problem faced by A&B is the inability to produce the amount of water it desires under its water right from the wells in the southwest portion of the project as a consequence of the declining water level and the slow rate of transmissivity resulting from the ancient lake bed silt and sand.” R. 3111.¹⁶

Ignoring its hydrogeologic setting, A&B instead supports its position that reasonable pumping levels have been exceeded by pointing to wells it has deepened, “some to levels over 800 feet” *Opening Brief* at 26. The record establishes four project wells have a bottom depth “greater than 600 feet (656, 700, 700 and 1,000 feet) [and] all are located in the southern portion of the project area (9S/21E, 9S/22E and 10S/21E).” Ex. 121 at 18 (A&B 1089). *Id.* These four wells constitute two percent of A&B’s 188 points of diversion. For the entire project, the average bottom depth of all wells is 300.7 feet. Ex. 121P (A&B 1108-1114). For the entire project, the average depth to water for all wells is 191.5 feet. *Id.* Clearly, A&B’s deepest wells are not indicative of pumping levels across the project as a whole.

In his review of the evidence, the hearing officer concluded that A&B’s request for curtailment was not supported by the record and guiding legal principles:

Measuring the protection due A&B’s water right by the levels of its poorest performing wells would mean subsequent ground water development would be limited unreasonably. A relatively small percentage of A&B’s wells would define reasonable pumping levels and set an unreasonable standard for determining material injury. The fact that junior ground water pumping may cause some level of reduction in the capacity of a minority of A&B’s wells situated in an area of poor productivity does not lead to the conclusion that curtailment is appropriate. A

¹⁶ Interestingly, A&B ignores the record and instead directs the Court’s attention to a 2009 administrative order issued by the Department regarding a senior, non-excepted domestic well in the Clearwater drainage that could be impacted by the appropriation of new water rights. *Opening Brief* at 27. The administrative order was not part of the record before the hearing officer. There, the Director made numerous findings of fact regarding the specific hydrogeologic setting and the movement of water therein. As evidenced in the record before this Court, there is no indication that the A&B Irrigation District with its 62,604.3-acre place of use and 188 points of diversion, like the single domestic user in the Clearwater drainage, is nearing the extent of its reasonable pumping level. The ESPA, unlike the Frazier Plateau, is a prolific aquifer. Despite the difficulties of producing water in the southwestern part of the project and aquifer declines, A&B has maintained a water supply through its well rectification efforts that support its crop needs, evidencing the fact that water is available for diversion and beneficial use. R. at 3104-05.

finding of material injury leading to curtailment or mitigation cannot rest upon what would amount to a bottleneck in the system, similar to Schodde's means of diversion. The right to water established in the partial decree remains, but that right is dependent upon A&B's ability to reach the water from those wells or to import it from other wells.

R. at 3113 (emphasis added).

In *Clear Springs*, the Court confirmed that a senior's means of diversion must be reasonable in order to sustain a delivery call: "Whatever amount of water defendant shows himself entitled to for the irrigation of his meadows or other lands as a prior right over the plaintiff, the judgment should so decree, but beyond that he cannot go under any other pretext or claims for the natural condition of the stream." *Clear Springs* at ____, 252 P.3d at 90.

Here, much like a surface water user whose means of diversion is dependent upon historic conditions, *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), A&B seeks a return to 1950s aquifer levels to support certain wells in the southwest, despite the fact that at historic levels those wells were classified as problematic by the USBR. A&B therefore asks the Court to excuse its inherent hydrogeologic environment and sanction its unreasonable means of diversion in favor of a finding of material injury and curtailment of junior ground water users. The Ground Water Act and the CM Rules were expressly designed to prevent what A&B seeks: monopolization of the ESPA by a single ground water user with unreasonable means of diversion.¹⁷ Idaho Code § 42-226; CM Rule 20.03; *Clear Springs*; *Baker*. Accordingly, the conclusion that A&B has not exceeded its reasonable pumping level is supported by substantial evidence and should be affirmed.

¹⁷ There are ground water rights that are senior to A&B's 36-2080, but its 1948 priority date is senior to virtually all ground water rights that pump from the ESPA. Ex. 200, Figs. 5-2, 5-3 & Ex. 136 at 2.

3. The Director Properly Analyzed A&B's Cumulative Decreed Quantity And Properly Required A&B To Take Reasonable Steps To Interconnect Its System And Extend Its Diversion Works Within Project Boundaries

A. A&B's Integrated Water Right was Specifically Permitted, Licensed, and Decreed with a Cumulative Quantity of 1,100 cfs for Use on Any Lands within Project Boundaries

In the Final Order, and consistent with A&B's 2007 Motion to Proceed, R. at 836-37 (¶ 11.d), the Director examined injury to A&B's water right based on depletions to the cumulative decreed quantity. A&B argues the Director's analysis was in error and he should have instead examined injury on a well-by-well basis. In making this argument, A&B ignores the four corners of its partial decree, correspondence between the Department and the USBR during the licensing process, the accepted findings of the hearing officer, and review of its water right by the district court.

As stated on the face of its partial decree, A&B is authorized to divert 1,100 cfs (250,417.20 acre-feet) for the irrigation of 62,604.3 acres. Ex. 139. A&B's license, issued in 1965, substantially mirrors its 2003 partial decree. Ex. 157 at 538 (bate-stamp 4308). While individual points of diversion are listed, A&B's water right provides it great flexibility because the points of diversion are not appurtenant to particular places of use, allowing A&B to move water freely within its boundaries. "Structuring the right in this manner was not due to oversight" observed the district court. Clerk's R. at 84 (emphasis added).

In 1955, the USBR described the permit it filed with the Department as follows: "In the best interests of the Division as a whole, the permit is upon the basis that all the wells will, as a group, be appurtenant to all the lands of the entire Division, rather than being made appurtenant to a particular parcel of land. This would permit a more satisfactory distribution of water to lands and maximum over-all development." Ex. 111A at 73 (emphasis added).

When approached in 1964 by then-Director Carl E. Tappan to provide a land list for purposes of licensing, Ex. 157 at 628 (bate-stamp 4398), the USBR reiterated its position: “We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, depending on project operational requirements, can be served from water from several wells. Therefore, it is impractical and undesirable to designate precise land areas within the project served only by each of the specific wells on the list.” Ex. 157D (emphasis added).

Completely ignoring the history of its water right, A&B demands that the Director review each individual point of diversion in his material injury analysis: “That is how the project was designed and constructed by Reclamation.” *Opening Brief* at 37. On review, the district court rejected A&B’s argument: “The way in which the 36-2080 right was licensed and ultimately decreed in the SRBA is not typical. The partial decree does not define or limit the place of use The legal effect is that up to the full rate of diversion can be diverted from any combination of the 177 points of diversion . . . and applied to any of the lands” Clerk’s R. at 83-84. “Simply put, based on the way the right is decreed A&B does not get to dictate particular quantities that need to be diverted from particular points of diversion.” *Id.* at 84.

B. The Requirement that A&B take Reasonable Steps to Interconnect is Consistent with the Requirement that Water Users Maintain Reasonable Means of Diversion

Because topography limited A&B’s initial ability to interconnect its system, the hearing officer recognized that “consideration must account for the fact that water from one pump is not accessible to the entire system.” R. at 3095. The hearing officer concluded, however, that A&B must take “reasonable steps” to interconnect its system and “maximize the use of that flexibility . .

. before it can seek curtailment or compensation from junior users.”¹⁸ R. at 3096. The district court concurred: “the extent to which the Director may require A&B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director.” Clerk’s R. at 83.

Reasonable diversion requires A&B to drill deeper and/or extend its diversion works laterally within project boundaries in pursuit of additional yield: “[A]lthough a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.” *Baker* at 584, 513 P.2d at 636 (emphasis added). Reasonable diversion requires that A&B exercise the flexibility its predecessor sought for the project’s water right. A&B must therefore take reasonable steps to drill wells deeper, drill additional wells, and interconnect its system by extending its diversion works laterally across the project.

C. If Additional Water is Needed to Raise Crops, the Record Supports the Fact that A&B could Alter its Historic Means of Appropriation to Achieve Greater Yield

During cross-examination by counsel for A&B, Dr. Ralston explained that A&B could improve yield by altering its historic means of diversion. Tr. Vol. I, p. 131, lns. 3-25; p. 132, lns. 1-25; p. 133, lns. 1-25; p. 133, lns. 1-25; p. 134, lns. 1-24. Additional yield could be achieved by: (1) pumping its wells for longer periods of time to achieve its desired volume; (2) drilling additional lower yield wells to achieve its desired pumping capacity; or (3) moving wells from areas of lower yield (southwest) to areas of higher yield (rest of the project). *Id.*

¹⁸ In its Opening Brief, A&B states that “a physical interconnection of the entire A&B project would likely cost about \$360 million.” *Opening Brief* at 38. The project discussed by A&B is full conversion of its system from ground water to surface water, as proposed by the Comprehensive Aquifer Management Plan, and testified to by A&B’s manager at the hearing. Tr. Vol. III, p. 481, lns. 19-25; p. 482, lns. 1-6. A&B made this same argument to the hearing officer, who found: “Those costs are not reflected in this record and must be considered speculative.” R. at 3096. The \$360 million cost may not be speculative for full conversion of the A&B project to surface water, but it is certainly not appropriate to imply that cost to full or partial interconnection of its ground water wells.

Implementation of Dr. Ralston's opinions is consistent with the substantial evidence in the record. While A&B's water right authorizes diversion from 188 points of diversion, A&B only pumps from 177 wells. R. at 3081. The 11 unused points of diversion could be put into production to achieve additional yield. In fact, A&B's manager has already anticipated this possibility: "And I've had those [11 wells] repermited as production wells so that if I ever needed those, I could develop those as production wells instead of drilling a whole new well." Tr. Vol. III, p. 467, lns. 3-7. Yet A&B seeks curtailment instead of using all of its points of diversion. A&B's failure to fully exercise its right is inconsistent with the CM Rules, which authorize the Director to examine "[t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities" CM Rule 42.01.g.

Because individual points of diversion are not appurtenant to specific places of use, A&B could interconnect higher producing wells with lower producing wells to achieve a desired yield without having to file a transfer. In Exhibit 481, an expert witness for IGWA demonstrated how this type of interconnection could be engineered. Reasonable interconnection is consistent with the CM Rules, which authorize the Director to examine "[t]he extent to which the requirements of the holder of the senior-priority water right could be met . . . by employing reasonable diversion . . . practices" CM Rule 42.01.g.

If additional water is in fact needed by A&B, the substantial evidence in the record establishes that A&B's senior water right could support it. First, it was established that A&B irrigates 4,081.9 junior and subordinated enlargement acres¹⁹ with water diverted under its calling

¹⁹ Enlargement acres are "subordinate to all other water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to section 42-1426, Idaho Code, the earlier priority is the superior right." Idaho Code § 42-1426. As recognized by the district court, the quoted material was "included in decrees for enlargement rights following the Idaho Supreme Court's holding in *Freemont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). *Ironically the inclusion of the remark was challenged by A&B in the SRBA with respect to its enlargement claims stemming from the 36-2080 right. In Re: SRBA Case No. 39576, Order*

water right, 36-2080. R. at 1148. A&B admitted it cannot limit distribution of water under 36-2080 to the original 62,604.3-acre place of use; rather, A&B patrons irrigate all junior and subordinated enlargement acres with water pumped under its senior right. Tr. Vol. III, p. 605, lns. 18-25; p. 606, lns. 1-4; Tr. Vol. IV, p. 742, lns. 8-25; p. 743, lns. 1-6. The practice of irrigating all junior and enlargement acres with water diverted under water right 36-2080 is referred to as “water spread[ing].” Tr. Vol. III, p. 525, lns. 11-19. Therefore, instead of irrigating 62,604,3 acres under its senior water right, A&B irrigates 66,686.2 acres.

The district court recognized this quandary: “A&B seeks regulation of juniors to satisfy underperforming points of diversion for the 36-2080 right while at the same time continues to irrigate [junior and] enlargement acres” Clerk’s R. at 85. Consequently, if additional water is needed, reasonable diversion requires that A&B forego water spreading and limit irrigation to its senior acres with its senior water right prior to seeking curtailment of junior ground water rights.

Second, A&B’s water right authorizes diversion of 1,100 cfs during the irrigation season, for a maximum volume of 250,417.20 acre-feet. R. at 1112. According to A&B’s records, the greatest volume ever pumped was 226,254.9 acre-feet, or 24,162.3 acre-feet less than the authorized maximum. R. 1114, Fig. 3; Ex. 132 at 6 (A&B 1450). The greatest volume ever pumped was achieved in 1966 when the project was irrigated by gravity systems and conveyance loss was 8 percent. Ex. 113 at 58. The original conveyance system included 109.71 miles of laterals and 333 miles of drains. Clerk’s R. at 50.

According to A&B’s expert report, the average volume of water pumped for the period 1995-2007 was 177,873 acre-feet. Ex. 200 at 4-39, Tbl. 4-8. During this time period, A&B’s lands were converted from 63 percent sprinkler irrigation to 96 percent sprinkler irrigation, *id.* at

on Challenge, (A&B Irr. Dist.), Subcase Nos. 36-2080 et al. (April 25, 2003) (Hon. Roger S. Burdick). The inclusion of the remark was affirmed by the Idaho Supreme Court in A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist. et al., 141 Idaho 746, 118 P.3d 78 (2005).” Clerk’s R. at 85 (emphasis added).

4-38, Tbl. 4-6, and conveyance loss was reduced to 3 percent, *id.* at 4-4. The original conveyance system was reduced to 51 miles of laterals and 138 miles of drains. Clerk’s R. at 50.

Not surprisingly, as A&B converted its system, its diversions decreased. *Compare* R. at 1114, Fig. 3 *with* R. 1115, Fig. 4; Tr. Vol. VI, p. 1179, lns. 6-25; p. 1180, lns. 1-25; p. 1181, lns. 6. The Director specifically found that A&B’s decreased diversions were “attributable to increased irrigation system efficiencies . . . and the fact that A&B added nearly 4,100 [junior and enlargement] acres beyond the 62,604.3 acres licensed under its calling water right, 36-2080.” R. at 1148. Because A&B has never pumped the maximum volume authorized under its senior right, it could alter its historic practices to pump more water if it is needed for beneficial use.

Even with 11 unused points of diversion, the ability to pump additional water under its senior right, and the fact that it irrigates 4,081.9 acres beyond the limit of its calling right, A&B raises crops to maturity on project lands with crop yields increasing over time and at rates higher than the Minidoka County average. Tr. Vol. IV, pp. 721-722, 845-846; Tr. Vol. X, pp. 2090-2091, 2139-2140; Ex. 355A; Ex. 357; Ex. 358. If A&B needs additional water for beneficial use, it must exercise the flexibility expressly bargained for under its senior water right and take reasonable steps to alter its historic means of appropriation.

VI. RESPONSE TO ISSUE RAISED BY IGWA & POCATELLO

In its Memorandum Decision, the district court held that the proper standard of evidence to apply in a conjunctive management delivery call is clear and convincing. Because the Director’s orders were silent on which standard was applied, the district court remanded the proceeding to the Department “for the limited purpose of the Director to apply the appropriate evidentiary standard

to the existing record. No further evidence is required.”²⁰ Clerk’s R. at 93. The district court further clarified its holding in its Memorandum Decision on Rehearing. Clerk’s R. at 106. On appeal, IGWA and Pocatello argue that the district court erred because the correct evidentiary standard to apply in administration, as opposed to adjudication, is preponderance.

The Department agrees with the holding of the district court. The prior appropriation doctrine, as established by Idaho law, protects holders of senior water rights. Idaho Const. Art. XV, § 3. Because this protection is not absolute, “there must be some exercise of discretion by the Director.” *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 875, 154 P.3d 433, 446 (2007). A senior’s use must be reasonable, beneficial, and not result in monopolization or waste of the resource. CM Rule 20.03; *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911); *Clear Springs* at ____, 252 P.3d 89-90; *Mountain Home Irrigation District v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957). “Economy must be required and demanded in the use and application of water.” *Clear Springs* at ____, 252 P.3d at 89. The Director must “equally guard all the various interests involved.” *Id.*

In conjunctive administration, the amount of water necessary for beneficial use can be less than decreed or licensed quantities—it is therefore possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. *American Falls* at 868, 154 P.3d at 439; *Memorandum Decision on Rehearing* at 7. The “public waters of this state shall be subjected to the highest and greatest duty.” *Clear Springs* at ____, 252 P.3d at 89. Thus, a senior water right holder cannot demand that junior ground water right holders diverting water from a hydraulically

²⁰ On June 30, 2011, the Department issued its *Amended Final Order on Remand Regarding the A&B Irrigation District Delivery Call* (“Amended Final Order on Remand”). See http://www.idwr.idaho.gov/News/WaterCalls/A&B_Irrigation_Call/2011/06Jun/20110630_Amended%20Final%20Order%20re%20AandB%20Del%20Call.pdf (last visited August 22, 2011). Applying the clear and convincing evidentiary standard to the record, the Amended Final Order on Remand found that A&B was not materially injured. Petitions for judicial review have been filed with the Honorable Eric J. Wildman, and consolidated under Case No. CV 2011-14409 (consolidated Minidoka County Case No. 2001-604).

connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use. “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Id.*

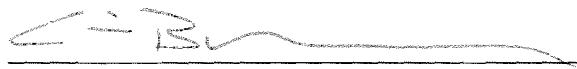
Given the authority and discretion vested in the Director in conjunctive administration, his evidentiary decisions should be supported by reasonable certainty: “Clear and convincing evidence is generally understood to be ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008). To require that the Director’s evidentiary decisions be supported by something less than reasonable certainty would devalue priority of right. Therefore, the Director requests the Court affirm the district court’s holding.

VII. CONCLUSION

In this case, the actions taken by the Director in responding to the conjunctive administration delivery call filed by A&B were consistent with constitutional and statutory provisions, were supported by substantial evidence in the record, were made upon lawful procedure, and were within the Director’s discretion. Based on the foregoing, the Department respectfully requests that this Court affirm the Final Order. Idaho Code § 67-5279(3).

RESPECTFULLY SUBMITTED this 25th day of August, 2011.

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Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that, unless otherwise noted, I served a true and correct copy of the following described document on the persons listed below by electronic mail and by mailing in the United States mail, first class, with the correct postage affixed thereto on this 25th day of August, 2011.

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ADDENDUM

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

PROCEEDINGS
of the
Idaho State Bar



VOLUME XXXII, 1949

TWENTY-THIRD ANNUAL MEETING



SHORE LODGE, (Payette Lakes) McCALL, IDAHO

June 27, 28, 29, 1949

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is expensive to develop underground water. There are some wells that have actually been drilled in Idaho 20 and 22 inches in diameter down five and six hundred feet. By the time such a well is drilled and equipped with pumps and pipe and that sort of thing, there is a large investment. It would be too bad from any angle if a chap who develops such a water right and has gone to that expense is vulnerable to subsequent attack.

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

The next point we thought was fundamental in preparing any underground water bill was that assuredly we should not take any existing rights away from anyone. All presently existing rights should be confirmed and validated. There are many of them in Idaho of which there is no record. We thought a simple and easy procedure should be set up whereby every man claiming underground water rights could go in and make a filing and have the right made a matter of record.

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

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

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

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

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

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

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

man who is there first with his investment. In other words, under that set-up the gamble would always be taken by the late comer.

It all gets down to this: If you are going to have interference between wells, who is going to take the gamble? The man who is already there with his investment? Or the late comer who comes last onto the scene?

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

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

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

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

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

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

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

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

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

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

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

MR. PARRY: Yes.

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

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

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

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

MR. STINSON: What is it then?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. JOSEPH McFADDEN: I think so.

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman. (applause)

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

CAREY NIXON: Members of the Bar:

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

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

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

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

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

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

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

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

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

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

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

