CHARLES L. HONSINGER (ISB #5240)
DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 455
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for Protestants Joseph, Lynn and Michael Moyle,
Eugene Muller, Charles W. Meissner, Jr., Charles Howarth
and Mike Dixon/Hoot Nanney Farms, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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| IN THE MATTER OF APPLICATIONS TO APPROPRIATE WATER NOS. 63-32089 AND 63-32090 IN THE NAME OF THE CITY OF EAGLE | PROTESTANT MOYLE'S BRIEF IN SUPPORT OF PETITION FOR RECONSIDERATION OF FINAL ORDER |

COMES NOW Protestants Joseph, Lynn and Michael Moyle (hereinafter "Moyle"), by and through their counsel of record, Ringert Clark Chartered, 455 S. Third Street, P.O. Box 2773, Boise, Idaho 83701-2773, and hereby submit this Brief in support of their petition for reconsideration of the Director's February 26, 2008 *Final Order* issued in the above-captioned matter. This Brief is supported by the record herein.

**SUMMARY**

The City of Eagle (hereainafter "Eagle") filed two applications for permits to appropriate water in January, 2005. Protests to the applications were filed by several protestants, including Moyle. A hearing on the protests was held in December, 2006. After the Hearing Officer entered both a *Preliminary Order* and an *Amended Preliminary Order*, the Director issued his *Final Order*

approving the applications with conditions on February 26, 2008. Moyle filed a timely Petition for Reconsideration of the Final Order raising two issues: (1) the Director's conclusion that Moyle's water rights authorizing diversion for ground water for non-domestic uses, bearing priority dates earlier than the 1953 amendment to the Idaho Ground Water Act do not create a right to protection of historic ground water levels is erroneous and must be reversed; (2) the *Final Order* erroneously fails to require that the City adequately protect Moyle's domestic water right levels at its expense. Instead, Moyle is required to, at his own expense, establish injury to his water rights when the evidence at hearing clearly established such injury. The Director should revisit and rectify both of these errors.

## ARGUMENT

### I. Reasonable Pumping Limitations Do Not Apply to Ground Water Rights Established Prior to Enactment of the Idaho Ground Water Act

The *Final Order* holds that the reasonable pumping limitations in Idaho's Ground Water Act I.C. §42-226 are applicable to water rights established prior to the date of that statute's enactment. The analysis used by the Director to reach this conclusion is one of flawed statutory construction. Additionally, the Director's conclusion itself is wrong and must be reversed. As application of the Ground Water Act to pre-1951 priority ground water rights is strictyly a legal issue, no facts will be discussed in this section of Moyle's brief.

The relevant portions of I.C. §42-226 provide as follows:

> 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. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided. . . . *This act shall not affect the rights to the use of ground water in this state acquired before its enactment.* (Emphasis added).

The italicized portion of the statute immediately above was added as a result of the 1987 legislative amendments to the Ground Water Act. Prior to the 1987 amendments, and since its enactment, the sentence in its place provided that "[a]ll 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 (approved Mar. 19, 1951).

In 1994, the Idaho Supreme Court held that "[b]oth the original version and the current statute" (referring to I.C. §42-226) "make it clear that this statute does not affect the use of ground water acquired before the enactment of the statute." *Musser v. Higginson*, 125 Idaho 392 , 396 (1994). This holding was in response to the Director of the Idaho Department of Water Resources' defense of his refusal to honor a call by a senior water user on the grounds that I.C. §42-226 prevented the Director from delivering water to the senior because "a decision has to be made in the public interest as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource." *Id.* The Supreme Court, in response to the Director's concerns did make the decision requested by the Director - they held that senior water users like Musser with priority dates earlier than March 19, 1951 were not subject to the provisions of the groundwater act.

The Director, in the *Final Order* in the case at bar, deals with the clear precedent in *Musser* very simply: by stating that "the Idaho Supreme Court in *Musser* was incorrect when it noted that, "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." *Final Order*, p. 31. Putting aside the issue of whether or not the Supreme Court was incorrect, it is not for the Director to make this determination - rather, it is for the Supreme Court itself to determine whether its holding was wrong. "It is fundamental that the judiciary has the ultimate responsibility to construe legislative language to determine the law." *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 853 (1991) *citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 73 (1803). *See also*, 73 C.J.S. Public Administrative Law and Procedure §55 ("An administrative agency is without power to render a judgment differing from a court's prior judgment or judicial precedent . . ."); *see e.g. Spraic v. United States Railroad Retirement Bd.*, 735 F.2d 1208, 1211 (9th Cir. 1984) ("An agency is bound to follow precedent established by an unappealed decision of a circuit court on any matter within that court's jurisdiction.") The Director has no authority to counter the construction of statutory language set forth so clearly and concisely by the Idaho Supreme Court in *Musser*.

Even if the opinion set forth by the Idaho Supreme Court in *Musser* were not available to provide the meaning of the language, the Director's analysis is erroneous as a matter of statutory interpretation.[1] The portion of the statute that the Director has construed reads as follows:"*This act shall not affect the rights to the use of ground water in this state acquired before its enactment.*" Statutory interpretation starts with the plain meaning of the statute. *State v. United States*, 134 Idaho 940, 944 (2000). If the statutory language is clear and unambiguous, courts should apply the statute without engaging in any statutory interpretation. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732 (1997). Unless the result is palpably absurd, a court must assume that the legislature

[1]The argument is also erroneous because, under Idaho law, statutes "are not to be applied retroactively in the absence of clear legislative expression to that effect. *Parker, supra* at p. 511.

meant what is clearly stated in the statute. *In re Permit No. 36-7200*, 121 Idaho 819, 822, 828 (1992). It is difficult to understand how a statute could be any more clear or unambiguous than the provision the Director has determined means the exact opposite of what it so clearly states.

Despite the clear language of the statute, somehow the Director has determined that the statute actually only applies to ensure that geothermal ground water rights acquired before the 1987 amendments to the Ground Water Act are valid whether they are used for heating purposes or not. *Final Order*, pp. 30 - 31. It is difficult to believe that the legislature would place such unambiguous language in the statute only for that purpose. However, regardless of whether or not this language was added to the statute with other language addressing geothermal water rights, a limiting interpretation of such clear language is absurd, and must simply be dropped from the Final Order.

The language from the original enactment of the Ground Water Act is as follows: "*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. If the legislature had meant to state that rights acquired before the Ground Water Act were subject to its provisions, why wouldn't it have stated exactly that? The language of the original enactment makes it unambiguously clear that the provisions of the Ground Water Act that affect the use of water rights are not applicable to pre-enactment water rights because those rights are "in all respects" validated and confirmed. The Idaho Supreme Court recognized as much in *Musser* when it stated

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

*Musser*, at 396.

The Director attempts to minimize the Supreme Court's language in *Musser* by replacing the word "held" with the word "noted" when discussing the language with which he disagrees. Final Order, p. 30, ¶13. Apparently the Director means to imply that the language is "dicta." Yet, the *Musser* Court discussed the Ground Water Act, because, as that opinion points out, it was the Director who raised the Ground Water Act and it was he who, using language remarkably similar to that contained in the Act, stated that 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. As previously discussed, the Court complied with the Director's request by finding that the Ground Water Act's provisions did not apply to pre-1951 water rights. Obviously, the language addressing the Ground Water Act in *Musser* is not dicta.

The clear and unambiguous language of I.C. §42-226 must be upheld as meaning what it says because the Supreme Court has already clearly explained the meaning of the language, and even if it had not, the Director's interpretation fails to follow principles of statutory construction, and simply makes no sense given the language itself.

## II. Moyle's Water Rights are Injured and Must be Protected

From June 2, 2006 through June 9, 2006, the City of Eagle conducted a pump test to determine the impact the diversions proposed under its applications would have upon other wells, including those owned by Moyle. According to the City's own test, diversions of 2.23 cfs from a new well proposed under the City's applications will result in a decline in Moyle's artesian pressure of 3.9 feet. *Final Order*, pp. 24 - 25, ¶44. The Hearing Officer's July 17, 2007 *Preliminary Order* presumed the City would be pumping 8.90 cfs from a new well, and that such diversion would result

in a decline in artesian pressure in the Moyle wells of approximately 15 feet. *Preliminary Order*, p. 13, ¶ 39. The Hearing Officer's *Preliminary Order* found that such a decline in artesian pressure would significantly reduce the flow needed to supply Moyle's needs. *Id.* Additionally, the Hearing Officer found that "*[l]esser reduction of artesian pressure will also significantly reduce the flow needed by Moyles to supply the beneficial uses.*" *Id* (italics added). Despite this finding, the *Final Order* only finds that a 2.23 cfs diversion rate by the City "may reduce the flow needed to supply" Moyle's needs. *Final Order*, pp. 24 - 25, ¶44. The Director then went on to require Moyle to test the impact of the reduction in pressure head expected to be caused by the City's pumping to determine whether there would be a "reduction in delivered flow" to Moyle's beneficial uses. Id, at p. 35, ¶32.

The Director's approach is contrary to both the Hearing Officer's findings of fact and to established Idaho law. First, after finding that Moyle suffered damage in June and/or July of 2006 due to a decrease in artesian pressure in the Moyle wells, the Hearing Officer found that "*[l]esser reductions of artesian pressure*" than those resulting from the pumping of 8.9 cfs by the City "*will also significantly reduce the flow needed by Moyles to supply the beneficial uses.*" *Preliminary Order*, p. 13, ¶¶ 38, 39. Even small losses in pressure will cause injury to Moyle - as indicated by the death of Moyle's mink resulting from an unexplained loss in artesian pressure. *Final Order*, p. 24, ¶43. There is nothing in the *Final Order*, nor in the record to contradict the fact that the death of mink cased by smaller reductions in artesian pressure ***are*** an injury to Moyle. The same analysis that reductions in artesian pressure are injurious should apply to Moyle's domestic rights that are

entitled to protection under *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).[2]

Under Parker, Moyle is "entitled to protection of their historical water levels" - there has been no change or addition of facts that would permit the Director to make any contrary conclusion. Especially in light of the *Preliminary Order's* finding of fact that injury will result to Moyle with lesser diversions than those presumed under the *Preliminary Order*, there is simply no basis for the Director to require that Moyle must now "prove" injury to his water rights before they are protected. Injury has already been proven, as the Hearing Officer has found.

Given that there is no basis for the Hearing Officer to require Moyle to again prove injury so that they are protected in their historical water levels, the *Final Order* must be amended to provide, as did the *Preliminary Order*, that the City of Eagle must mitigate Moyle's injury *before* diverting any water pursuant to the water rights that are the subject of this action.

## CONCLUSION

The Final Order issued by the Director contains errors that require the issuance of an Amended Final Order providing that Moyle's pre-Ground Water Act water rights are entitled to protection in their current pumping/pressure levels as is provided under Idaho Law, and that the City should mitigate injury to Moyle's domestic water rights before such injury occurs.

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[2] It is particularly inequitable to force Moyle to "prove" injury to his water rights in light of the fact that the City failed to notify Moyle and other Protestants at the time of its Aquifer Pumping Test that such test was taking place so that the Protestants could measure the water levels in their wells. Forcing Moyle to measure his own injury at his own expense while it is occurring when such measurements could and should have already taken place but for the City's failure to notify Protestants of the situation which would have resulted in absolute proof of injury to their water rights necessitates that the Director, at a bare minimum, require the City to bear the expenses of the measurements of Moyle's wells.

Respectfully submitted this 18th day of April, 2008.

RINGERT CLARK CHARTERED

By _____
Charles L. Honsinger
Attorneys for Protestants

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2008, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Jerry & Mary Taylor
3410 Hartley
Eagle, Idaho 83616

Corrin & Terry Hutton
10820 New Hope Road
Star, Idaho 83669

Sam & Kari Rosti
1460 N. Pollard Lane
Star, Idaho 83669

Western Region
Attn: John Westra
2735 Airport Way
Boise, Idaho 83705-5082

Dana and Vicky Purdy
5926 Floating Feather
Eagle, ID 83616

Leeroy & Billie Mellies
6860 W. State Street
Eagle, Idaho 83616

Dean & Jan Combe
6440 W. Beacon Light
Eagle, Idaho 83616

Bruce Smith
Moore Smith Buxton & Turke
950 W. Bannoc, Ste.520
Boise, Idaho 83702

John M. Marshall
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701

Charles L. Honsinger