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A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist. (In re SRBA Case No. 39576), 118 P.3d 78 (Idaho 2005)

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Wien also asserted that the lower court made evidentiary errors and gave improper jury instructions, but the court dismissed these claims.

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IDAHO

A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist. (*In re* SRBA Case No. 39576), 118 P.3d 78 (Idaho 2005) (holding appellant's claim for superior enlargement of an existing groundwater right failed whether the water at issue was groundwater or waste or drain water because all proposed enlargements cause *per se* injury to junior appropriators, and therefore, even if the water was treated as groundwater, the statute required subordination of the enlargement to water rights established prior to the statute's enactment).

Appellant A & B Irrigation District ("A & B") had the right to divert 1,100 cubic feet per second ("cfs") of groundwater from the Eastern Snake River Plain Aquifer for the irrigation of more than 62,000 acres in Jerome and Minidoka Counties. Due to the geographic layout and soil conditions of A & B's land, A & B did not consume all of the 1,100 cfs for irrigation. A portion of the irrigation water became runoff and collected in ponds and drains at the end of A & B's fields. Beginning in March 1963, A & B used some of this captured runoff to irrigate land not included within the scope of its water right.

In November 1984, A & B and its predecessor in interest, the United States Bureau of Reclamation ("BOR"), filed an application with the Idaho Department of Water Resources ("IDWR") for an expansion of their right to irrigate an additional 2,363.1 acres of land with the excess run-off. A & B and BOR subsequently withdrew the 1984 application, due to the enactment of Idaho Code § 42-1416. This new statute provided a rebuttable presumption in favor of water right holders who expanded their water rights in violation of Idaho's statutory permitting scheme, but who caused no injuries to other water right holders in doing so. Seeking a formal decree of the enlarged right, A & B and BOR filed an application in the Snake River Basin Adjudication ("SRBA"). In 1992, IDWR recommended approval of A & B and BOR's requested enlargement, subject to determination of the enlargement's priority dates based on evidence of when A & B started using the extra water.

In February 1994, the SRBA court held Idaho Code § 42-1416(2) unconstitutional, and the Idaho Legislature subsequently enacted Idaho Code § 42-1426. Section 42-1426 granted amnesty for enlargements where there was no additional diversion and no injury to junior appropriators. Where either additional diversion or injury to junior appropriators occurs, section 42-1426 required subordination of the

enlarged rights to junior rights. In 1996, the Idaho Supreme Court held section 42-1426 constitutional in *Freemont-Madison v. Idaho Ground Water Appropriators.*

In September 1997, IDWR filed an Amended Director's Report to reflect the holding in *Freemont-Madison.* This report recommended approval of A & B and BOR's enlargement application subject to subordination to all junior rights appropriated prior to April 12, 1994, the date Idaho's legislature enacted section 42-1426.

In January 2001, appellees Ralph E. Breeding, Tim Deeg, and the Estate of Mack Neibaur (collectively "Groundwater Users") and Idaho moved for partial summary judgment against A & B. The special master determined that the source of A & B's enlargement right was groundwater, and that the enlargement right's priority date should be the date of the water's first beneficial use, subject to IDWR's April 12, 1994 subordination recommendation. The Snake River Basin Adjudication Court of the Fifth Judicial District affirmed the special master's determination and rejected A & B's motion to reconsider. A & B appealed to the Idaho Supreme Court.

On appeal, A & B challenged the district court's determination that the source of its enlargement was groundwater. It argued instead that, following irrigation, the water collected with other diffuse water in irrigation drains and thus transformed into "waste" or "drain" water independent from appropriated groundwater. A & B further argued the court should grant its enlargement amnesty under section 42-1426. The Groundwater Users countered that the district court correctly determined the source of the enlargement to be groundwater, and that the enlargement should not be granted amnesty because section 42-1426(2) required that the source of an enlarged right must be tied to the diversion of an existing right.

The court held that, whether or not the source of A & B's enlarged right was waste or drain water or groundwater, A & B was not entitled to a superior enlargement of its original water right.

The court analyzed the enlargement as if its source were waste or drain water. Section 42-1426 specifically allows for declaration of new water rights only for enlarged uses of existing water rights. Since A & B claimed its enlargement would use waste or drain water independent from its appropriated groundwater, the court held that treating the water as anything other than groundwater would require A & B to apply for a new water right for that source prior to any future use on A & B's 2,363.1 acres.

The court held the district court properly determined the source of the enlargement was groundwater, stating, to the extent IDWR or the district court can identify the source of the appropriated water, the water retains that characterization. Thus, the court held the district court properly treated the water as groundwater under the original right and applied the law applicable to enlargements.

The court applied both section 42-1426(2) and section 42-1416 (repealed) to A & B's proposed enlargement, treating the source of the enlargement as groundwater. Both sections prohibit a proposed enlarged water right that injures junior appropriators. The court held that, under the *Freemont-Madison* decision, proposed enlargements constitute *per se* injuries to junior appropriators. Treating A & B's proposed enlargement as a *per se* injury to junior appropriators, the court ruled that section 42-1426(2) requires that an injurious enlargement must become subordinate to a junior right by advancing its priority date to a date one day later than the junior appropriator's priority date. The court also noted that, even though the district court declared section 42-1416 unconstitutional, A & B still would not receive the statute's rebuttable presumption because of its *per se* injury to junior appropriators. In applying both the current and repealed version of the Idaho statute, the court held all proposed enlargements must be subordinate to junior rights, since a *per se* injury to junior appropriators cannot by definition be mitigated.

The court held that the Groundwater Users' recommendation in support of IDWR's Amended Director's Report was a sufficient procedural action to preserve and establish the Groundwater Users' interests and rights in the case.

Accordingly, the court affirmed the district court's decision granting partial summary judgment in favor of the Groundwater Users, the State, and the Groundwater Districts.

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ILLINOIS

Valstad v. Cipriano, 828 N.E.2d 854 (Ill. App. Ct. 2005) (holding the state's imposition of fees on NPDES permit holders is justified and is not preempted by the federal Clean Water Act where a legally sufficient justification exists which is reasonably related to the legislative purpose and it advances the objective of the imposing Act).

The Illinois General Assembly enacted Public Act 93-32 ("Public Act"), effective in relevant part July 1, 2003. The Public Act added section 12.5 to the Illinois Environmental Protection Act ("Act") requiring the Illinois Environmental Protection Agency ("Illinois EPA") to collect annual fees from certain holders of National Pollutant Discharge Elimination System ("NPDES") permits. In June 2003, the Illinois EPA requested such fees from Harold Valstad, the owner and operator of Valstad Quarry, Inc., and 40 other quarry owners (collectively "Valstad"). Valstad paid the fees under protest. In August 2003, Valstad filed a revised complaint against the Illinois EPA director, Renee Cipriano ("Cipriano"), the Illinois EPA, and the Illinois State Treas-