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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA	)	**DOCKET NO. 37-03-11-1** **A&B IRRIGATION DISTRICT'S RESPONSE TO JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW, A&B IRRIGATION DISTRICT ("A&B"), by and through its attorneys of record, pursuant to I.R.C.P. 56(c) and the Hearing Officer's September 22, 2008, *Order Approving Stipulation to Move Dispositive Motion Deadline*, and hereby submits this *Response to Joint Motion for Partial Summary Judgment* in the above-entitled matter.

INTRODUCTION

IGWA asks the Hearing Officer to ignore the on-the-ground ***actual*** operations of A&B's project and affirm the Director's *Order,* which failed to properly analyze A&B's request for water right administration. In his *Order*, the Director turned a blind eye to lowered aquifer levels and the water-short well systems within the A&B project. By erroneously "averaging" water use across the A&B project area, the Director ignored the fact that A&B has 138 ***individual*** water distribution or well systems within its project area.[1] This is the *only way* that the Director could find no "injury" to A&B's senior water right #36-2080. IGWA asks the Hearing Officer to make the same unrealistic view of the facts.

IGWA further seeks to excuse the material injury caused by junior priority ground water diversions on the basis that A&B's water right includes multiple points of diversion. According to IGWA, A&B should be required to re-engineer its project and drill and interconnect additional wells in order to continue to receive water under its senior right. Such a demand has no support in the law. As set forth below, IGWA's motion fails as a matter of law.

ARGUMENT

I. IDWR Recognized A&B's Project Uses Multiple Points of Diversion (Wells) But Erroneously Analyzed Water Use as if A&B Delivered Water From a Single Distribution System.

IGWA's motion is based on the erroneous assumption that A&B can deliver "ground water pumped from *any* point of diversion onto *any* of A&B's 62,604 acres" *IGWA Memo* at 2. This claim, first asserted in the Director's *Order*, ignores reality and how the A&B project was developed, licensed by IDWR, and eventually decreed by the SRBA Court in 2003. IGWA's attempt to continue this fiction – i.e. that A&B's water use can be analyzed through a "project-

[1] *See* A&B Expert Report at 3-1. Only eight well systems on the project have any interconnection and they have a limited ability to share water. *See id.* at n. 2.

wide average" lens – should be seen for what it is: an attempt to evade its obligations to mitigate for the injury that its members' junior priority diversions have caused to A&B's senior right. As set forth in the examples offered by IGWA, the Director's *Order* erroneously looked at a "mean annual amount of ground water pumped", "average annual water use", and a "total water supply" in order to justify a denial of the call. *See IGWA Memo* at 10.

A&B pumps water from 177 individual wells that comprise 138 ***separate*** well systems.[2] While a few well systems are interconnected, these ***separate*** systems were not constructed to deliver water anywhere throughout the entire project area. Indeed, a well in the northeast corner of the project cannot pump and deliver water to the southwest corner. Stated simply, A&B's ground water project *is not a single distribution system*, as the Director's *Order* and now IGWA, would have it perceived. Accordingly, the Director's analysis regarding total "average" annual water use across the project does not accurately depict how water is actually diverted and delivered to the various landowners. *See Order*, FF 35-64; CL 23-26.

Department staff working on the *Order* recognized this fact. First, Mr. Sean Vincent recognized that A&B could not pump water and deliver it equally to all landowners on the project:

> Q. (BY MR. THOMPSON): Yeah. Is it your understanding that the current total water supply for A&B at its maximum diversion rate of 970 cfs, whether or not that can be delivered equally to all 62,000 acres under its water right?
>
> A. I doubt it.
>
> Q. Are you aware that the irrigation system under that water right was acquired and is represented by 177 separate irrigation systems?
>
> A. Approximately 177 wells, yes.

[2] Although A&B has 188 authorized points of diversion through prior transfers approved by IDWR, it has 6 temporarily abandoned wells and 5 inactive wells. Presently A&B can only divert water from 177 active production wells. *See* A&B Expert Report at 3-1, and Figure 3-3.

Vincent Depo. Tr., at p. 80, lns. 15-24, p. 81, lns. 7-16.

Tim Luke, IDWR's Water Distribution Section Manager, further recognized the individual points of diversion for A&B's water right:

> Q. (BY MR. LING): Were you aware when you prepared your report that the 177 wells referred to in A & B's decree are 177 mostly independent diversion points that serve specific lands under that particular well and is not an interconnected system?
>
> A. (BY TIM LUKE): Yes, I was aware of that.
>
> Q. How did you become aware of that?
>
> A. I became aware of that mainly, I think, in just working with the measurement district initially, and, you know, back in the '94/'95 time frame that that's how the system was.
>
> And as we got measurement reports, you know, I had looked at those measurement reports in all of the wells and the various uses from those wells. . . .

Luke Depo. Tr. p. 42, lns. 14-25, p. 43, lns. 1-3.

> Q. . . . Well, in finding 64, you didn't recognize it, but you have today that the 177 wells aren't interconnected so you can't average diversions and have a real picture of what either the district is able to divert and deliver can you? Because they are not interconnected, each system has to stand on its own; do you agree with that?
>
> A. Well, each system is on its own, correct.
>
> Q. Are you saying that you believe that that's an unreasonable method of diversion of delivery of water?
>
> A. No, I don't think that's unreasonable.

Id., p. 57, lns. 16-25, p. 58, lns. 1-3.

Despite the fact that A&B pumps from individual wells, Mr. Luke explained that his inability to determine irrigated acreage under the various well systems led to his decision to average water use on the entire project, rather than look at individual well systems:

Q. But notwithstanding that knowledge, you still throughout the preparations that you made for this order of January 29, you looked at the total annual diversions of the project rather than the total annual diversions of each particular well and the land served by that well, did you not?

A. Well, I think the findings of the order shows that. But in review of the data, no, I looked at – I looked at diversions from individual wells because that's what the information –

Q. But you didn't include it in your report, do you?

A. Not specifically. I think there was one reference to that here somewhere.

Q. Don't you think that was – that's more relevant than what is going on on an annual average for all wells?

A. I thought the delivery call was on the water right.

Q. It is on the water right.

A. Okay.

Q. And the water right has 177 points of diversion –

A. Correct.

Q. -- does it not?

A. It does.

Q. And those 177 points of diversion, if there's an interference with any one of those diversions, if they're not interconnected, affects the ability to get the water to which they're entitled out that water right, doesn't it?

A. Uh-huh. Well, we looked – I specifically looked at what was presented to us, the diversions from the individual wells, what was alleged as being short. So I did look at individual systems.

The shortages were based on this delivery of three-quarters of an inch per acre, which A & B says they're not meeting. And those are – and they identified the wells over different years that were not capable of meeting that requirement.

One of the things we discovered in review of this is that three-quarters of an inch per acre is based on, I think, what they call the system acreage; in other

words, the acreage associated with that well or well system determined originally by the Bureau of Reclamation as to what was irrigable lands.

What we found is that irrigable lands are not necessarily what's irrigated. But the calculation was based on irrigable lands, as determined by the Bureau back early in the development of the project.

So it was very difficult for us to do an analysis of individual systems because that number acreage system is not necessarily what's irrigated.

Id., p. 43, lns. 4-25, p. 44, 1-25, p. 45, 1-10.

Q. (BY MR. LING): And how did you determine that the irrigable acres was not the acres being irrigated?

A. Well, through communications with Mr. Temple, through review of the – one of the items the Department had requested was place-of-use information for these well systems.

And what we got in return was two GIS files showing a place of use in the A & B and also the lands that were short at the time the motion to proceed was filed. And we had a lot of questions about those .shp files. And that prompted a meeting with Mr. Temple and some of his staff. And at least that's when I discovered that the irrigable acreage is not necessarily that lands that are irrigated by those wells.

Q. Who prepared the .shp files? Do you know?

A. Mr. Temple said the Department did, but –

Q. You didn't have any personal knowledge of that?

A. I did not, no.

Id., p. 45, lns. 11-25, p. 46, lns. 1-7.

Despite their admitted misunderstanding and questions about irrigated acres within those tracts, the Department failed to further evaluate the water-short wells systems. In his deposition, Tony Morse stated:

Q. (BY MR. THOMPSON): Did you ever recognize that this was not the actual place of use of A & B irrigated lands within those tracts, that it was a gross area identified in that tract?

A. (BY MR. MORSE): No.

Q. You didn't understand that?

A. Not if I understand what you're saying now. My understanding was that it's the polygon, that was the area that was water-short.

Q. You thought everything inside the boundary of each of these polygons was irrigated acreage served by A&B, that it wasn't just a gross area?

A. I'm sorry. Would you say that again?

Q. Did you understand that these polygons didn't represent the actual irrigated place of use from A & B within those tracts, that they were a gross area shape?

A. No. My understanding was that those polygons were the area that were water-short.

* * *

Q. . . . So after you did that, after you overlaid that – those polygons on that imagery, did you review each of those polygons to see what was going on inside them?

A. Well, yes.

Q. And after you did that review, did you still think that every acre within those polygons was being irrigated by A & B?

A. Oh, no. No. I mean you can plainly see that there is land within it that's not irrigated at all.

* * *

Q. And that's – did you do any type of review to try and identify those lands within the polygons that were actually irrigated compared to those that were not being irrigated?

A. I'm not entirely sure I understand your question. I mean, I just – I was not looking at trying to discriminate irrigated land from nonirrigated land within each polygon.

Q. But your review revealed that?

A. Well, I mean, you could certainly see it.

Q. But that didn't raise any issues for you to reevaulate taking those

gross areas of those polygons as being the total area served by A & B?

A. Well, I don't recall that I made a determination about the number of acres within each polygon that were irrigated or not irrigated.

Morse Depo. Tr., p. 40, lns. 13-25, p. 41, lns. 1-7, 20-25, p. 42, lns. 21-25, p. 43, lns. 1-12.

The Department admittedly failed to try and verify the number of irrigated acres, but instead assumed A&B's represented number was incorrect. As demonstrated in A&B's Expert Report, the irrigated acreage for the water-short well systems (Item G Lands), was properly reported by A&B to the Department back in December 2007. *See* A&B Expert Report at 4-30 to 4-31. Therefore, the questions that IDWR failed to investigate or answer do not justify a refusal to properly evaluate water use at the individual well systems. Nonetheless, apparently these "unanswered questions" served as the basis for the Department's refusal to complete a comprehensive analysis of the water use under A&B's individual wells for purposes of the *Order*:

Q. (BY MR. LING): And then in 35, we've kind of covered this again. But again, you indicated that A&B provided this information, which includes records of total annual ground water volume pumped but don't mention that the information you provided also shows records by which you determined the total amount of water pumped from each well for the acres served.

That also was in that information, was it not?

A. Yes. There was that system acreage.

Q. Why didn't you include it in the report, include it in the order?

A. Why didn't I include reference to the system acreage?

Q. Individual system acres and the diversion rate by each individual well, right?

A. I don't know. I thought there was a reference to system acreage in here somewhere.

Luke Depo. Tr., p. 77, lns. 24-25, p. 78, lns. 1-17.

Rather than attempt to answer the outstanding questions, the Department simply pressed forward and issued the *Order* – claiming that its lack of understanding was the basis for not reviewing individual well systems.

Now, IGWA appears to suffer from the same "misunderstanding" that plagues the Director's *Order*, and would have the Hearing Officer believe that water can be pumped at any location and distributed "pro-rata" across the whole project. IGWA even goes so far as to claim that A&B can pump its entire water right from a single well:

> A&B and its representatives … admit that A&B's water right allows them to divert up to their maximum diversion rate under ***any one well*** or combination of wells and that the 1100 cfs was appurtenant to all of A&B's lands, not tied to specific farm units.

See IGWA Memo at 3 (emphasis added). Outside of the erroneous conclusions in the Director's *Order*, there is no basis for this assertion. Indeed, the information relied upon in preparing the Director's *Order* defies this erroneous assertion.

Contrary to IGWA's claims, A&B cannot divert 1,100 cfs from a single well and distribute it equally to approximately all 62,000 acres across the project. The Department recognizes this fact:

> Q. (BY MR. LING): As a practical matter – and now that you've seen the project, which was made after you made your report, do you recognize it as being possible to take water from the east end, of the wells, and deliver it to the west end? Well, possible financially. Impractical should be the better word.
>
> MS. McHUGH: Objection. Foundation
>
> THE WITNESS (MR. LUKE): There would certainly be a cost involved in doing something like that. And it may not be practical, depending on what the costs were.

Luke Depo. Tr., p. 77, lns. 13-23; *see also, Vincent Depo., supra* at 3.

Although A&B's water right has multiple points of diversion, and is appurtenant to all acres, that does not mean IDWR is free to disregard A&B's actual diversion and delivery system and instead pretend as if the water was delivered equally through a single distribution system. Contrary to IDWR's present position, it previously licensed and then later recommended A&B's water right to the SRBA Court recognizing the separate wells and well systems that were actually in place at the time. By refusing to properly analyze A&B's individual points of diversion for purposes of administration now, the *Order* wrongly assumes that water can be equally distributed to all acres on the project from any point of diversion, or even a single point of diversion. As this is not the case, IGWA's reliance on the conclusions in the *Order* must fail.

Accordingly, IGWA's motion for partial summary judgment fails.

II. Under Idaho Law Junior Water Right Holders Cannot Interfere With or Force a Senior Water Right Holder to Change or Add Point(s) of Diversion.

As described in A&B's *Motion for Summary Judgment,* and supporting documents, the Director made several incorrect assumptions in denying of A&B's call.[3] IGWA seeks to confirm the Director's erroneous analysis by claiming that a review of A&B's water use should be "based on *all* the supplies available to A&B." However, IGWA proceeds to take the Director's findings a step further and seeks an order forcing A&B to change or add points of diversion under its water right:

> A&B's water right no 36-2080 allows A&B to divert water from any well and deliver it to any land within its place of use. It is equally unacceptable, however, to allow A&B to complain that individual wells are short thereby causing "injury" to its water right when there is plenty of water in the ground under A&B to divert and apply to beneficial use. It is A&B's refusal to maximize its delivery system or because A&B's choice of well location and

[3] As described in A&B's *Motion for Summary Judgment,* and supporting documents, the Director made several incorrect assumptions about the physical capacity of A&B's wells and delivery systems. This erroneous conclusion (based upon pre-decree information), coupled with a comparison to A&B's "annual average" water use across the project, served as the foundation for the Director's denial of A&B's call.

> farm unit configuration that makes it difficult to deliver water to certain fields, not injury from junior ground water pumping.

IGWA Memo at 8. Stated another way, IGWA seeks to justify material injury to A&B's water-short wells on the theory that A&B should "self-mitigate" and change or add to its points of diversion. Such a contention is not legally supportable.

First, contrary to IGWA's claim, Idaho law does not authorize interference with a senior water right holder's point of diversion, even if the senior water right has multiple points of diversion. Injury to a water right occurs when there is an unlawful interference with the diversion of water under that right. A&B cannot, under Idaho law, be deprived of the right to divert water from each of its points of diversion. A&B is not required to mitigate damages incurred by junior diversions. Instead, the burden falls on a junior water right holder to prove non-interference with diversions and use under a senior right. *See Moe v. Harger*, 10 Idaho 302, 303-04 (1904); *Josslyn v. Daly*, 15 Idaho 137, 149 (1908); *Jackson v. Cowan*, 33 Idaho 525, 528 (1921).

Second, there is no statutory support for IGWA's extreme demand. While the Ground Water Act does authorize the Director to force certain injured senior water users to deepen their wells to a "reasonable pumping level," there is nothing in the Ground Water Act that mandates the <u>relocation or addition</u> of a point(s) of diversion.[4] Indeed, there is a stark distinction between deepening a well – as authorized for certain ground water rights, *see infra* n.4 – and forcing a water user to move or add to its point(s) of diversions – which will undoubtedly require substantial changes to the distribution system, including increased costs. IGWA's motion presses the erroneous conclusion drawn by the Director's *Order*, that A&B should drill more and in different locations to remedy its injury. Nothing in the law requires A&B to remedy the

[4] A&B maintains that the Ground Water Act and its amendments do not apply to its senior ground water right #36-2080 with a September 9, 1948 priority date.

injuries caused by others. Moreover, A&B does not have to drill additional wells and file countless transfers as a predicate to administration.

Moreover, in the adjudication of water rights, the Director is required to determine certain elements of each water right, one of which is the legal description of the points of diversion. *See* I.C. § 42-1411(e). Under A&B's decree for water right #36-2080, A&B has 177 separate points of diversion, or individual wells.[5] By law, junior appropriators have no right to interfere with any of A&B's multiple decreed points of diversion. Indeed, for purposes of administration in Idaho, senior water rights must be satisfied prior to junior rights, and watermasters must administer according to the decree. *See* I.C. § 42-607; *State v. Nelson*, 131 Idaho 12, 16 (1998). The Director cannot ignore A&B's decree, including its established points of diversion, for purposes of administration. IGWA's *Motion* would turn water right administration on its head and instead force seniors to change or drill new wells in the face of injury caused by its junior members. Such a policy would plainly violate Idaho's Constitution and water distribution statutes. *See* IDAHO CONST. Art. XV, § 3; I.C. §§ 42-602, 607.

Furthermore, the case law does not support IGWA's attempt to compel A&B to move all or a portion of its wells to new locations. In *Randall Canal Co. v. Randall*, 56 Idaho 99, 50 P.2d 593 (1935), a farmer received his water right through three separate headgates on a canal. The Court noted that these "headgates are so located as to deliver water to three high points, or ridges, on respondent's farm and make convenient the efficient irrigation thereof." 50 P.2d at 593. The Canal Company sought a decree authorizing the company to discontinue the use of headgates 2 and 3. *See id.* Such a change required the construction of a new ditch upon the

[5] A&B filed Transfer No. 72566 to add 11 points of diversion and ensure that its junior beneficial use and enlargement water rights could be used from any well on the project. Despite the additional points of diversion authorized by this transfer A&B is only able to pump water from 177 wells.

farmer's land that would occupy approximately 3 acres of his land. *See id.* The Canal Company's demand was rejected:

> 3. "That because of the original construction by him of his said headgates and lateral ditches, and because of his continuous use thereof since said time, the defendant has acquired, and now has, a right in the nature of an easement to the use of each of said ditches and headgates, for the purpose of taking and carrying his water from the Randall Canal to the high points on his land, and ***that the plaintiff is without right in law or equity to change the points of diversion or to interfere with any or either of said headgates*** or ditches of the defendant, unless such change would be made after substituting and providing for a method of diversion without injury or expense to him which would be equally efficient and serviceable to the defendant, and without any extra burden to the defendant, and without injury to him."

50 P.2d at 594 (emphasis added).

The Idaho Supreme Court affirmed and recognized the Canal Company could not interfere with the farmer's ditch rights without compensation. *See id.* The same logic applies in this case. Here, A&B's wells were located at higher elevation locations across the project in order to effectively irrigate lower lands through its gravity canal systems. The canals and ditches were constructed according to the existing locations of the wells (points of diversion). IGWA has no authority to force A&B to re-locate its wells and construct new conveyance systems to effect the delivery of water under its senior water right.[6]

Additionally, by statute, an appropriator, senior or junior, may not change his point of diversion to the injury of another appropriator. *See* I.C. § 42-222(1); *see also*, *Wood River Power Co. v. Arkoosh*, 37 Idaho 348, 215 P. 975, 977 (1923) ("It is well settled that a point of diversion may not be changed if it will work any injury to other appropriators, though subsequent in time"). This applies to all water right holders, and has been applied as early as 1933 to protect a point of diversion from interference.

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[6] Even if such a right did exist, however, the *Randall Canal Co.* Court makes clear that no such change could occur unless it was done "without injury or expense to [A&B] which would be equally efficient and serviceable to [A&B], and without any extra burden to [A&B], and without injury to [A&B]. 50 P.2d at 594.

In *Noh v. Stoner*, 53 Idaho 651 (1933), the Court found that the lowering of a water table constituted an interference with the right of a prior appropriator. Next, in *Board of Directors v. Jorgensen*, 64 Idaho 538 (1943), the court cited *Daniels v. Adair*, 38 Idaho 130 (1923), wherein the plaintiffs sought to deliver water to Agency Creek from the Lemhi River in an exchange for water out of Agency Creek. This exchange would compel prior appropriators in Agency Creek to accept water decreed to them below their points of diversion. The court held that this would work an injury to the prior appropriators in Agency Creek, denied the proposed exchange, and issued a permanent Writ of Prohibition against the lower court. A required change in the point of diversion of a ground water right was again found to be an injury to the water right in *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). There, the lowering of the water table by the pumping of a junior appropriator, as was the case in *Noh, supra*, was found to be an unauthorized change in diversion.

To effectuate the policy of maximum development of the water resources, junior appropriators may divert surplus ground waters – so long as the junior diversion does not deprive senior appropriators – here, A&B – of the use of water under their senior rights. While A&B may not be deprived of any right to its use if water can be obtained by changing the method or means of diversion, the expense of changing the method or means of diversion must be paid by the junior appropriator(s) causing the depletion – such that A&B will not suffer any monetary loss. *See Randall Canal Co., supra*; *see also Parker, supra; Bower v. Moorman*, 27 Idaho 162, 147 P. 496 (1915). Likewise, any change must be "be equally efficient and serviceable to"

A&B. *Id.*[7] The burden is on the junior ground water right holders, not A&B, to devise and implement such changes.

Since Idaho law does not allow the Director to force A&B to change or add to its point of diversion in order to mitigate for depletions caused by junior diversions, IGWA's motion should be denied.

CONCLUSION

IGWA's motion suffers from the same misunderstandings and misstatements of law as the Director's *Order*. Both ignore the well-established law in the state of Idaho and disregard the fact that A&B's system is set up with 177 individual wells comprising 138 separate well systems – systems that cannot pump and deliver water equally to all acres within the project area. Rather than acknowledge A&B's individual systems, the Director, and now IGWA, have erroneously combined the entire project for an injury and water use analysis. Such an analysis does not accurately portray water use and availability from each of A&B's points of diversion and the lands served by those various wells.

Accordingly, lands served by water-short wells are not made whole by the Director's paper "average" of water use from all points of diversion across the project. Likewise, IGWA's attempt to evade its responsibility to mitigate for material injury caused by junior diversions – by forcing A&B to move and add to its points of diversion – cannot be supported by the law. As such, IGWA's motion should be denied.

[7] Furthermore, since A&B's 1948 senior water right predates the Ground Water Act, its right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred in deepening the well and pumping from a lower water table. *Parker, supra.*

DATED this 22nd day of October, 2008.

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