A&B IRRIGATION DISTRICT,

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES and **GARY SPACKMAN** in his official capacity as Interim Director of the Idaho Department of Water Resources,

Respondents.

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

CASE NO. CV-2009-647

RESPONDENT CITY OF POCATELLO'S RESPONSE BRIEF

On appeal from the Idaho Department of Water Resources

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ARGUMENT

A&B Irrigation District ("A&B") made a delivery call for Water Right No. 36-2080 initially in 1994, and then again through its Motion to Proceed in 2007. The Director reviewed the available data and issued an Order on January 29, 2008 ("January 29 Order") finding that A&B's water right had not suffered material injury. Following the issuance of the Director's initial Order, A&B challenged the January 29 Order and moved for a declaratory ruling that Water Right No. 36-2080 was exempt from the Ground Water Act of 1951 ("GWA") and that A&B was entitled to historic ground water levels. The Hearing Officer, Justice Gerald Schroeder, denied the Motion for Declaratory Ruling.

A&B proceeded to hearing on its claims of injury and lost.

Justice Schroeder found, *inter alia*,

> **The Director's determination is supported by substantial evidence.** Several factors support the Director's determination. It is consistent with the Motion to Proceed which indicates that 0.75 [miner's inches/acre] to be a minimum need. A minimum is not a desirable amount, but it is adequate. The 0.75 is consistent with the policy of [well] rectification adopted by A&B. It is unlikely rectification would be prompted at a level below the amount necessary for crop production. More is sought, and more is better, but 0.75 meets crop needs. There is persuasive evidence that 0.75 is above the amount nearby irrigators [outside of A&B] with similar needs consider adequate.

R. 3110 (emphasis in original). On appeal, A&B argues for reversal on every point. Its appeal can be broken down into two parts: the threshold legal arguments that A&B makes upon which it must prevail in order to overturn the rulings below, and mixed arguments of fact and law which assume its success on the predicate legal issues.

A&B's threshold legal arguments must be rejected. A&B's Opening Brief is devoted to extensive argument that Idaho law does not support applying the Ground Water Act to Water Right No. 36-2080 and, by implication, that all junior ground water users in the Eastern Snake Plains Aquifer ("ESPA") should be curtailed to restore to A&B the historic water levels within

its wells. In fact, Idaho law demands application of the Ground Water Act to A&B's water right, but more importantly in this context, it also requires that A&B establish injury to its water right as a basis to claim an entitlement to *any* particular water levels (whether historic or "reasonable pumping levels"). A&B's appeal must fail because it hasn't established the factual trigger for a water level inquiry: injury to the water right. A&B forgets that its water right is for a quantity of water, not a particular water level; in the absence of showing injury to its water right, the question of water levels is irrelevant. In fact, without a showing of injury, A&B's insistence on a particular water level must be rejected much as Mr. Schodde's was in *Schodde v. Twin Falls*. 224 U.S. 107, 122 (1912) (Schodde's water wheel does not have the right to "appropriate the entire volume of the water of the river, without regard to the extent of his beneficial use").

A&B also attempts to overcome its failure to demonstrate injury at any point in this process by arguing on appeal that the Director's examination of the available evidence in order to prepare the January 29 Order was *ultra vires*. Under A&B's theory the Director should simply have adopted A&B's sworn allegations of injury, found injury and curtailed most of the junior wells on the ESPA during the pendency of any appeal in the matter in order to ensure the delivery of the entire amount of A&B's decree. Although A&B argues that this position is consistent with *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007) ("*AFRD#2*"), the Hearing Officer declined to adopt this position, finding that:

> The language of *AFRD#2* is that after 'the initial determination' of material injury is made the junior has the burden of establishing a defense to the senior's call, <u>not that the allegation of material injury constitutes that determination</u>. The allegation of material injury under oath invoked the Director's authority and responsibility to develop the facts upon which a well-informed decision could be made as to the existence of material injury and the consequences if there were material injury.

R. 3085 (emphasis added).

A&B's mixed arguments of fact and law made on appeal must be rejected

A&B's mixed arguments of fact and law assume the predicate: that A&B is injured unless it receives its entire decreed water right (or 1100 cfs through 0.88 miner's inches/acre at each of its well systems.) However, the Director properly applied Idaho law, including the standards of *AFRD#2*, in declining to find that A&B was injured. To wit:

- A&B suggests that the Director's finding that the B Unit's delivery of 0.75 miner's inches/acre is adequate for beneficial uses somehow "re-adjudicates" A&B's water right, despite the holding in *AFRD#2* that depletion alone does not equal injury.
- Second, A&B argues that because the Director examined the ability of A&B to deliver adequate water to their wells as a whole (on the basis of the decree for Water Right No. 36-2080, which makes all 1100 cfs appurtenant to all 62,604 acres in the place of use) the Director erroneously created a new standard under Idaho law called the "failure of the project" standard.
- Third, despite the fact that the *AFRD#2* decision expressly holds that water users may only call for an amount of water that can be beneficially used, A&B argues that the Director's Final Order was erroneous because it created a "minimum amount needed" standard for injury. Prior to statehood the law in Idaho has limited water users to the "minimum amount needed"—also known as the "beneficial use" standard.

A&B's next two arguments relate to its crabbed reading of the terms and conditions of Water Right No. 36-2080, which expressly make all the water pumped under this right appurtenant to all the acres in the 62,604 acre place of use.

- Because A&B has experienced some operational problems on about 5000 of its 62,604 acres that may be served by Water Right No. 36-2080, it suggests that the Director erred in not evaluating its claims of injury on a well system by well-system basis. On the one hand, A&B insists its demands must be satisfied based on the terms of its license and decree; on the other hand, A&B ignores the operative terms of these documents which constrain (along with the *AFRD#2* imprecation that "depletion does not equal injury") the Director's examination of A&B's injury claims.
- A&B also argues that although its license and decree for Water Right No. 36-2080 contemplate interconnection, and even though A&B has taken advantage of these flexible decree terms to interconnect well systems, the Director erred in considering A&B's claims of injury in light of its decree terms allowing interconnection to further enhance the yield on any acres it believes may be short.

A&B also suggests that the Director erred in finding that reasonable pumping levels had not been exceeded, even though the threshold condition of material injury was not established that would require evaluation of water levels, and that the Director abused his discretion by not designating the ESPA as a Ground Water Management Area. These determinations are within the Director's discretion, and he acted consistent with his statutory authority by declining to establish either a reasonable pumping level or a Ground Water Management District.

A&B has failed to carry its burden of proof at any point in this proceeding, and as a matter of law and as supported by substantial evidence in the record, the Final Order should be affirmed.

I. STATEMENT OF THE CASE

A&B is a Bureau of Reclamation project that has both surface water (Unit A) and ground water (Unit B) delivery systems. Ex. 108 at 106. The wells in the Unit B system were constructed beginning in the late 1950s. Ex. 108 at 111. The Bureau obtained an 1100 cfs Water Right No. 36-2080 on behalf of the B Unit in the 1960s. Exs. 157B, 157D. Although the B Unit was planned for over 150 wells, the Bureau declined to obtain individual water rights for each of the well systems. Instead, the Bureau sought and obtained a water right that would allow delivery of ground water from *any* well to *any* acre within the 62, 604 acre place of use. *Id.* A&B began interconnecting its well systems to maximize delivery flexibility early in the Project's operation; it continues to interconnect well systems today, reflecting that A&B has taken advantage of the flexibility under its Water Right No. 36-2080. Luke testimony, Tr. Vol. VI, pp. 1317-1319; Exs. 417, 157D.

The ESPA is a vast aquifer that today—more than 35 years after the issuance of the A&B water right license—includes 8.3 million acre feet/year of recharge as compared to 2.3 million acre feet/year of pumping. Ex. 301 at 34. Thus the issue for A&B is not now (and has never been) one of physical supply but one of adequate well capacity to allow A&B to reach its 1100 cfs water right. Put simply, if A&B has failed to construct wells that can deliver the decreed amount, it is analogous to a surface water user failing to build a headgate large enough to divert his decreed amount and arguing he is injured because sufficient water does not flow to his ditch. *See also Schodde v. Twin Falls,* 224 U.S. 107, 122 (1912) . The evidence at trial showed, A&B has never had the well capacity to delivery 1100 cfs. Tr. Vol. XI, pp. 2196 ln. 14 – 2197 ln. 3, pp. 2201 ln. 14 – 2203 ln. 18 (referring to Figure 3-20); Tr. Vol. VIII, pp. 1670 ln. 9 – 1671 ln. 3, pp.1696 ln. 3 – 1697 ln. 4 (referring in part to Ex. 319); Tr. Vol. VI, pp. 1266 ln. 14 – 1267 ln. 5; ,R. 1118. Although A&B has alleged a shortage in water supplies due to water level declines,

the evidence at trial showed only the southwest portion of Unit B has experienced water level declines, and these problems were identified by the Bureau of Reclamation and A&B personnel as early as the 1960s. Exs. 157, 157D.

II. THE DIRECTOR DID NOT ERR IN FINDING THAT THE GROUND WATER ACT APPLIES TO A&B'S WATER RIGHT NO. 36-2080

A&B's delivery call is premised on the faulty legal reasoning that it is entitled to maintenance of historic ground water levels associated with its water right no. 36-2080. The Hearing Officer rejected this argument and denied A&B's motion for declaratory ruling in May of 2008, which the Director adopted as part of his findings. R. 3322, COL 1. The Court should affirm the Director's order on this point. A&B's arguments misconstrue the legislative history of the Ground Water Act and confuse three lines of cases and should be rejected. Rather than duplicate the arguments of IGWA in this matter, Pocatello adopts the legislative history arguments in IGWA's response brief filed in this matter, and limits its arguments on Ground Water Act issues to a review of the applicable case law.

A. At common law there was a right to maintenance of water levels—but only upon a showing of shortage or injury to the water right.

Consistent with the Idaho Supreme Court's application of concepts of public interest and maximum use of surface water rights, the common law rule that ground water rights were entitled to maintenance of water levels was premised on the showing that the ground water in question was needed for beneficial uses and—importantly—that there was a shortage caused by another water user. *See, e.g., Bower v. Moorman*, 27 Idaho 162, 147 P. 496, 504 (1915).

The same principle was applied in *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933) where the Court relied on the finding that the senior's well was short of water <u>because</u> the junior appropriators had pushed their point of diversion lower than the senior's pumps. *Id.* at 1112. Contrary to A&B's arguments, the Idaho Supreme Court did not find a *per se* entitlement to

ground water levels, but, after noting that the district court found that pumping of the junior's wells lowered the water table "to such an extent that [the seniors'] pumps were dry", the Court posed the question of whether the senior was entitled to continue his means of diversion. *Id.* at 1112-13. Although the Court's decision in *Noh* affirmed that at common law a finding of injury was the trigger to shift the burden to juniors to rectify the situation, it is clear that even at common law this was not an easy burden to meet. *Bower v. Moorman*, 147 P. at 503 (reversing the district court's finding that the junior was required to take steps to replace the senior's water supply).

A&B's claims of an entitlement to historic water levels are akin to those made by the defendant Blucher in the decision of *Nampa & Meridian Irrigation Dist. v. Petrie.* 37 Idaho 45, 223 P. 531 (1923) ("*Nampa*")[1]. There, the Idaho Supreme Court rejected a *per se* entitlement to water levels and found that such an entitlement would offend the Idaho constitution. *Id.* at 532. *Nampa* involved a dispute over the proportionality of assessments in a new irrigation district. *Id.* Blucher's apparent objection to the assessment was that the new irrigation district had in some way disturbed the historic ground water levels associated with his well and, as such, had interfered with an element of his ground water right:

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

[1] Pocatello notes that this case is no longer good law for the issue of irrigation district liability. *Stephenson v. Pioneer Irrigation Dist.*, 49 Idaho 189, 288 P. 421 (1930).

Id. at 532 (emphasis added). In light of A&B's failure to prove injury to its water right, A&B's argument that it has a legal entitlement to any particular water level is similarly without legal basis, even under the common law.

B. The *Baker v. Ore-Ida* Court found that the Ground Water Act overturned the *Noh* decision.

In *Baker v. Ore-Ida Foods, Inc.* 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) ("*Baker*") the Court held that the common-law rule in *Noh* was abrogated by the Ground Water Act of 1951, as *Noh* is "inconsistent with the full economic development of our ground water resource", and that while the "Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest", the Act was "intended to eliminate the harsh doctrine of *Noh*." *Baker,* 95 Idaho at 582-84, 513 P. 2d at 634-36 (citing to Idaho Const. art. 15, § 7). A&B suggests, erroneously, that this holding is limited to ground water rights that arose after the adoption of the GWA because the Court "merely" found that the GWA was "inconsistent" with *Noh*. *See* Opening Brief 25. The Idaho Supreme Court's use of the word "inconsistent" should not be dismissed so casually - according to Black Law Dictionary, two concepts are "inconsistent" when they are

> [m]utually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance of one implies the abrogation or abandonment of the other.

Blacks Law Dictionary 907 (Rev. 4th Ed. 1968).

That the *Baker* Court interpreted the Ground Water Act to overrule *Noh* is confirmed by a review of the facts. In *Baker*, the trial court found that the aquifer at issue was being mined and that only four senior wells could pump without exceeding the rate of natural recharge, and enjoined all junior appropriators, including Ore-Ida, from pumping. Ore-Ida appealed, arguing that under the Ground Water Act Baker could only prevent Ore-Ida from pumping by showing

that the junior's pumping has exceeded reasonable pumping levels. *Id.* at 578, 630. The Court agreed with Ore-Ida's parsing of section 226 of the Act and found that a senior, including senior rights with pre-GWA water rights[2], are not entitled to maintenance of historic pumping levels:

> A senior appropriator is only entitled to be protected to the extent of the 'reasonable ground water pumping levels' as established by the IDWA. I.C. s. 42-226. A senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development.

Id. at 584, 636.

The Court went on:

> our agreement [with Ore-Ida's parsing of section 226] avails appellants nothing because the trial court found the aquifer's water supply inadequate to meet the needs of all appropriators.

Id. According to the Court, a senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion and, further, the he may have to accept a modification of his right in order to achieve the goal of "full economic development," to wit:

> 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 c[l]ash 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....

Id.

Baker is the only Idaho Supreme Court case interpreting Section 226 of the GWA in the context of a dispute involving water rights senior to the Act's enactment. A&B's arguments are

[2] In footnote 1 of the *Ore-Ida* decision, the Court notes that some of the senior rights at issue in that matter were pre-GWA rights, so it had before it rights like A&B's Water Right No. 36-2080 with priority dates prior to 1951, the year of the GWA. *Id.* at 578, 630 n.1.

incorrect, and the Director's finding that the Ground Water Act would apply if A&B had shown injury to its water rights should be affirmed. *See, e.g.*, R. 1150, ¶ 38; R. 3113.

C. A&B's arguments regarding the Ground Water Act disregard sections 227 and 229 of the Act and the actual holding of *Parker v. Wallentine.* Irrigation wells are not among the wells exempted from the GWA under section 227, and A&B's arguments to the contrary are not well taken.

Parker v. Wallentine, 103 Idaho 506, 650 P.2d 648 (1982) ("*Parker*") involved a senior domestic ground water right holder that claimed injury from junior well pumping. The Court's decision involved examination of sections 227 and 229 of the Ground Water Act to determine the applicability of the Act to Parker's rights. The Court relied on the legislature's express exclusion of domestic wells under Idaho Code section 227 from regulation under the Ground Water Act.[3] Absent this express legislative exemption, section 229 of the Ground Water Act controls, and expressly applies the Act's provisions to *all* water rights, whenever acquired, unless expressly excepted by the legislature:

> the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act.

I.C. § 42-229.

Because of the legislative exemption found in section 227, the *Parker* Court determined that the senior domestic right holder was entitled to maintenance of historic ground water levels, relying on the following findings: (1) domestic wells are expressly exempted from all provisions of the GWA, and thus (2) the only provision that domestic wells are subject to are those found in amended section 227, and they are excluded from the reasonable pumping levels provision in

[3] In 1978, the legislature amended section 227 to require domestic wells appropriate their water via the permit system. Wells used for drainage or recovery purposes are also expressly exempt from the Ground Water Act pursuant to Idaho Code section 42-228.

Section 226. *Id.* at 510-11, 652-53. As such, the *Parker* Court distinguished its ruling from that in *Baker v. Ore-Ida.*

Importantly, in *Parker* the Court's determination regarding ground water levels was once again preceded by a finding of injury to the senior domestic water right, another important difference from the case at hand.[4] Further, the Court did not parse or otherwise rely on the language in section 226 that applies to A&B's rights in this matter. The holding of *Parker* is limited to domestic water rights, or other water rights that are expressly excluded from application of the Ground Water Act[5] and the case is therefore inapposite. Simply put, irrigation rights such as A&B's are not among the types of rights expressly excluded from regulation under the Act.

A&B's arguments rely on an extended quote from the *Parker* decision, and A&B suggests that rather than finding that domestic wells were expressly excluded under section 229, the Court found that *all* pre-1951 ground water rights were exempt, and that the *Noh* decision was consistent with concepts of "maximum development" of ground water resources in Idaho. Opening Brief 15. This is an erroneous reading of *Parker,* and the quote is taken out of context. The Court's reference to "maximum development" is made in the context of determining the remedy for Parker–the senior domestic water right holder whose rights were expressly exempted from the Act and thus was entitled to historic water levels. While one remedy would have been an injunction against any future junior well-pumping, the Court instead found that when a junior appropriator is found to have caused injury to a senior user exempt from the Ground Water Act, the junior appropriator will not be permanently enjoined from doing so, but instead may continue

[4] Evidence at trial revealed that when Wallentine ran a pump test for adequate water supply from his well at 4:10 p.m., Parker discovered at 4:20 p.m. that his well had ceased pumping. *Parker*, 650 P.2d at 649.
[5] As such, the holding of *Noh* applied in Parker's situation because Parker's well was not regulated by the GWA. *Id.* at 654 fn. 11.

to pump provided he compensates the senior for that injury because both parties are supplied water, the goal of "maximum development is served.[6]

D. *The Ore-Ida* decision requires that the Ground Water Act applies to A&B's water right, and the *Musser* decision is limited to its facts, which were unrelated to pre-1951 ground water rights.

Simply put, unless the ground water right involved is a domestic well experiencing material injury, or a well used for drainage or recovery purposes, both of which are expressly exempt under Sections 227 and 228 of the Ground Water Act, *Baker* controls. As the Hearing Officer noted, "Justice Shepard, who wrote the opinion in Baker, as well as Justices Donaldson, McFadden, and Chief Justice Bakes who all concurred in [*Baker*], also concurred in the *Parker* decision without commenting on any perceived inconsistency between the decisions. *Parker*, therefore, cannot be read to undercut the conclusions stated in *Baker*." R. 1634.

Similarly, *Musser v. Higgensen* is limited to its facts. 125 Idaho 392, 871 P.2d 809 (1994). *See also* R. 1635-36; *cf.* Opening Brief 16-17. In *Musser*, the Idaho Supreme Court held that the Director of the IDWR has a duty to distribute surface and ground water conjunctively. *Musser* was not a case that interpreted and applied the Ground Water Act. The Court indicated no intent to overrule the decision announced in *Ore-Ida*, did not interpret the language of section 229, and did not address the issue presented in this case: whether section 226 applies to pre-enactment ground water rights. The Court only mentions Section 226 in passing, when it rejected the Director's reliance on an IDWR policy that "a decision has to be made in the public interest as to whether those who are impacted by ground water development are unreasonably blocking full use of the resource," and that because section 226 recognizes the validity of pre

[6] Indeed, the two sentences that precede the quote that A&B relies upon makes this point clear:
"In essence, the Court in *Bower* held that a perpetual injunction should not be granted if, by changing the prior appropriator's method or means of diversion, both parties can be supplied with water. The right of a subsequent water user to divert unappropriated waters was similarly alluded to in *Noh,* but as in *Bower,* that right was conditioned upon the subsequent appropriator's payment of damages." *Id.* at 514, 656.

GWA water rights, the Director had no basis to decline to deliver Musser's April 1, 1892 *surface* water right. *Id.* at 813, 396.

The Hearing Officer, in ruling on A&B's motion for declaratory ruling, explained why the broad language found in dicta in the *Musser* decision cannot be accepted as a final resolution of the issue before the court in this matter:

> The most logical conclusion in the context of the issues presented in the case is that the Court's comment can only be read to establish that rights acquired prior to adoption of the Ground Water Act were acknowledged to be valid with whatever benefits their priority dates might confer. The issue before the Court was a claimed failure of departmental action, not analysis of the effect of the Ground Water Act on rights established before enactment of the Act.

R. 1635. This interpretation is consistent with the Idaho Supreme Court's own framing of the issues presented by *Musser* opinion. *See Musser*, 125 Idaho at 393, 871 P.2d at 810 (identifying the only water issue as "whether the trial court properly issued a write of mandate ordering the director of the Idaho department of water resources immediately comply with Idaho Code Section 42-602 and distribute water in accordance").

Hearing Officer Schroeder and the Director properly found that the Ground Water Act of 1951 applies to pre-Act ground water rights. The Court should be aware that District Court Judge McKee, Fourth Judicial District, reached the same conclusion in a recent case.[7] There, Judge McKee was faced with the same arguments that are before this Court, and held that section 226 simply recognizes the priority of a pre-Act water right and does not except such rights from the Act's application:

> While the statute provides that rights acquired prior to the enactment of the statute are to be recognized, it also provides an overriding policy of requiring that even those prior-acquired and first-in-time water resources are to be devoted to beneficial uses and in reasonable amounts, and it does impose upon the director the duty of administration and enforcement. I conclude that the director's

[7] *Moyle v. Idaho Dep't of Water Resources*, Case No. CV OT 08 014978, Memorandum Decision (4th Jud. Dist. July 13, 2009).

> determinations in this regard are consistent with the historical, constitutional and statutory mandates expressed in *Baker* v. *Ore-Ida Foods, Inc., supra.*

Memorandum Decision at 8-9. While Judge McKee's decision is certainly not binding on the Court's decision in this matter, it provides persuasive authority in support of affirming the Director and Hearing Officer Schroeder's decision that the Ground Water Act applies to pre-Act rights.

III. DIRECTOR PROPERLY APPLIED PRESUMPTIONS AND BURDENS IN COMPLIANCE WITH THE CONJUNCTIVE MANAGEMENT RULES, IDAHO CONSTITUTION AND IDAHO SUPREME COURT CASE LAW

A&B's delivery call presents the first case on appeal where the Department declined to find that the senior water right had suffered material injury. R. 1149-50. For example, in the Surface Water Coalition and Thousand Springs delivery calls, the Director found injury to the seniors, although the seniors contested the quantity of injury and argued that they were entitled to the amounts of water on the face of their decrees.[8] A&B takes this argument a step further—it demands the amount of water on the face of the decree without even the administrative finding of injury. Here, A&B appears to suggest an approach where the IDWR would stop exercising its statutory obligations to administer water rights consistent with Idaho law and instead wait to be told when a senior is short and by how much, and then curtail all juniors accordingly. Put simply, A&B's contention is that the only relevant action is the filing of an affidavit alleging injury by a senior.

As the Hearing Officer found:

> The language of *AFRD#2* is that after "the initial determination" [made by the Director] of material injury is made the junior has the burden of establishing a defense to the senior's call, not that the allegation of material injury constitutes that determination. The allegation of material injury under oath invoked the Director's authority and responsibility to develop the facts upon which a well-

[8] An argument the senior water rights have made repeatedly since before the *AFRD#2* decision and one that has yet to prevail in any administrative matter or in any court in Idaho.

> informed decision could be made as to the existence of material injury and the consequences if there were material injury.

R. 3085. The Director's Final Order (which adopted the Hearing Officer's finding on this matter) should be affirmed both as a matter of law and as a matter of practicality: because the legal standard for initiating a delivery call is a verified affidavit by the senior, unless the Department's statutory obligation to investigate a delivery call is recognized, a senior ground water user willing to sign an affidavit on the ground that it believes it has suffered a shortage could literally cause the curtailment of the entire ESPA in the course of an afternoon. This practical result, coupled with the Department's statutory obligations to administer water rights—rather than merely shut-and-fasten headgates—requires affirmation of the Director's Order on this point.

Before considering the merits of A&B's arguments that the Director improperly required A&B to "re-prove or re-adjudicate" its water right to 0.75 miner's inches acre, that the Final Order established a "failure of the project" and that the Final Order established a "minimum amount" required standard, it is important to note what A&B's *evidence* failed to demonstrate at the hearing. *See generally* Opening Brief 11, 32, 37. Simply put, testimony by A&B's experts and lay witnesses was wholly insufficient to establish that A&B has ever required 0.88 miner's inches/acre, or even that A&B has ever delivered 0.88 miner's inches/acre. To wit:

- In the entire history of the operations of the B Unit, A&B has never had the well capacity to deliver 1100 cfs (or 0.88 miner's inches/acre) during the irrigation season. Koreny testimony, Tr. Vol. XI, pp. 2196 ln. 14 – 2197 ln. 3, pp. 2201 ln. 14 – 2203 ln. 18 (referring to Figure 3-20); Sullivan testimony, Tr. Vol. VIII, pp. 1670 ln. 9 – 1671 ln. 3, pp. 1696 ln. 3 – 1697 ln. 4 (referring in part to Exhibit 319); Luke testimony, Tr. Vol. VI, pp. 1266 ln. 14 – 1267 ln. 5. *See also* R. 1118 (Director found that well capacities in

1963 were only 1007 cfs); R. 3108 (since at least 1963 there was no time at which all well systems could produce 0.88 miners inches per acre).

- Given that the A&B well capacities did not match the decreed amount even in 1963, the question is whether the available water supply (given A&B's well capacities) is sufficient to satisfy crop demands.[9] The evidence at trial showed that 0.75 miner's inches/acre was adequate. This was confirmed by the analysis of the experts (*see* Exs. 155, 155A, 366; Luke testimony, Tr. Vol. VI, pp. 1196-1203) as well as the farmer witnesses.[10] This testimony was relied upon by the Hearing Officer in the Recommendations. R. 3106-07.
- Finally, as the evidence at trial demonstrated, even if A&B wanted to deliver more water to its farmers, it could have done so. Brockway testimony, Tr. Vol. XI, pp. 2260 ln. 22 – 2262 ln. 4.

A. The Director properly found that A&B had an adequate water supply because it had 0.75 miner's inches/acre, and thus was not suffering material injury.

The Director's January 29 Order found that A&B had an adequate water supply because its wells could deliver at least 0.75 miner's inches/acre. R. 1119. At the hearing, A&B argued that it was injured if its deliveries dropped below 0.88 miner's inches/acre; however, as the

[9] Although it may seem like a fine technical point, a short review of the applicable concepts is important here. The B Unit maintains annual pumping reports (*see, e.g.*, Exs. 477, 562) which report "low flow discharge" data and "high flow discharge" data. The "low flow" data (paradoxically) is the *highest* reported discharge from each well during the peak season; the "high flow" data is the highest reported discharge from each well at times other than the peak irrigation season. According to testimony at trial, the "low flow" data is most germane to the question of well capacities because it demonstrates the system capacity during the time of peak irrigation demands. Luke testimony, Tr. Vol. VI, pp. 1284 ln. 23 – 1285 ln. 3, p. 1287 lns. 7-12, 18-23; Brockway testimony, Vol. XI, p. 2299 lns. 8-15.

[10] *See* Temple testimony, Tr. Vol. IV, p. 664 lns. 1-4; Deeg testimony, Tr. Vol. V, pp. 1067 ln. 9 – 1068 ln. 11, pp. 1081 ln. 19 – 1082 ln. 11; Mohlman testimony, Tr. Vol. V, p. 1018 lns. 8-21, p. 1031 lns. 5–18, pp. 1031 ln. 23 – 1032 ln. 1, p. 1035 lns. 1-8; Maughan testimony, Tr. Vol. X, pp. 2136 ln. 22 – 2137 ln. 12, pp. 2137 ln. 13 – 2138 ln. 2; Adams testimony, Tr. Vol. V, pp. 877 ln. 20 – 879 ln. 10, pp. 905 ln. 23 – 907 ln.5, pp. 919 ln. 24 – 920 ln. 11, p. 938 lns. 6-16; Eames testimony, Vol. IV, p. 812 lns. 7-21, p. 814 lns. 5-19, p. 827 lns. 3-23, p. 829 lns. 17-22, p. 835 lns. 14-25, pp. 837 ln. 18 – 838 ln. 2, p. 854 lns. 3-12; Kostka testimony, Tr. Vol. V, p. 950 lns. 7-19, pp. 974 ln. 10 – 975 ln. 12, pp. 979 ln. 1 – 980 ln. 2, p. 990 lns. 6-8, p. 993 ln. 6-25; Stevenson testimony, Tr. Vol. X, pp. 2084 ln. 6 – 2085 ln. 14.

Hearing Officer found in the Recommendations, A&B failed to provide evidence of injury to its beneficial uses from deliveries below 0.88 miner's inches/acre.[11] As a matter of law, A&B cannot simply rest on its decreed amount as a basis for claiming injury. As a matter of fact, the substantial evidence in the record shows that 0.75 miner's inches/acre was more than adequate to satisfy A&B's beneficial uses.

As demonstrated by the evidence in the record, A&B has an extensive well rectification program which is employed to maintain the wells and delivery systems under the B Unit. Under the rectification program, A&B considers rectifying a well when the delivery rate drops to 0.75 miner's inches/acre. Based on testimony of Mr. Temple and others associated with the A&B District, the Hearing Officer concluded:

> The Director's determination [that .75 miner's inches/acre is adequate] is supported by substantial evidence. Several factors support the Director's determination. It is consistent with the Motion to Proceed which indicates 0.75 to be a minimum need. A minimum is not a desirable amount, but it is adequate. <u>The 0.75 is consistent with the policy of rectification adopted by A&B. It is unlikely rectification would be prompted at a level below the amount necessary for crop production</u>. More is sought and more is better, but 0.75 meets crop needs. There is persuasive evidence that 0.75 is above the amount nearby irrigators with similar needs consider adequate.

R. 3110 (emphasis added).

A&B's argument on this point simply recycles the arguments that "depletion equals injury", arguments made repeatedly by the various senior water rights engaged in the current flurry of delivery calls in Idaho, and argument uniformly rejected by decision-makers in all proceedings thus far, including the Gooding County District Court at the initial stages of the *AFRD#2* case. There, the Court noted that the Director had concluded that:

[11] As the record shows, A&B repeatedly characterized injury to its water right as deliveries that dropped below 0.75 miner's inches/acre and only at trial did A&B alter its theory to suggest that 0.88 miner's inches/acre (or 1100 cfs divided pro rata amongst the 177 well systems) was injury. *See, e.g.*, R. 11-14; R. 830-41; Ex. 210.

> Because the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury.... Contrary to the assertion of [senior users], depletion does not equate to material injury. Material injury is a highly fact specific inquiry that must be determined in accordance with IDAPA conjunctive management rule 42. [Senior users] ha[ve] no legal basis to seek the future curtailment of junior priority ground water rights based on injury alleged by [senior users] to have occurred in prior years.

AFRD#2, 143 Idaho at 868, 154 P.3d at 439. The Court agreed with the Director and went on to reject the argument of senior users, including A&B, that they are *per se* entitled to the amount of water found in the their partial decrees, explaining that the Director's consideration of beneficial use in "responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute re-adjudication... there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed." *Id.* at 876-78, 447-49.

While A&B is authorized to divert its decreed amount (*see AFRD#2*), it does not have an entitlement to request curtailment for that amount unless it can show that the decreed amount is required for beneficial uses. R. 3108; R. 1142. A&B (and the other members of the Surface Water Coalition who brought the *AFRD#2* challenge) declined to bring an appeal on this point in *AFRD#2*, and it remains the law. *AFRD#2,* 143 Idaho at 870, 154 P.3d at 441 (noting that senior water users did not appeal the district court's rejection of the senior water user's "position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis.").

As a matter of law, it is not enough for A&B to simply complain that it is not able to deliver the amount on the face of its decree for Water Right No. 36-2080; it must also show that it requires the entire decreed amount. As a matter of fact, the substantial evidence in the case showed that the Director properly found that A&B requires only 0.75 miner's inches/acre and that while A&B might prefer to have greater volumes of water, its decreed amount was not

required to satisfy crop demands. As the Hearing Officer found, A&B is authorized to divert up to 0.88 miner's inches per acre if:

> its delivery system can produce the higher rate and that amount can be applied to a beneficial use. The question of whether A&B suffers material injury as a result of junior ground water use if it cannot produce the higher rate of delivery is a separate question.

R. 3102.

A&B relies in part on testimony from Mr. Eames and Mr. Temple that A&B farmers would prefer to have 0.88 miner's inches/acre. However the record is replete with testimony that 0.75 inches/acre is adequate. *See*, citations *supra* footnote 10 to testimony of Mssrs. Temple, Deeg, Mohlman, Maughan, Adams and Eames. While it is no surprise that farmers would prefer to have more water, making the management of irrigation easier, that isn't a legal basis to curtail juniors. In fact, crop yields have increased over the historic period, which supports the Director's finding that 0.75 miner's inches/acre is adequate. Exs. 357, 355A, 358.

A&B's representation that *Cottonwood Water & Light, Co. Ltd. v. St. Michael's Monastery* holds that a water user is entitled per se to its decreed rate of flow is without support. 29 Idaho 761, 162 P. 242 (1916); Opening Brief 27, 32. There, the trial court found that the senior water user, St. Michael's Monastery (which did not have a decree for its water right) had a prior right to that of plaintiffs, but nevertheless ordered that plaintiff be allowed the flows from the subject springs during certain hours of the day from July to October. *Id.* at 244. The Idaho Supreme Court found that the trial court erred in so ordering and that there was no basis to force defendants to share their water right. *Id.* This is not what the Director found in A&B's delivery call, and is inapposite to the matter before the Court.

A&B's reliance on *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969) is similarly misplaced: there, seniors had established beneficial use to the subject water right during the

disputed period of use (winter usage), and the trial court had found a causal connection between junior pumping and injury to senior water users. In *Stevenson*, the agency found and trial court affirmed that junior ground water users were injuring senior springs appropriators to the point that ground water pumping was causing Warm Springs to cease from flowing entirely. *Id.* at 5, 820. Junior ground water users argued that as a condition of continued pumping they should not be forced to replace water in the winter months to senior spring users, as they contested the senior's need for water during those months. *Id.* at 12-13, 827-28. The Court, noting that the senior spring users had established with substantial evidence beneficial use of the subject water right during the winter months, such winter use must be protected. *Id.* Because A&B did not establish injury to its water right, and because it did not show beneficial use of the entirety of its decreed amount, *Stevenson* should not be considered analogous.

The cases relied upon by A&B are distinguishable and fundamentally irrelevant to the case before the Court. Most importantly, these cases do not undermine the Supreme Court's decision in *AFRD#2* that establishes the standard that injury accrues to a water right only if the amount available is insufficient to satisfy beneficial uses.

B. Neither the Director nor the Hearing Officer has created a "failure of the project" standard.

A&B's suggestion that the Director's Final Order which analyzed the injury to Water Right No. 36-2080 on a project-wide basis creates a "new injury standard" under Idaho law is a straw man that should be rejected. The term "failure of the project" is used in the context of the Hearing Officer's Recommendations (*see* R. 3092-97) discussing the nature and character of A&B's water right. After concluding that the Director properly analyzed the question of A&B's injury on a project-wide basis, the Hearing Officer went on to qualify the Director's consideration by finding that:

> Consideration of the system as whole must also account for the effect upon individual systems when the number of short systems would constitute a failure of the project.

R. 3095. However, the finding that a project-wide analysis was proper is driven by the terms of the A&B decree, which were terms demanded by the Bureau of Reclamation and that in the past A&B has relied upon to operate its project with the greatest flexibility. Ex. 157D. Regarding the A&B decree, the Hearing Officer found that: the license and decree did not limit the place of use of Water Right No. 36-2080 (R. 3094); A&B has the opportunity under its decree to drill 188 wells, but only 177 wells are currently in place (R. 3093); and A&B's decree allows it to interconnect its well systems to the extent necessary (R. 3095). *See also* Ex. 157B.

1. Lay and expert testimony does not support a finding of injury on a well system by well-system basis.

Although A&B insists that its decreed amount must be delivered, A&B objects to analyzing the injury claims by reference to its decree. A&B's arguments are limited to arguments as a matter of law because there are no facts in the record to support A&B's position. By its terms the appurtenance provisions of the decree must control whether the Director analyzes claims of injury on a project wide basis or a well-system by well-system basis.

A&B failed to provide testimony or other evidence of injury on a well-system by well-system basis. A&B's farmers testified that they wished to have had more water, but none pointed to water shortages that interfered with crop yields. See *supra* footnote 10. Also, A&B's consultants presented a technical analysis which purported to show that the system was short of water on a well-system by well-system basis—but in fact the analysis relied on project-wide data for inputs. *See, e.g.*, Ex. 200, Vol. 3, Appendix M - Irrigation Diversion Requirement Graphs for Unit B Well System. This lead to certain logical disconnects, like conclusions by Dr. Brockway that a certain well system was short of water; however, when the owner of the lands served by

the well, Mr. Orlo Maughan (a witness for IGWA, Maughan testimony, Tr. Vol. X, pp. 2117-2153) was questioned about the apparent shortage shown on Dr. Brockway's graph, he testified that he had grown wheat that season and hadn't requested any water deliveries during July and August. Maughan testimony, Tr. Vol. X, pp. 2149 ln. 11 – 2151 ln. 8. There was no shortage—in fact there was no demand for water because of the crop choice. Dr. Brockway admitted that these logical disconnects made his analysis unreliable and that the calculated shortages were likely to be erroneous. Brockway testimony, Tr. Vol XI, p. 2264 lns. 14-19.

2. Although A&B has not established an entitlement to a particular water level, in any event the record does not support a finding that A&B has suffered shortages based on water level declines.

In arguing against the straw man, A&B asserts that water level declines have lead to shortages in the B Unit. A&B, however, has not established an entitlement to any particular water levels because it cannot show a shortage of water. *See supra* Section I, discussion regarding the Ground Water Act. As importantly, A&B's arguments related to ground water level declines are not supported by the evidence in the record.

According to the testimony of Dr. Ralston, he concluded that water levels have declined in the B Unit as a result of conversions, drought, and ground water pumping. Ralston testimony, Tr. Vol. I, pp. 87 ln. 16 – 89 ln. 6. Exhibit 356 showed that the production from A&B farmer lay witnesses' wells had remained relatively constant despite changes in the water table. *See also*, R. 1114, Figure 3. Further, Dr. Ralston's testimony established that there were no declines in diversions as a result of water level declines, with the exception of three wells he examined in the southwestern portion of the District. Ralston testimony, Tr. Vol. I. pp. 194 ln. 20 – 195 ln. 14. As described in the introduction, the southwestern portion of the B Unit is interbedded with sedimentary layers which reduce the flow contact zones and, accordingly, well production. Ralston testimony, Tr. Vol. I, p. 78 lns. 6-21. This problem was well known prior to the

construction of the District's wells. Tr. Vol. I, p. 79 lns. 1-14. A&B's consultant, Mr. Koreny, was unable to support his assertion that water level declines had lead to declines in diversion from B Unit wells from 0.89 miner's inches/acre in 1966 to the present. Koreny testimony, Tr. Vol. XI, pp. 2207 ln. 22 – 2208 ln. 12.[12]

3. The Director's authority is constrained by Idaho law and he is not authorized to order juniors to pay for deepening A&B's wells in order to facilitate greater volumes of water unless and until A&B can show that it is injured.

Part and parcel of A&B's injury claim is its claim for reimbursement for costs to maintain its well system. *See, e.g.*, Temple testimony, Tr. Vol. IV, pp. 757 ln. 5 – 758 ln. 6; R. 835-36. However, monetary compensation is not available to A&B, as the Director found. Although Rule 37.03.11.42 ("Rule 42") of the Idaho Administrative Code, Rules of Conjunctive Management of Surface and Ground Water Resources ("CMR") authorizes the Director to consider "the effort or expense" of a senior to deliver water, the scope of that consideration must be consistent with Idaho law. *See AFRD#2*, 143 Idaho at 444, 154 P.3d at 873 (the CMR must be interpreted by reference to Idaho law and must be read to incorporate Idaho law to the extent it is not clear from the face of the rules). All water users incur some effort or expense to deliver water, so this cannot be a wholesale requirement to evaluate costs in every delivery call. Further, if Idaho law forecloses evaluation of a reasonable pumping level unless and until a shortage to the senior is demonstrated, then there is little reason to consider the senior's "effort or expense" to deliver water until it is determined whether pumping levels are reasonable.

In addition, Rule 42 requires the Director to consider whether the senior is required to expend some "effort or expense" to obtain his water right from an alternate source or alternate

[12] *See also* Koreny testimony, Tr. Vol. XI, pp. 2207 ln. 22 – 2208 ln. 12; Temple testimony, Tr. Vol. IV, pp. 679 ln. 3 – 680 ln. 11; Ralston testimony, Tr. Vol. I, pp. 188 ln. 2 – 189 ln. 7, pp. 189 ln. 25 – 190 ln. 6.

well. CMR 42.01.h. As a threshold matter, the Director must also consider Rule 40 which requires a determination of whether the petitioner making the delivery call:

> is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground water as described in Rule 42.

CMR 40.03.

Given that all of these provisions are included in the Rules for Conjunctive Management of Surface and Ground Water Resources, Rule 42.01.b should be narrowly construed.[13] *State v. Hensley,* 145 Idaho 852, 855, 187 P.3d 1227, 1230 (2008) ("It is a fundamental law of statutory construction that statutes that are in *pari materia* are to be construed together, to the end that the legislative intent will be given effect") (citations omitted); *Posey v. State Dept. of Health and Welfare*, 114 Idaho 449, 450, 757 P.2d 712, 713 (Idaho App. 1988) (noting that principles of statutory construction apply to rules and regulations promulgated by administrative agencies).

A&B failed to show through its technical analysis or lay testimony injury to the water right on a well-system by well-system basis, but even if it could, the Director's project-wide analysis was the proper approach given the appurtenance terms of the decree. Like A&B's arguments made and discussed above regarding the Director's alleged "re-adjudication" of its water right to 0.75 miner's inches/acre (addressed above) and the "minimum amount needed" arguments (addressed in the next section of this brief), these are all phrases that simply restate A&B's arguments that the Director must deliver A&B's decreed water rights on demand, without examining whether A&B's existing physical supply is adequate to satisfy the decreed

[13] Although Rule 42.01.h. seems to speak only to senior surface water rights, there is no constitutional or legal basis to so limit the rule. If a senior surface water right can be charged with expending effort to obtain water supplies from an alternate source or through supplemental wells, there is no basis to suggest that senior ground water users should not also be charged with such an obligation. In any event, the Director lists Rule 42.01.h. as a basis for his decision-making and thus must understand it to be within his discretion to apply. R. 1146-47.

beneficial uses. As described elsewhere in the brief, it is black letter law in Idaho that the Director must do more than "shut and fasten" headgates in answering a delivery call.

C. "Minimum amount needed" does not create a new standard, but merely means that A&B may call for the amount of water that is needed to satisfy its beneficial uses.

A&B is entitled to call for the "minimum amount needed" to meet crop requirements; another way to frame this is that A&B may call for the amount of water required to satisfy beneficial uses. A&B suggests that for purposes of determining how much water it may demand, the decree is the standard (never mind that it would like to avoid the terms of the decree for purposes of the injury analysis, as described above) because it had to make a showing of beneficial use in order to obtain the license and decree. This—again—is merely another way of stating the "shut and fasten" administration standard, and demanding delivery of the amount on the face of the decree. As has been described elsewhere in this brief, A&B's arguments simply are not consistent with Idaho law.

A&B erroneously relies on *Caldwell v. Twin Falls Salmon River Land & Water Company* as the standard for Idaho water rights administration. 225 F. 584, 588–89 (D. Id. 1915) ("*Caldwell*"). A&B argues that under *Caldwell,* the Department is required to ensure delivery of the decreed amount of the water right. Opening Brief 39. However, *Caldwell* was a dispute about the terms of water contracts, not a water administration case. *Id.* at 588-89. Further, the Court in *Caldwell* concluded that *actual use* of a water right is limited by "reasonable need." *See id.* at 595. A&B's reliance on a quote from *Caldwell* about *appropriation* is irrelevant in the case before the court, which is about *administration.* It is undisputed that A&B may divert its entire decreed amount when available; but it is also the law that A&B may not demand curtailment for its entire decreed amount unless it can show it requires that amount for beneficial use.

The Hearing Officer properly considered whether A&B's exercise of its water rights is reasonable. R. 3108. The Director's order is consistent with IDAPA 37.03.11.40.03, which promotes reasonable use. Interestingly, in citing *Caldwell*, A&B is pressing the same issue that it already lost before the Idaho Supreme Court. A&B, as an appellee in *AFRD#2*, cited *Caldwell* for the proposition that reasonable use is determined by a decreed water right and cannot be considered in an administrative call. R. 3200-13. The Idaho Supreme Court soundly rejected A&B's argument. "[R]easonableness is not an element of a water right; thus, evaluation of whether a diversion is reasonable in the administration context should not be deemed a re-adjudication." *AFRD#2*, 143 Idaho at 877, 154 P.3d at 448.

A&B also misstates the case of *Arkoosh v. Big Wood Canal Company*, 48 Idaho 383, 283 P. 522 (1929) ("*Arkoosh*"); Opening Brief 39. There, Arkoosh and Big Wood Canal Company disagreed whether Arkoosh could unilaterally determine the beginning and end of the irrigation season. After noting (as cited by A&B in its Opening Brief on page 39) that a water user is best positioned to know when to ask for water for beneficial use under a water right, the Idaho Supreme Court reversed the lower court's injunction requiring Big Wood Canal Company to bypass water to Arkoosh upon any demand. Instead, the Court held:

> Our present statutes give the commissioner of reclamation the "immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom." C. S. § 5606. <u>We are of the opinion that the matter should be determined by that department</u>.

Id. at 525-26 (emphasis added).

Thus, *Arkoosh* does not stand for the proposition that A&B is entitled to curtailment of juniors to produce its decreed flow rate any time A&B demands water. *Cf.* Opening Brief 39. Instead, as recognized by the Court in *Arkoosh*, curtailment is a function of water administration vested in the Idaho Department of Water Resources. Here, the Director properly concluded that

A&B could not reasonably require higher water levels in the ESPA because its beneficial uses are adequately supplied under existing conditions. This is not micro-management of A&B's operations, *cf.* Opening Brief 38: it is a determination that A&B is not suffering material injury because it has enough water to accomplish its purposes.

IV. THE RECORD REFLECTS THAT THE DIRECTOR PROPERLY CONCLUDED THAT A SYSTEM-WIDE (AND NOT A WELL-BY-WELL) ANALYSIS WAS APPROPRIATE

A&B's testimony and evidence at hearing regarding irrigation requirements and shortage hinged on the erroneous legal argument that the Director should have ignored the terms of A&B's partial decree and evaluated injury based on a well-by-well basis. Essentially, A&B asked the Director to find injury to a particular well system if that well system does not pump 0.75 miner's inches/acre.

As explained above, the appurtenance provisions of A&B's license and partial decree for Water Right No. 36-2080 create maximum flexibility in A&B to arrange its delivery system to 62,604 acre-place of use in a way that satisfies its water users. Pursuant to the partial decree all ground water pumped is appurtenant to all acres in the place of use. As the evidence at hearing established, the Bureau of Reclamation bargained for those terms and conditions in the partial decree in order to maximize the flexibility of the project. Exs. 157B, 157D. Indeed, as established at hearing, A&B has taken advantage of this flexibility insofar as it interconnected some of its well systems and drilled several supplemental wells to serve unreliable well systems. However, A&B asked the Director to ignore this built-in flexibility in its water right and instead treat its system as if it has separate and distinct water rights for each of its approximately 135 well systems.

The Director properly rejected A&B's well-by-well system analysis, consistent with the CMR. Rule 40 which requires the Director to examine the operations of the petitioner to see

whether the petitioner is "diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and groundwater as described in Rule 42." CMR Rule 40.03. A&B's decree promotes the District's ability to be flexible in its water delivery system and the decisions it makes about that system: the Director properly concluded that A&B, as a matter of "reasonable use", would rely on these provisions to provide water supplies from systems that have sufficient water to those that do not.

The Director properly concluded that A&B cannot have it both ways—while it has taken advantage of the flexibility it obtained through its partial decree for a single water right, it cannot simultaneously assert a right to call for its entire water right at 135 separate points of diversion. The Director clearly has discretion to evaluate A&B's delivery call on a system-wide basis. A&B's analysis, should a shortage have been found, would have penalized juniors and rewarded A&B for its failure to maximize its system's flexibility.

V. THE DIRECTOR DID NOT REQUIRE A&B TO INTERCONNECT THEIR WELLS BUT INSTEAD PROPERLY EXAMINED A&B'S REASONABLE USE OF THE WATER IN LIGHT OF THE APPURTENANCE PROVISIONS FOUND IN THE LICENSE

Contrary to the assertions of A&B, the Hearing Officer did not find that A&B must interconnect its 177 wells before it may seek administration of its water right. *Cf.* Opening Brief 44. On the issue of interconnections, the Hearing Officer concluded that

> Considering that the project was developed, licensed, and partially decreed as system of separate wells with multiple points of diversion, it is <u>not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury</u>.

R. 3096 (emphasis added). Therefore, the Hearing Officer Recommendations contain language directly contrary to A&B's assertions on the issue of interconnection. However, the Recommendations went on to find that A&B has a duty to take steps to maximize use of its water right:

> However, it is equally clear that the licensing requested by the Bureau of Reclamation envisioned flexibility in moving water from one location to another. Consequently, there is an obligation of A&B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from juniors.

Id. (emphasis added). The Hearing Officer's conclusions are consistent with Idaho law: a single water right may not command the entire natural body of water to effect a diversion of a water right. In the context of the constitutional and statutory concepts of "reasonable use" and the "public interest", the analysis of Justice Schroeder properly took into consideration A&B's ability under its partial decree to interconnect or otherwise obtain water four areas of the project it considers water short. *Schodde v. Twin Falls Land and Water Co.,* 224 U.S. 107, 125 (1912); Idaho Const. art. XV, § 5; I.C. §§ 41-101, -226; CMR Rule 40.03. Justice Schroeder properly concluded that A&B is in the position of the owner of the water wheel in *Schodde v. Twin Falls Land and Water Company*. A&B should not be allowed to curtail other uses of the natural water body in order to make use of its existing diversion facilities: under Idaho law, which incorporates the concepts of public interest and reasonable use, A&B has an obligation to go after available ground water rather than demand curtailment.

VI. A&B HAS NOT ESTABLISHED AN ENTITLEMENT TO ANY PARTICULAR PUMPING LEVEL, AND THUS THERE WAS NO BASIS FOR THE DIRECTOR TO ESTABLISH REASONABLE PUMPING LEVELS

The Court in *AFRD#2* made the point concisely: the Director's authority is circumscribed by Idaho constitutional provisions and case law. 143 Idaho at 872, 154 P.3d at 443. Thus, the trigger for the Director to establish "reasonable pumping levels" under Idaho Code section 42-226, for all or some portion of the ESPA, in response to A&B's delivery call is similarly circumscribed by Idaho law, including the question of whether A&B has a legal entitlement to water levels. To understand that entitlement, the analysis begins first with the nature of entitlement to water levels (if any) at common law, and then moves on to examine what remains

of that entitlement after modification of the common law by the Ground Water Act. *Baker*, 95 Idaho at 583, 513 P.2d at 635; R. 1633-36. At common law, the elements of A&B's water right did not include a right to ground water levels. This is clear from the result in *Nampa-Meridian*, which rejected defendant irrigation district-member Blucher's claim of injury from changes in ground water levels. 223 P. at 532-33. If, prior to the adoption of the Ground Water Act, ground water rights had included the entitlement to specific water levels an element, the *Nampa-Meridian* Court would not have rejected out of hand the claims of the defendant irrigation district member who complained of changes in his ground water levels as a result of irrigation district activities. *Id.* Instead, if there was an entitlement to water levels at common law, the Court would have found that the defendant irrigation member's claim stated a cause of action, which would have required the Court to offer some relief.

Although not an *element* of a ground water right, under the common law, water levels were a means to shift the burden to juniors for shortages caused by junior pumping. For example, in *Noh*, the effect of junior pumping was that there was "no water" in the senior's well. *Noh v. Stoner*, 26 P.2d at 1112. The Court determined, based on the fact of shortage, that the junior had to pay to deepen the well or otherwise cause the water level to return to historic levels (presumably by complete curtailment of the junior's pumping). *Id.* at 1113. Thus, at common law, a finding of "no water" was the trigger to shift the burden to the junior to rectify the situation. Although the Court in *Noh* affirmed that shift, it was not an easy burden to meet as demonstrated in the decision of *Bower v. Moorman*, 27 Idaho 162, 147 P. 496 (1915) (reversing the district court's finding that the junior was required to take steps to replace the senior's water supply).

Similarly, "reasonable pumping levels" under the Ground Water Act provide a means for the Department to shift the burden to juniors to rectify the senior's shortage. I.C. § 42-226. But, as in *Noh*, the trigger for administrative action shifting the burden to juniors should be a finding of shortage to the senior. The senior ground water user is, after all, still only entitled to an amount of water (as opposed to a water level). It is the finding of a shortage sufficient to constitute injury that—requiring administration of junior ground water rights—that triggers the further administrative evaluation, which then leads to determinations regarding reasonable pumping levels. Simply put, without a finding of injury to a senior ground water right "triggering" the Department's examination of "reasonable pumping levels" across the aquifer, the Department has no basis to exercise its discretion to make such a determination.

On a practical level, any change in water levels results in increased pumping costs. If a delivery call can be sustained merely on the basis of decreased ground water levels, there will be the proverbial race to the courthouse. There are approximately 15,000 wells on the ESPA that are senior to 1980. Any of them could potentially make a delivery call based on a change in water levels, which would lead to a change in the cost to pump or a cost to deepen the well. If A&B's claim is recognized it could lead to the conclusion that only the most senior ground water user is entitled to pump as all pumping by subsequent users has some negative effect on ground water levels available to A&B. Therefore, requiring a factual trigger (beyond the mere allegation of a senior ground water user) to authorize administrative action to determine reasonable pumping levels is a practical prerequisite to IDWR action, and is also consistent with the constitutional policy of maximum utilization of water resources.

The Director properly declined, in the absence of actual physical shortage of water, to provide relief to A&B's claims of injury from unreasonable ground water levels and other issues

arising under the Ground Water Act including costs associated with well deepening, interconnection, and well pumping because these issues are not proper for consideration in this proceeding.

CONCLUSION

For the reasons set forth above, Pocatello respectfully requests that the Court affirm the decision of the Director finding no injury to A&B's water right and finding that A&B's water right is subject to the Ground Water Act of 1951. There is substantial, competent evidence in the record to support the Director's decision and pursuant to Idaho Code section 67-5279 the Court should dismiss A&B's appeal.

Respectfully submitted this 28th day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2010, I caused to be served a true and correct copy of the foregoing **Pocatello's Response Brief** for **Case No. CV-2009-000647** upon the following by the method indicated:

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