

Randall C. Budge (ISB #1949)
Candice M. McHugh (ISB #5908)
Thomas J. Budge (ISB #7465)
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
101 S. Capitol Boulevard, Suite 208
Boise, ID 83702
Telephone: (208) 395-0011
Facsimile: (208) 433-0167

Attorneys for Idaho Ground Water Appropriators, Inc.

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

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

**IGWA'S MEMORANDUM IN
OPPOSITION TO A&B IRRIGATION
DISTRICT'S MOTION TO ENFORCE**

The Idaho Ground Water Appropriators, ("IGWA") by and through their attorneys for record hereby filed this *Memorandum in Opposition to A&B Irrigation District's Motion to Enforce Orders*.

BACKGROUND

A&B Irrigation District ("A&B") has requested the District Court to order the Director to act on remand and re-evaluate his determination of material injury under the clear and convincing

standard. Further, A&B seeks “confirmation the Director will consider the proposed ‘inter-connection’ feasibility study.” (*A&B Memorandum* at 6.) A&B wants the Court to order the Director to provide A&B assurance that he will actually “consider and not disregard the proposed report” and as such requests the Court to “order the Director to consider the proposed feasibility study as part of the ordered remand.” (*Id.*) Further, A&B wants the Court to “[o]rder IDWR to assist and lend its expertise to the study as recommended by Hearing Officer Schroeder and previously accepted by the former Director.” (*Id.*)

IGWA presents argument below on the issue of A&B’s request to have this Court order the Director to develop and consider its proposed interconnection feasibility study.¹ IGWA is not presenting argument in this memorandum on the question of whether the Director must act now to determine under a clear and convincing standard whether A&B needs less than its full decreed water right. That issue is directly on appeal to the Supreme Court by IGWA, the City of Pocatello and the Idaho Department of Water Resources in this case and in the Surface Water Coalition delivery call case.

ARGUMENT

A&B is requesting that this Court order the Director to take new evidence, to consider the evidence, although the evidence has yet to be developed, and to help develop the evidence on A&B’s behalf. A&B’s request is improper and should be denied for the following reasons: 1) A&B’s request goes beyond the scope of the remand; 2) the time has passed for the consideration of new evidence and 3) A&B’s request violates the separation of powers doctrine.

¹ The issue of whether A&B could interconnect its system was directly presented at the hearing. Exhibit 481 is attached hereto for the Court’s reference. A&B had a full and fair opportunity to present its own evidence in rebuttal.

A. A&B's Request Goes Beyond the Scope of the Remand Order

This Court clearly states what the scope of the remand is “The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.” (*Memorandum Decision and Order on Petition for Judicial Review* at 49). This limited scope on remand was further confirmed in the Court’s *Memorandum Decision and Order on Petitions for Rehearing*: “The Order [on the petition for judicial review] remanded the case to the Director for application of the standard of proof to his determination that A&B could get by with less water than decreed to it in the SRBA.” (*Memorandum Decision and Order on Petitions for Rehearing* at 7.) To order the Director to develop, take and consider new evidence is beyond the scope of the ordered remand and should be rejected.

A similar motion was filed by Blue Lakes in the Thousand Springs delivery call matter and was rejected by the District Court. In that case, Judge Melanson determined that “[t]he Director is not obligated to take additional evidence in order to apply the correct burdens of proof and evidentiary standards on remand.” *Order Granting in Part Motion to Enforce Order; Order Setting Status Conference* (May 11, 2010) at 4. In that case, Blue Lakes asked the Court to order the Director to take new evidence on the trim line and spring allocation when both issues were pending on appeal before the Idaho Supreme Court. The Court determined that it had jurisdiction to enforce its orders on remand but that it did not have jurisdiction to order action be taken outside the scope of the prior orders. The Court said that “[t]he prior *Orders* affirm the Director’s use of the trim line and the spring allocation determinations. Accordingly, neither is within the scope of the prior *Orders* on remand.” (Id.)

Similarly, in this case the prior *Orders* by this Court affirm the Director’s determination that A&B should interconnect its system or show that it is not feasible to do so. In affirming the

Director's decision, this Court said: "[t]his Court agrees the system must be considered as a whole based on the way in which the water right is decreed." (*Memorandum Decision and Order on Petition for Judicial Review* at 39). And, given the way A&B's water right is decreed this Court found that "flexibility has its benefits and burdens. The Director also has flexibility when it comes to responding to requests for regulation. Until such time as the right is defined with more particularity, the extent to which the Director can require inter-connectedness is left to his discretion." (*Id.* at 41) The Court concluded that the Director did not abuse his discretion in imposing a requirement on A&B to demonstrate whether inter-connection is not physically or financially practical. (*Id.*) Because this Court affirmed the Director's finding regarding interconnection, the issue of whether interconnection is feasible is beyond the scope of the remand.

B. A&B's Request to Change the Relief Granted or to Present New Evidence is Untimely

1) The Time to Ask for Reconsideration on the Relief Granted Has Passed

Idaho Code § 67-5279 defines the scope of review and the type of relief that this Court may grant on A&B's *Notice of Appeal and Petition for Judicial Review*: "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67-5279(3). In this case, the Court's decision is clear, it affirmed "the decision of the Director to evaluate material injury to the 36-2080 water right based on depletion to the cumulative quantity as opposed to determining injury based on depletions to individual points of diversion" and it affirmed the Director's determination to "require A & B to take reasonable steps to move water from performing to underperforming areas or alternatively demonstrate physical or financial impracticability." (*Memorandum Decision and Order on Petition for Judicial Review* at 50.) The Court did not remand the question on interconnection to the Director to take additional evidence and if A&B desired such a result, it was required to ask for reconsideration of this court's

order within fourteen days. I.R.C.P. 11(a)(2). A&B's request seeks to avoid this filing requirement and should be denied.

2) The Record in this Case is Closed and A&B's Request is Untimely.

The agency record "constitutes the exclusive basis for the agency action in contested cases under this chapter or for judicial review thereof." I.C. § 67-5249. Further, "[f]indings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding. I.C. § 67-5248(2). A&B's request amounts to a request to present additional evidence to the agency and this Court under I.C. § 67-5267. To grant A&B's request would be improper as the time has passed for any such request. A&B is unable to show that it had good reasons for not complying with the requirements of I.C. § 52-5276(1) which states that:

[i]f, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action and that...

- (a) there were good reasons for failure to present [the evidence] in the proceeding before the agency" [or]
- (b) there were "alleged irregularities in the procedure before the agency"

The Supreme Court held that while I.C. § 67-5276 allows a party to seek leave to present additional evidence in a judicial review proceeding, it requires such a request to be made in a timely manner; a request after the hearing and after the decision on the petition was untimely and should be denied. *Spencer v. Kootenai County*, 145 Idaho 448, 458 (Idaho 2008).

This matter has already gone to hearing before this court, two times – first on A&B's *Notice of Appeal and Petition for Judicial Review* dated August 31, 2009 and second on IGWA, the City of Pocatello's *Petitions for Rehearing* which were filed June 28, 2010. A&B neglected to request that they be allowed to present evidence on the feasibility of interconnection prior to the hearings before

this court. However, over 18 months after it filed its appeal, A&B is now asking this Court to order IDWR to not only take and consider new evidence, but to help develop it and to use it to make new findings of fact and conclusions of law in this case. A&B's request is too late and an order requiring the Director to take evidence would be improper and prejudicial to IGWA and the other parties in the proceeding.

A&B was also aware for over a year that the Hearing Officer and the Director believed it was incumbent upon A&B to show interconnection was not possible or feasible before junior groundwater users would be curtailed or required to compensate A&B. (*See A&B Memorandum at 6.*) If A&B wanted to alter the outcome of this proceeding, it had to act timely to augment the record with this evidence, trying to do so now after this Court agreed with the Hearing Officer and the Director is not allowed. While A&B is free to develop evidence regarding its opinion on whether interconnection is practical and feasible and may be allowed to initiate another case to present that evidence,² there is no question that the evidence should not be allowed in this proceeding.

C. A Determination on the Admissibility, Reliability and Credibility of Evidence is Left to the Trier of Fact

A&B asks this court for an advisory opinion and to pre-determine that its "feasibility" study will present relevant, reliable and credible evidence, although A&B has not yet developed the evidence. In addition, A&B wants this Court to order that the Director consider and use the evidence in a new finding of material injury in this proceeding. Such an order violates the separation of powers and impermissibly infringes on the Director's authority to consider and weigh evidence in a contested proceeding.

² IGWA is not conceding however, that such a second proceeding is proper, however, at the very least, other parties should be provided a full and fair opportunity to discover the information that is used for such evidence and to provide rebuttal evidence.

The Director of the Idaho Department of Water Resources is vested with the authority and obligation to distribute waters of the public water supply. I.C. § 42-607; see also I.C. § 42-605(3). This duty includes administering water rights under the Ground Water Act, I.C. § 42-226 *et seq* and to conduct hearings in accordance with the Idaho Administrative Procedures Act , chapter 52, title 67, Idaho Code and the Department's own rules, including the Rules for the Conjunctive Administration of Ground and Surface Water Resources, IDAPA 37.03.11. I.C. § 42-1701A. The separation of powers doctrine recognizes that each branch of government is intended to operate in its own area of authority subject only to those checks and balances expressly granted within the Idaho Constitution.

Article II, § 1 of the Idaho Constitution defines the departments of government and states the policy of separation of powers:

Departments of government. The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Article IV, § 1 of the Idaho Constitution outlines the executive power. The Idaho Constitution grants the Governor the ability to carry out this authority through the allocation of executive departments as outlined within article IV, § 20. IDWR was created pursuant to this authority. I.C. § 42-1701A.

Article V, § 2 of the Idaho Constitution defines the powers of the judicial branch:

Judicial power--Where vested. The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature. Until provided by law, no changes shall be made in the jurisdiction or in the manner of the selection of judges of existing inferior courts.

Article V, § 13 of the Idaho Constitution sets forth the role of the Legislature as it concerns

the courts:

Power of legislature respecting courts. The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution....

Through the Idaho Administrative Procedures Act, in I.C. § 67-5279 the Legislature has limited the Court's role in reviewing decisions of executive agencies such as IDWR. The Legislature also limited the Court's ability to review issues of fact on appeal and states that "judicial review of disputed issues of fact must be confined to the agency record for judicial review." I.C. § 67-5277. Further, Idaho Code states that the Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279.

In this case, A&B is requesting that the Court pre-determine that its proposed interconnection feasibility study is admissible, credible and reliable although this new evidence does not yet exist. Further, it wants the Court to tell the Director that he must consider and "not ignore" the study. Whether the proposed study is admissible or whether it is sufficiently credible or reliable to be given weight or considered is left to the judgment of the agency and should not be pre-determined by the Court. Furthermore, to have the Court order the Director to commit his staff and state resources to assist in the development of the new evidence is an improper request. A&B's request violates the separation of powers and should be denied.

CONCLUSION

For the foregoing reasons, IGWA requests that A&B's request to submit new evidence be denied.

DATED this day of 4th day of February, 2011.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: 

Randall C. Budge
Candice M. McHugh
Thomas J. Budge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2011, the above and foregoing document was served in the following manner:

Deputy Clerk
Clerk of Minidoka County Court
715 G Street
PO Box 368
Rupert, ID 83350
Fax: (208) 436-5272

- U.S. Mail/Postage Prepaid
- Facsimile 208-436-5272
- Overnight Mail
- Hand Delivery
- E-mail

Garrick Baxter
Chris Bromley
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
chris.bromley@idwr.idaho.gov

- U.S. Mail/Postage Prepaid
- Facsimile 208-436-5272
- Overnight Mail
- Hand Delivery
- E-mail

John K. Simpson
Travis L. Thompson
Paul L. Arrington
Sarah W. Higer
Barker Rosholt
P.O. Box 485
Twin Falls, ID 83303
jks@idahowaters.com
tlt@idahowaters.com
pla@idahowaters.com

- U.S. Mail/Postage Prepaid
- Facsimile 208-436-5272
- Overnight Mail
- Hand Delivery
- E-mail

Sarah A. Klahn
Mitra Pemberton
White & Jankowski LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
sarahk@white-jankowski.com
mitrap@white-jankowski.com

- U.S. Mail/Postage Prepaid
- Facsimile 208-436-5272
- Overnight Mail
- Hand Delivery
- E-mail

A. Dean Tranmer
City of Pocatello
PO Box 4169
Pocatello, ID 83201
dtranmer@pocatello.us

- U.S. Mail/Postage Prepaid
- Facsimile 208-436-5272
- Overnight Mail
- Hand Delivery
- E-mail

Jerry R. Rigby
Rigby Andrus and Moeller
25 N 2nd East
Rexburg, ID 83440
jrigby@rex-law.com

- U.S. Mail/Postage Prepaid
- Facsimile 208-436-5272
- Overnight Mail
- Hand Delivery
- E-mail


CANDICE M. McHUGH

EXPLANATION

2007 Turn Out Delivery (miner's inches per acre)

- Less Than 0.75
- 0.75 to Less Than 0.83
- 0.83 to Less Than 0.88
- Greater Than or Equal to 0.88

Well System Labeling

- 18AB922 (Well System Name)
- 1.04 cfs (Potential Available Flow Above 0.75 Miner's Inches Per Acre)
- 0.80 in (2007 Miner's Inches Delivered Per Acre)

Pipe Labeling

- 0.06 cfs (Q Transferred Between Well Systems)
- Arrow (Indicates Flow Direction)

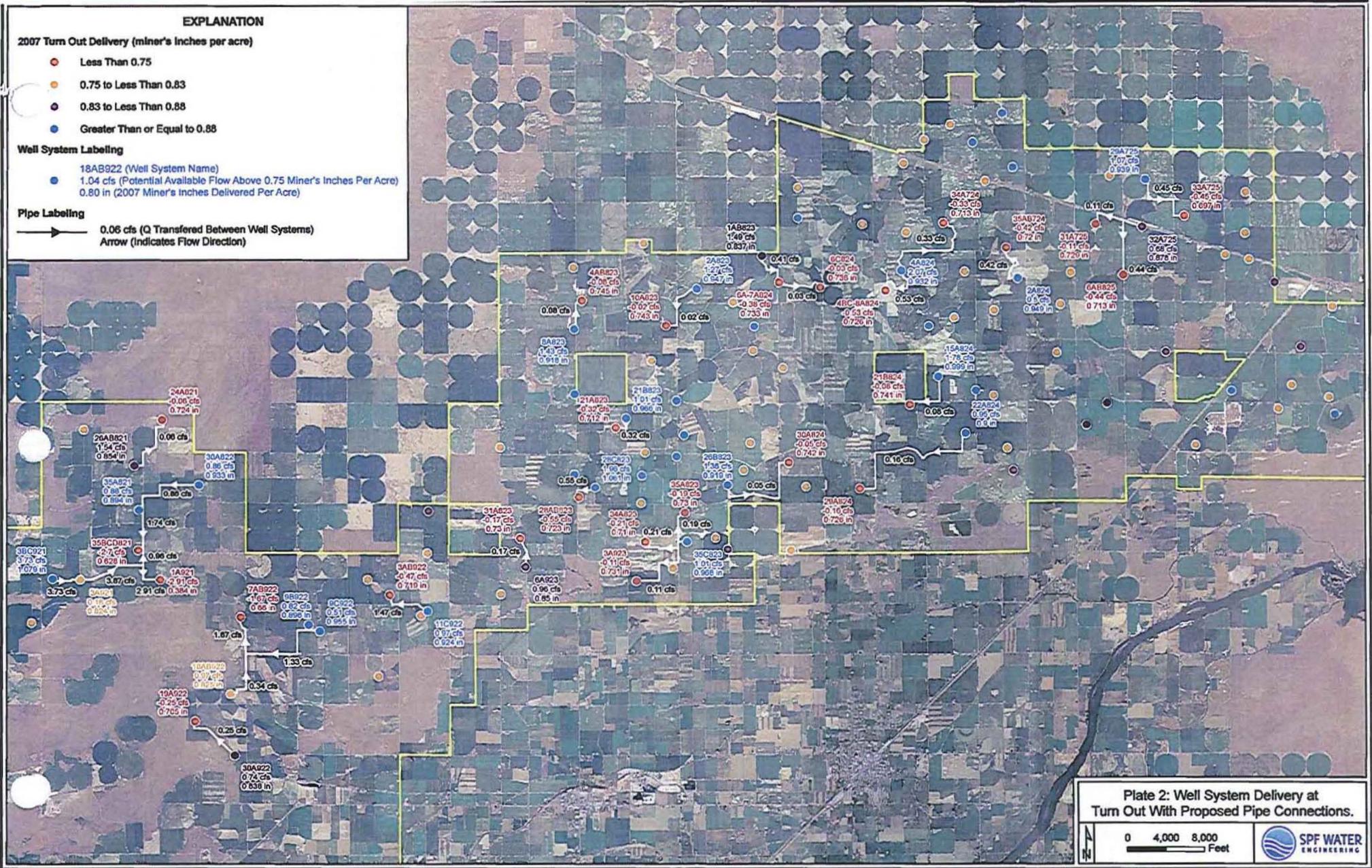


Plate 2: Well System Delivery at Turn Out With Proposed Pipe Connections.

0 4,000 8,000 Feet

SPF WATER ENGINEERING