

Roger D. Ling, ISB #1018
Attorney at Law
P. O. Box 396
Rupert, Idaho 83350
Telephone (208) 436-4717
Facsimile (208) 436-6804

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone (208) 733-0700
Facsimile (208) 735-2444

Attorneys for Petitioner A&B Irrigation District

**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) **DOCKET NO. 37-03-11-1**
GROUND WATER AND FOR THE) **A&B IRRIGATION DISTRICT'S**
CREATION OF A GROUND WATER) **MOTION TO AMEND HEARING**
MANAGEMENT AREA) **SCHEDULE**
_____))
))
))

COMES NOW A & B Irrigation District ("A&B"), by and through its attorneys of record, and submits this *Motion to Amend Hearing Schedule* in the above-entitled matter. The grounds for this motion are set forth below and are further supported by the *Affidavit of Charles E. Brockway* submitted together herewith.

BACKGROUND

The present hearing schedule was amended by the Hearing Officer's *Order Amending Hearing Schedule* dated January 8, 2008. At that time it was contemplated the Director of the Idaho Department of Water Resources would issue an order "to make a determination of material injury, if any, in accordance with Rule 42 of the Conjunctive Management Rules on or before January 15, 2008" as required by Judge Butler's *Memorandum Decision Re: Respondent's Motion to Dismiss* (Case No. CV-2007-665, Minidoka County, October 29, 2007). Subsequent to January 8th, the Director and the Department requested and received an extension of that deadline to January 29, 2008. The Director then issued his order ("Order") in this matter on January 29, 2008. Ten days later, on February 8, 2008, the Department provided the partial agency record (over 3,500 pages), including a new hydrogeologic report, that was relied upon by the Director in formulating the Order. The partial agency record also identified information that was relied upon by the Director but was only available for inspection and review at the Department's state office in Boise, Idaho.

A&B, by petition dated February 13, 2008, filed a petition requesting a hearing on the Director's Order.

REQUEST TO AMEND HEARING SCHEDULE

A&B requests the Hearing Officer to amend the present hearing schedule that was set by order on January 8th for the following reasons:

I. Extension of Deadline for Director's Order / Partial Agency Record

Judge Butler, at the Director's and Department's request, extended the deadline for the issuance of the Director's Order two weeks to January 29, 2008. Accordingly, the deadline for filing a petition requesting a hearing on the Order was extended by statute to February 13, 2008.

A&B was the only party to file a petition requesting a hearing on the Director's Order. Although various other parties to the original contested case filed "statements", no other party has requested a hearing to challenge the Order. The extension that was granted to the Director by Judge Butler justifies extending the present hearing schedule, particularly since the Hearing Officer's current scheduling order was issued before the Director received the extension of time to issue his Order. Consequently, A&B and its consultants have had less time (14 days) to review the Order and prepare an expert report and testimony than was originally contemplated under the Hearing Officer's January 8th scheduling order.

In addition to the extended deadline for the Director's Order, the Department produced the partial agency record on the Order on February 8, 2008. A&B's consultants did not receive this information from the Department until February 11, 2008. *See Brockway Affidavit.* The partial agency record contains over 3,500 pages of material, including a new hydrogeologic report prepared for the Department that A&B's consultants received for the first time on February 11th. Since the record was only provided to A&B a little over a week ago, additional time to review and analyze this material is necessary and justifies an extension of the current hearing schedule.

II. Director's Order and Analysis / New Methods Used and Additional Information Needed for Purposes of Expert Report and Testimony

The Director's 47-page Order uses a variety of methods for purposes of analyzing A&B's request for water right administration to satisfy its senior ground water right. A&B's expert witnesses, after reviewing the Order, have initially identified several areas in which additional information is needed from the Department in order to fully discover the basis for the Director's methods and formulate an expert opinion on the Order for purposes of A&B's case. These areas

include the following:

1. The Order reports a calculation of irrigation diversion requirements based on calculations made by the Director. However, the spreadsheets with the supporting data for the calculations were not provided in the Department's partial agency record produced on February 11, 2008. A&B's experts need additional time to review these calculations once provided through discovery depositions or formal written requests.
2. The Order reports an evaluation of A&B lands reportedly served by private wells with the assumption that these wells are able to augment A&B's supply. While A&B does not agree or disagree with this assumption at this time, A&B needs time to review the data underlying the Director's analysis to determine if any of the cited private wells can actually supply water to A&B lands.
3. The Order reports on an evaluation of the use of METRIC ET data to evaluate whether a shortage has occurred on lands where A&B has stated that wells need to be upgraded due to falling water levels. The data that this analysis is based on has not been provided and is apparently only available for review at the Department's state office in Boise, Idaho. The index for the partial agency record notes: "Electronic data concerning the GIS Analysis of ET Data is not contained on this disc; however the data is available for inspection at the IDWR office in Boise". A&B's experts need time to inspect and review this data in Boise and identify whether the Director's analysis supports the conclusion. Full consideration of the IDWR's analysis will require formal discussions with IDWR employees who undertook such evaluations.
4. The Order presents the results of an analysis of area hydrogeology that resulted in development of a hydrogeologic report with newly published cross-sections that previously was not in the public domain. A&B's experts need time to evaluate the newly published hydrogeologic report which was only provided for the first time with the partial agency record on February 11, 2008, less than three weeks from the expert report deadline previously set in the Hearing Officer's Amended Scheduling Order.
5. As ground water levels have fallen in A&B's wells, A&B has been required to deepen and/or rehabilitate wells. The Order evaluates drilling methods and well construction methods used by A&B to rehabilitate or deepen wells. The Director uses this information to support the conclusion that A&B's wells and A&B's efforts to deepen wells do not conform to the standard of practice for well drilling and, therefore, the failure of some of A&B's wells to produce adequate water is the fault of A&B. Such conclusions require inquiry into the factual bases for said findings.
6. The Order presents estimates of 'reasonable' expenses for deepening or

rehabilitating wells required to maintain or restore well yields but provides no basis for the cost analysis. The Director concludes that the reported costs by A&B are normal expenses and therefore do not rise to the level of injury. Additional data and time for analysis are required for this effort.

7. A request was made to IDWR for some additional information and data on which the Order was based. Depositions and additional discovery will likely be required to determine the full extent of data and information utilized and the IDWR personnel who were involved in preparing the order and/or information relied upon.

See Affidavit of Charles E. Brockway.

As described above and as set forth in the *Affidavit of Charles E. Brockway*, A&B's consultants need additional information from the Department and an adequate opportunity to review this information for purposes of providing an opinion on the Director's Order. Some information has been requested from the Department, but other facts and bases underlying the Order may only be discovered through deposition of Department staff and persons responsible for participating in preparation of the Order. To facilitate receiving that necessary information, A&B is filing together with this motion a request for the Department to identify those staff and persons involved in preparing the Order and available dates for depositions in the next six weeks. Amending the hearing schedule will allow A&B's consultants the necessary time to gather and review this information that is required for purposes of rendering an opinion on the Director's Order.

III. Legal Standard / Summary Judgment Issue

The Director's Order fails to recognize the governing legal standard for administration of senior ground water rights perfected under the law as it existed prior to the adoption of the 1951 Ground Water Act. The Idaho Supreme Court has repeatedly recognized that the Ground Water Act does not apply to water rights established under the law as it existed prior to the 1951

adoption of the Act. With respect to a ground water right appropriated with a priority that is senior to 1951, the Supreme Court as well as the Department, have clearly held that those water right holders are entitled to the maintenance of their historic pumping levels unless junior appropriators seek to make a optimum use of this resource, which requires them to pay to the senior right holder compensation for expenses incurred by the senior appropriator in deepening his or her well to allow diversion of the water to which he or she is entitled under the senior right and the additional costs incurred in pumping from a deeper depth to divert that water if a junior appropriator desires to pump from the connected source under a junior right which results in the lowering of the senior's historic ground water pumping level. To the extent the Director applied the Conjunctive Management Rules to circumvent the appropriate legal standard that applies to A&B's 1948 ground water right (#36-2080) that application is erroneous as a matter of law. A&B intends to file a motion for summary judgment on this threshold legal issue that should be decided prior to a full evidentiary hearing on the Order.

Resolving the threshold legal issues controlling A&B's delivery call is necessary prior to proceeding directly to hearing. Amending the hearing schedule will provide the parties the necessary time to identify and resolve most legal issues well in advance of any evidentiary hearing. Moreover, providing sufficient time to address the legal issues furthers the interests of judicial economy and provides a more effective use of the parties' time and resources at this stage of the proceeding. A resolution of legal issues will also provide direction for the experts in the preparation of their expert reports, thereby avoiding costly supplements to the reports to address the factual issues to be applied to the law of the case.

IV. No Prejudice to Other Parties in Amending the Hearing Schedule

A&B was the only party to file a petition requesting a hearing on the Director's Order

pursuant to Idaho Code § 42-1701A. Given the new analysis performed by the Director, and the additional information that A&B needs to discover and review from the Department on the Order, A&B is the only party that is adversely affected by the present hearing schedule. A&B is currently attempting to discover this information and obtain available deposition dates for those involved in preparing the Order. Until that information is discovered, A&B's consultants will not have sufficient information or time to complete their expert report and testimony.

As the sole party challenging the Director's Order, A&B is entitled to due process to present its case. The basic requirement of due process is notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Idaho Supreme Court has further held that “[p]rocedural due process is an essential requirement of the administrative process, and notice is a critical aspect of that due process.” *City of Boise v. Industrial Com’n*, 129 Idaho 906, 910 (1997). Due process requires that the parties “be provided with an opportunity to be heard at a meaningful time and in a meaningful manner”. *Id.* The Court has also clarified that due process requires the opportunity to present a case:

In order to justifiably modify attorney fee arrangements in the interest of public welfare, the Commission must afford due process to the contracting parties, i.e., notice and an opportunity to be heard at a meaningful time. *Loudermill*, 470 U.S. at 542, 105 S.Ct. at 1493. The notice requirement mandates meaningful notification of the regulations to be imposed. *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495. This means, at a minimum, that the Commission must give notice of the purpose of the hearing, must have clearly articulated evidentiary standards that will be used at the hearing, assign the burden of proof and level of proof, and formally publish clear guidelines upon which it will base the fee modifications in order to eliminate any latent arbitrariness. The “meaningful hearing” component of the due process requirement insures the attorney the opportunity to influence the discretion of the decision-maker by presenting his or her reasons “why the proposed action should not be taken” *before* the Commission makes the decision to modify the fee agreement. *Id.* See also, *Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993).

Curr v. Curr, 124 Idaho 686, 693 (1993).

At a minimum, A&B must be afforded an opportunity to discover additional information from the Department in order to review the underlying basis for the Director's Order and formulate expert opinions on that analysis and the methods employed. Moreover, since the partial agency record was only produced a little over a week ago, A&B and its consultants have not been afforded adequate time to review the 3,5000 page record to properly analyze the information underlying the Director's Order.

In addition, no other order issued by the Director has been held to such an abbreviated schedule for purposes of a contested hearing. As the case currently stands, A&B will have had less than 30 days to review the Director's Order and provide an expert report and testimony, something which cannot be produced given the additional information that needs to be discovered. *See Brockway Affidavit*. In addition, the time between the issuance of the Director's Order and the date for the start of the hearing is a little over three months. No other order, or party filing a petition requesting a hearing on those orders, has been held to such an abbreviated schedule. For example, the Director's orders in responding to requests for administration by the Surface Water Coalition, Blue Lakes Trout Co., and Clear Springs Foods were issued in May and July 2005. The hearings on those orders were recently held before the Hearing Officer at the end of 2007 and early 2008. While reasons for the delay between the initial orders and the hearings included a constitutional challenge to the Department's CM Rules, the parties were nonetheless provided well over six months to continue the hearing schedules in those cases after the Supreme Court rendered its decision in *AFRD #2 v. IDWR* in March 2007. A&B should be afforded the same reasonable time to discover the additional information and have a "meaningful

opportunity” to present its case.

No other party would be prejudiced by amending the present schedule. Notably, no other water right holder, including junior ground water right holders, has requested a hearing on the Director’s Order. As the matter now stands, no junior ground water right holder faces curtailment or any mitigation requirement for the 2008 irrigation season to satisfy A&B’s senior ground water right. Consequently, no other party would be prejudiced by continuing the hearing schedule.

REQUEST FOR RELIEF

For the foregoing reasons, A&B respectfully requests the Hearing Officer to amend the present hearing schedule to continue the hearing and the existing deadlines by a period of not less than 60-90 days. Counsel for A&B has contacted the Department regarding a hearing on this motion and will provide notice to the parties once a date and time can be set.

DATED this 4th day of February, 2008.



Roger D. Ling
Attorney at Law

BARKER ROSHOLT & SIMPSON LLP



John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for A & B Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2008, I served the original/ true and correct copies of the foregoing, by the method indicated below, and addressed to the following:

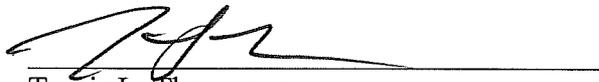
BY EMAIL AND U.S. MAIL

Hon. Gerald F. Schroeder
c/o Victoria Wigle
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
fcjschroeder@gmail.com
victoria.wigle@idwr.idaho.gov

BY U.S. MAIL

B.J. Driscoll McGrath Meacham & Smith PLLC 414 Shoup PO Box 50731 Idaho Falls ID 83405	Michael Patterson, President Desert Ridge Farms, Inc. PO Box 185 Paul ID 83347
Randall C. Budge Racine Olson Nye Budge & Bailey PO Box 1391 201 E Center Street Pocatello ID 83204-1391	Candice M. McHugh Racine Olson Nye Budge & Bailey 101 S Capitol Suite 208 Boise ID 83702
Todd Lowder 2607 W 1200 S Sterling ID 83210	Neil and Julie Morgan 762 West Hwy 39 Blackfoot ID 83221
Charlene Patterson, President Patterson Farms of Idaho 277 N 725 Lane W Paul ID 83347	William A. Parsons Parsons Smith & Stone, LLP 137 West 13 th Street PO Box 910 Burley ID 83318
A. Dean Tranmer City of Pocatello Box 4169 Pocatello ID 83201	Sarah A. Klahn White & Jankowski LLP 511 Sixteenth Street Suite 500 Denver CO 80202
Winding Brook Corporation C/o Charles W. Bryan Jr. UBS Agrivest LLC PO Box 53 Nampa ID 83653	James C. Tucker Idaho Power Company 1221 West Idaho Street Boise, ID 83702-5627
James S. Lochhead Michael A. Gheleta Brownstein Hyatt Farber Schreck P.C. 410 Seventeenth Street Suite 2200 Denver, CO 80202	City of Castleford PO Box 626 300 Main Castleford, ID 83321

F. Randall Kline PO Box 397 427 North Main St Pocatello, ID 83204	Larry S. Larson Hopkins Roden Crockett Hansen & Hoopes PLLC PO Box 51219 Idaho Falls, ID 83405-1219
Josephine P. Beeman Beeman & Associates P.C. 409 West Jefferson Street Boise, ID 83702	City of Basalt PO Box 178 Basalt, Idaho 83218
M. Jay Meyers Meyers Law Office PLLC 300 North Seventh Avenue PO Box 4747 Pocatello ID 83205	John J. Hockberger Jr. Kathleen Marion Carr Office of the Field Solicitor U.S. Department of the Interior 960 Broadway Avenue, Suite 400 Boise, ID 83706
LaDell and Sherry R. Anderson 304 N 500 W Paul ID 83347	Denise Glore, Attorney U.S. Department of Energy 1955 Fremont Avenue MS 1209 Idaho Falls, ID 83415-1510
Mary Ann Plant 480 N 150 W Blackfoot, ID 83221	O.E. Feld & Berneta Feld 1470 S 2750 W Aberdeen, ID 83210
Jeff Feld 719 Bitterroot Drive Pocatello ID 83201	Eugene Hruza PO Box 66 Minidoka ID 83343
Jerry Rigby Rigby Andrus and Moeller 25 North Second East Rexburg, ID 83440	Robert E. Williams Fredericksen Williams Meservy & Lothspeich LLP 153 East Main Street PO Box 168 Jerome ID 83338
Gregory P. Meacham McGrath Meacham & Smith PLLC 414 Shoup Idaho Falls ID 83405	Fred & Phyllis Stewart 300 Sugar Leo Road St. George, UT 84790
Richard J. Kimmel 867N 800E Shelley, ID 83274	City of Firth Box 37 Firth, Idaho 83236


 Travis L. Thompson