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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA	)	**DOCKET NO. 37-03-11-1** **PETITIONER'S EXCEPTIONS BRIEF**

COMES NOW, Petitioner A&B Irrigation District ("A&B"), by and through counsel of record, and pursuant to Rule 720.02(b) of the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*), and the Director's June 19, 2009 *Order Shortening Time to File Exceptions*,

and hereby files this *Exceptions Brief* regarding the Hearing Officer's March 27, 2009 *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* (hereinafter "*Recommended Order*" or "*RO*"), the May 29, 2009 *Order Granting in Part and Denying in Part A&B's Petition for Reconsideration of the Hearing Officer's Opinion* ("*Reconsideration Order*") and the June 19, 2009 *Hearing Officer's Response to A&B's Petition for Clarification* ("*Clarification Order*").

I. Incorporation of Prior Briefing

On January 23, 2009, A&B filed its *Post-Hearing Memorandum and Proposed Findings*. On April 10, 2009, A&B filed a petition for reconsideration of the *Recommended Order*. On May 15, 2009, A&B filed a reply in support of its petition. On June 12, 2009, A&B filed a petition for clarification of the *Reconsideration Order*. Except as discussed below, those pleadings are incorporated as if set forth herein.

II. A&B Takes Exception to the Order on Motion for Declaratory Ruling

On March 21, 2008, A&B filed a *Motion for Declaratory Ruling* seeking a order declaring that A&B's senior ground water right #36-2080 with a priority date of September 9, 1948 was not subject to Idaho's Ground Water Act, first enacted in 1951. The Hearing Officer issued an *Ordering Regarding Motion for Declaratory Ruling* on May 26, 2008, denying A&B's motion and concluding that the Ground Water Act "is applicable to the administration of water rights involved in this case, including those rights that pre-existed the adoption of the Ground Water Act in 1951". *Declaratory Ruling Order* at 7.

A&B takes exception to the findings in the *Declaratory Ruling Order* and submits that it is not subject to the Ground Water Act for purposes of water right administration. In support,

A&B readopts and incorporates its *Memorandum in Support of Motion for Declaratory Ruling* and the *Affidavit of Dan Temple* filed on March 21, 2008, as well as its *Reply in Support of Motion for Declaratory Ruling* filed on April 25, 2008. A&B further submits that the plain language of the Ground Water Act states that this "act shall not affect the rights to the use of ground water in this state acquired before its enactment." I.C. § 42-226. IDWR therefore has no authority to apply the Act, including the "reasonable ground water pumping levels" provision, to A&B's senior ground water right in this delivery call. The Director should reverse the *Declaratory Ruling Order* accordingly.

III. A&B Has Suffered Material Injury to Water Right #36-2080.

In the *Recommended Order*, the Hearing Officer ruled that A&B could not suffer material injury unless it suffered "catastrophic loss" on its project. In the *Reconsideration Order*, at 2, the Hearing Officer correctly recognized that this is not the standard in Idaho. Yet, the Hearing Officer continues to apply that standard by recommending denial of A&B's call because there has not been a "failure of the project." This standard is not supported by Idaho law.[1]

The burdens of proof and the presumptions that A&B is afforded are set forth in *AFRD #2 v. IDWR*, 143 Idaho 862 (2007). *See RO* at 7-8. According to *AFRD#2*, A&B is afforded a presumption that it can use the water authorized under its decree, subject to "post-adjudication" factors (i.e. waste, forfeiture, abandonment, etc.) that would warrant distributing less than the decreed diversion rate for water right 36-2080. *See AFRD#2, supra* (cited in *RO* at 7-8). No such factors have been demonstrated in this case.

[1] In the *Clarification Order*, the Hearing Officer attempted to characterize the "failure of the project" standard as merely a "finding of fact, not a measure of material injury." He stated that "material injury may occur before a total project failure." Yet, the Hearing Officer continues to deny A&B's call based on his finding that there has not been a "failure of the project."

After setting forth the correct burden of proof, the *Recommended Order* demands that A&B demonstrate a "failure of the project" in order to prevail in its call:

> **6. Consideration of the system as a whole must also account for the effect upon individual systems when the number of short systems would constitute <u>a failure of the project</u>.**
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> * * *
>
> **10. The portion of short wells in the project is not sufficient to show <u>a failure of the project</u>.** There is evidence that in 2007 there were 5,000 acres in Unit B that were being served by well systems that delivered less than 0.75 miner's inches per acre. The limited amount of this acreage is a consequence of costly rectification efforts. Temple testimony, pages 666-67. The wells that are short in the production of water that are unlikely to be susceptible to successful remediation are limited to the southern portion of the project. They do not serve a <u>sufficient portion</u> of the project to deem their failure <u>a failure of the project as a whole</u> considering the terms of the license and partial decree.

RO at 18 & 20 (underline added). While the *Clarification Order* attempts to characterize this as a "finding of fact, not a measure of material injury," the Hearing Officer still recommended denial of A&B's call based on the apparent "finding of fact" that the project has not totally failed. This is not the injury standard for water right administration.

Under the water distribution statutes and the CM Rules, the Director and watermaster are *required* to distribute water to A&B's *decreed* water right #36-2080. *See* Idaho Code §§ 42-602, 607; CM Rule 40.01. The Director and watermaster have a "clear legal duty" to distribute water to senior water rights, pursuant to the terms of a decree. *See Musser v. Higginson*, 125 Idaho 392, 395 (1994); *State v. Nelson*, 131 Idaho 12, 16 (1998). Since A&B's landowners can beneficially use the rate of diversion provided by the decree (0.88 miner's inch per acre) and have demonstrated a need for that water, they are entitled to that amount of water for purposes of administration.

Contrary to the Hearing Officer's orders, A&B and its individual landowners do not have to suffer "failure of the project" in order to demonstrate material injury. Rather, material injury occurs whenever there has been a "hindrance to or impact upon the exercise of a water right." CM Rule 10.14. At most, "failure of the project" demonstrates the extent of material injury, which at that time would be too late for water right administration anyway. *See AFRD #2*, 143 Idaho at 874 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call.").

A&B's water right is materially injured because diversions under junior priority water rights in the ESPA are causing a "hindrance to or impact upon" A&B's diversion and use of water under its senior water right. *See A&B's Post Hearing Memo and Proposed Findings* at 9-14 (Jan. 23, 2009). As such, the Director and watermaster must regulate "the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included with the district." CM Rule 40.01.a.

By adopting and applying a 0.75 miner's inch per acre benchmark, the *Recommended Order's* new standard excuses injury to A&B's water right because the injury suffered is not "sufficient" when compared to the project as a whole. *RO* at 20. The *Recommended Order* uses the fact that A&B is a large irrigation project (approximately 66,000 irrigated acres in Unit B) against A&B – holding that since only "5,000 acres" were served by well systems producing less than 0.75 miner's inch per acre no material injury has occurred. *Id.*[2] This false benchmark merely excuses the injury suffered and forces A&B to "self-mitigate" or accept material injury.

[2] Injury to A&B's water right cannot be condoned in any proportion. It does not matter how many of the acres served by A&B's right are impacted – be it 50,000 acres, 5,000 acres, or 50 acres. If diversions under junior priority ground water rights are interfering with A&B's *decreed* senior right, A&B is entitled to administration in order to protect its senior water right. CM Rule 10.14. That is the very purpose of the prior appropriation doctrine. The Director cannot deny a call just because there has not been "failure of the project."

The "failure of the project" standard dismisses the impacts to A&B's individual landowners. Whereas A&B's landowner witnesses all testified that they have a need for and can beneficially use the per-acre diversion rate provided by A&B's decree (0.88 miner's inch per acre) (*see A&B's Proposed Findings* at 11), the *Recommended Order* requires failure of the project" to justify an injury finding.[3]

A&B's landowners should not have to suffer "failure of the project" to justify administration of junior priority ground water rights. The Director should apply the proper presumption afforded A&B's decreed water right and find injury based upon the evidence presented.

IV. The "Minimum" Amount of Water Needed for Crop Maturity Standard Fails to Recognize A&B's Decreed Water Right and the Evidence in this Case.

The *Recommended Order's* "minimum amount needed" or "crop maturity" standard is not supported by Idaho law and ignores A&B's decree. As stated in the *Recommended Order*:

> 3. **The delivery rate of 0.75 is higher than that of nearby surface water users.** See SWC Delivery Call, Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation, at 55.
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> 4. **Crops may be grown to full maturity on less water than demanded by A&B in this delivery call.** Evidence from irrigators outside A&B is informative to the extent that it indicates that full crops can be produced on less water than demanded by A&B in this delivery call proceeding. In fact full maturity crops are grown on Unit B with less than the 0.75 amount. This may result in increased costs in power to the irrigators who may be required to run their pumps longer and increased labor to manage the water, but careful management by A&B and its irrigators has resulted in the

[3] Whereas various A&B landowners farm different parcels across the A&B project, the fact that they may receive more water on some well systems and less on others does not justify the injury to A&B's water right or the impacts to their individual farms, or portions thereof. The *Recommended Order's* example of Timm Adams' operation impermissibly justifies water shortage on part of his farm (20 acres in 2007) just because he farms 1,650 acres in total. Regardless of the affected acres, it is clear that Mr. Adams was affected by water shortage and injury to A&B's water right. Although he farms 1,650 acres, impact to any one of those acres affects Mr. Adams farming operation and his annual bottom line, as it does with any of A&B's landowners.

> production of crops to full maturity with less water than demanded by A&B.
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> * * *
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> [A&B] is not entitled to curtail junior pumpers to reach that full amount if the full amount is not necessary to develop crops to maturity. . . The question is whether irrigators' crop needs in Unit B can be met with less than the full amount of the water right.
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> * * *
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> **6. 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 0.75 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 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 with similar needs consider adequate.

RO at 30 & 33. These findings are not supported by the evidence in this case and ignore A&B's decreed water right.

A. The Delivery Rate of Other Irrigation Entities Is Not Relevant to A&B's Use of Its Decreed Water Right.

A&B's water right has been decreed in the SRBA. That decree authorizes a specific diversion rate for a specific number of acres based upon its prior license and the information presented to the SRBA Court. A&B is a unique groundwater project with a decreed water right different than that of surrounding irrigation projects. As such, the rate of delivery of other surface water canal companies or irrigation districts (i.e. NSCC) is not relevant to whether A&B can beneficially use the amount provided in <u>its</u> water right decree. *RO* at 30.[4] Attempting to

[4] Assuming, *arguendo*, that a comparison can be made, it is undisputed Idaho law provides an irrigator with the right to appropriate and use 0.02 cfs (1 miner's inch) per acre. *See* Idaho Code § 42-202(6). A comparison of private ground water rights appropriated in Water District 130 reveals that approximately 55% of IGWA's members hold water rights with diversion rates <u>exceeding</u> 0.75 miner's inch per acre (with 40% over 0.85 miner's inch per acre). A&B's decreed diversion rate per acre is comparable to those private ground water users in the area. Furthermore,

equate one water users' diversion to another's would defeat the very purpose of the SRBA – wherein water rights are commonly decreed with varying diversion rate for varying places of use. Accordingly, another irrigation project's water rights and its internal delivery rates does not support the Director's no-injury finding in this case.

Indeed, if "what the neighbor" uses is the standard for water right administration then the Director and IDWR should set a "common" delivery rate for all water users across the State, regardless of the water rights. Despite recommending A&B should be held to a rate of delivery far reduced from what is provided by the water right the *Recommended Order* does not make the same recommendation for private ground water rights. By claiming that A&B should be held to a delivery rate of surrounding irrigation projects, the *Recommended Order* ignores A&B's decreed water right. There is no basis to limit A&B to a lower rate of diversion while at the same time allowing private ground water rights to pump their full entitlement. *See* CM Rule 40.03 ("The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste."). Accordingly, the comparison to other water rights and surrounding irrigation projects to set a diversion rate (0.75 miner's inch per acre) which is lower than A&B's decreed water right is not supported by the facts or law.

B. Crop Maturity / "Minimum Needed" Standard

The Director and watermaster are statutorily mandated to distribute water to "water rights" based upon priority. *See* Idaho Code §§ 42-602, 607; CM Rule 40.01. The CM Rules do not authorize the Director to delve into and micromanage farming practices. The fact that a crop

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A&B delivers 0.80 to 0.85 miner's inch per acre to its landowners in Unit A pursuant to its surface water rights. *See Dan Temple Testimony*, Tr. P. Vol. III, p. 523, lns. 14-22. Even using water rights of area ground water users and the delivery rate provided to Unit A within the A&B project, it is clear that Unit B's decreed diversion rate is comparable and well within the standard provided by Idaho law (0.02 cfs, 1 miner's inch per acre).

has been or can be grown with less than 0.75 miner's inch per acre (obviously depending upon crop type, climatic conditions, and other factors) does not define a new standard to replace that provided by a water user's *decreed* water right. Indeed, a license or decree is binding upon the Director and watermaster and sets the "standard" to be used in administration. *See* Idaho Code §§ 42-220 ("Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein."); 42-1420(1) ("The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.") (emphasis added).[5] If a water right holder can beneficially use the amount of water in his decree, the Director and watermaster are obligated to deliver that amount and juniors are prohibited from interfering with that use, i.e. injuring the senior's right.[6]

Absent "waste" or some other constitutionally permissible defense, none of which have been shown here, A&B is entitled to deliver the decreed quantity of water. Importantly, A&B's landowner witnesses all testified that they require and can beneficially use the amount of water provided in A&B's decree (0.88 miner's inch per acre). *See A&B's Proposed Findings* at 9-14.

Furthermore, a water user's "minimum need" is not a valid basis for the Director and watermaster to distribute water. A landowner's "minimum need" will certainly change with cropping patterns, weather, precipitation, and other factors. A&B delivers water to its landowners and must be prepared to deliver what is requested, up to the decreed amounts on its

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[5] The Director was specifically authorized by the SRBA Court to perform interim administration in Basin 36 pursuant to Idaho Code § 42-1417. That statute authorized the Director and watermaster to distribute water pursuant to chapter 6, title 42, Idaho Code: "(b) in accordance with applicable partial decree(s) for water rights acquired under state law" (emphasis added).

[6] Even if a senior's crop can "mature" under an amount of water less than decreed, that does not mean the decreed amount cannot be beneficially used. Indeed, if a senior cannot beneficially use the water decreed, such use would constitute unlawful "waste". Pursuant to the findings in the January 29, 2008 *Order* and the *Recommended Order*, it is clear that A&B and its landowners do not "waste" water. Just the opposite, A&B is a highly efficient water delivery organization that delivers water to its landowners on-demand. *See RO* at 21-23.

water right. A&B cannot dictate what its landowners grow or how much water a particular landowner needs throughout the irrigation season.

Under Idaho law a water user is not held to such a standard for purposes of water right appropriation or administration:

> So far as I am aware, ***it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs***, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. ***Economy of use is not synonymous with minimum use.*** Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.

Caldwell v. Twin Falls Salmon River Land & Water Co., 225 F. 584, 596 (D. Idaho 1915) (emphasis added).

It is the individual farmer, *not the Director*, who is best acquainted with the land and is in the best position to know how much water is needed. *See Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383 (1930).

> The water user is acquainted with his land and his crops and should be in better position to determine when water should be applied than any other person. Various provisions of our statutes recognize his right to demand water. The respondents are entitled to apply water to their lands for the purpose of irrigation as early as it may be beneficially applied.

Id. at 395.

The SRBA District Court has also acknowledged that IDWR cannot limit what an individual farmer grows, nor the amount of water he can beneficially use under his water right. *See "Facility Volume" Decision* at 17 (the Department has no authority to "limit 'the extent of beneficial use of the water right' in the sense of limiting how much (of a crop) can be produced

from that right").[7] The Director cannot limit or reduce that amount if it can be beneficially used. Moreover, the Director cannot limit the use of water under a decreed senior water right for the purpose of allowing junior priority water rights to pump their full rights instead. *Lockwood v. Freeman*, 15 Idaho 395, 398 (1908) ("The state engineer has no authority to deprive a prior appropriator of water from any streams in this state and give it to another person. Vested rights cannot thus be taken away.").

Therefore, the *Recommended Order's* "minimum needed" standard is not supported by the facts or law and should be reversed. Idaho water law does not hold a senior water user to the "bare minimum" for purposes of administration, particularly where junior users are not held to the same standard. While A&B's landowners are in the best position to determine how much water is needed and when, they have a right to use up to their decreed diversion rate and the Director and watermaster are bound to deliver that amount in administration.

C. A&B Landowners Can Beneficially Use more Than 0.75 Miner's Inch/Acre.

The *Recommended Order's* basis for the 0.75 miner's inch per acre standard is not supported by the evidence referenced. First, the language of A&B's *Motion to Proceed* makes it clear that A&B was seeking to deliver its decreed diversion rate, not just 0.75 miner's inch per acre:

> d. That ***the decreed diversion rate under A&B's ground water right is necessary*** to provide a reasonable quantity for the beneficial use of water in the irrigation of lands of A&B. Because of the shortages suffered by junior pumping interference and declining ground water levels, A&B is unable to

[7] The "minimum needed" standard is akin to the riparian doctrine that was rejected in Idaho over a century ago. *See* IDAHO CONST. art. XV, § 3; Idaho Code § 42-106; *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 583 (1973). Rather than only allow A&B a "minimum needed", or what the Director deems is "reasonable", Idaho's prior appropriation doctrine requires the Director and watermaster to distribute water to A&B, according to its decree, and according to the priority stated. A "minimum needed" standard renders a water right meaningless, provided there is sufficient water for all users, junior and senior, to meet their "minimum needs".

> divert an average of ***0.75 of a miner's inch per acre which is <u>a minimum amount necessary</u>*** to irrigate lands within A&B during the peek periods when irrigation water is most needed.

Ex. 102 at 7 (emphasis added). A&B's motion references the need to divert the "<u>decreed diversion rate</u>" and notes that 0.75 miner's inch per acre is a "minimum" amount that is necessary. Dan Temple testified that the 0.75 miner's inch per acre criteria is a "minimum" amount, and that the A&B landowners have a need for the amount provided by the water right. *Dan Temple Testimony*, Tr. P. Vol. 3, p. 640, lns. 15-19, p. 641, lns. 3-4. Accordingly, the Director's use of 0.75 miner's inch "is **[not]** consistent with the Motion to Proceed."

Second, the rectification standard used by A&B does not support reducing the amount of water A&B's landowners can beneficially use under the water right. A&B is limited in time and resources in the off-season to work on wells and pumps. Both Virgil and Dan Temple explained at hearing that it is not possible for A&B to work on all well systems that fall below the decreed diversion rate (0.88 miner's inch per acre), hence the 0.75 standard has been used to create a priority list of wells for the district to address during the non-irrigation season. *See Virgil Temple Testimony*, Tr. Vol. 2, p. 365, ln. 14 – p. 366, ln. 16; *Dan Temple Testimony*, Tr. Vol. 4, p. 501, lns. 13-21 & p. 755, lns. 19-23. A&B's rectification is directed at working on the wells that are producing the least amount of water in the district. A&B could not raise its standard to a higher level and still work on all those wells on an annual basis.

In summary, A&B provided testimony that its landowners regularly use and require the decreed diversion rate (0.88 miner's inch per acre) for their farming operations. *See A&B's Proposed Findings* at 9-14. As such, the *Recommended Order* wrongly limited A&B's water right to only 0.75 miner's inch per acre in this proceeding.

V. A&B Does Not Have to Interconnect its Separate Points of Diversion (Wells) as a Condition to Seek Administration of Junior Priority Ground Water Rights.

The SRBA Court decreed A&B's water right, with 177 separate points of diversion (wells) on May 7, 2003. *RO* at 4. A&B diverts and delivers water to its landowners in a highly efficient and reasonable manner. A&B and its landowners do not "waste" water. Although some well systems on the project have more than one well, and in some cases more than one well can supply water to a particular landowner, these systems were originally set up and constructed by BOR. *Dan Temple Testimony*, Tr. Vol. 3, p. 475, lns. 10-16; p. 478, lns. 1-4. The Hearing Officer acknowledged that the A&B project was "developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, it is not A&B's obligation to show interconnection of the entire system to defend its water rights and establish material injury". *RO.* at 19.

Notwithstanding the above statement, the *Recommended Order* goes on to state "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.* The Hearing Officer further claims that "it is proper to consider the [A&B] system as a whole," *id.* at 16, but that the "practicality of interconnection of wells early in the project is not shown in the record," *id.* at 15. The Hearing Officer ignores all of the decreed points of diversion to arrive at this finding and the implication that A&B should "interconnect" its irrigation system.[8]

[8] The Hearing Officer also erroneously found that A&B's elimination of drain wells makes water "available for other purposes". *RO* at 22. A&B has closed nearly all of the drain wells across the project that formerly re-injected water back into the ESPA. Of the 10 remaining, six were listed as possible future production wells, but only one was been converted. *Dan Temple Testimony*, Vol. III, pp. 608-610. The closure of the injection wells did not make additional water available on the project.

First, A&B's decree for water right #36-2080 did not "condition" or limit A&B's ability to seek administration of junior priority water rights in any way, including requiring A&B to interconnect some or all of its individual points of diversion. A&B's water right was licensed and partially decreed with individual wells serving different farm units across the project. As reflected in the *Recommended Order*, that is how the project was actually developed. *RO* at 15-16. Both the license and decree are binding upon IDWR and the Director. *See* Idaho Code §§ 42-220, 42-1420. The Director cannot license a water right, recommend it to the SRBA Court, and then refuse to distribute water to the right after it is decreed just because the right has multiple points of diversion which are not interconnected. In addition, attempting to move water from well systems, or increase the lands served by a particular well would only reduce the amount of water provided to all landowners served by those wells during allotment. *See Dan Temple Testimony*, Tr. Vol. 4, p. 703, ln. 16 – p. 704, ln. 7. In essence, such an action would force A&B to "injure" it own landowners by taking water away from some and giving it to others.

Nothing in the water distribution statutes or CM Rules requires a senior water right holder to "interconnect" different points of diversion, or show that it is not feasible, as a condition to seek administration of junior priority rights that are injuring the senior. This requirement unlawfully disregards the "presumption" A&B is afforded for its decreed senior groundwater right. *See AFRD #2*, 143 Idaho at 878. As such the *Recommended Order* fails to recognize A&B's water right as decreed and impermissibly shifts the burden to A&B to prove certain conditions or take additional measures in order to receive water under its senior water right.

Importantly, the *Recommended Order* makes these demands even though there is nothing in the record addressing the practicality of interconnection in the project. *RO* at 15. There is nothing in the record that would demonstrate how interconnection would be helpful, feasible or even possible. Just the opposite, Dan Temple, in reference to a study commissioned by the Idaho Water Resource Board, testified that a physical interconnection of the A&B project would likely cost approximately $360 million. *Dan Temple Testimony*, Tr. Vol. III, p. 481, ln. 19 – p. 482, ln. 24.

Contrary to the Hearing Officer's statement, those costs are not "speculative". *RO* at 19. The study commissioned by IWRB was completed and presented by MWH in July 2008. *See A&B Irrigation District Ground Water-to-Surface Water Conversion Project Study* (found at http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/ESPA/LDP/espa-presentations.htm). The study, which the Director is certainly familiar with, estimates probable project costs at $360 million. *See* MWH Report at 13. Accordingly, the Director can take notice of those estimated costs and find that a complete interconnection is cost prohibitive for A&B. With respect to the "partial interconnection" rendering offered at the hearing (Exs. 416, 427-9), Dan Temple explained to move only 0.02 cfs (the amount of water for the size of a garden hose) was not practical on a large irrigation project such as A&B's. *Dan Temple Testimony*, Vol. IV, p. 715, p. 719, lns. 5-18. Certainly IDWR would not require a large irrigation project to move water several miles to only irrigate 1 acre (0.02 cfs). Yet, that was the schematic and absurd proposal offered by IGWA at hearing. Clearly, the finding that interconnection would offset shortages is unsupportable and should be set aside.

VI. Depletions of the Aquifer Levels in the Southwest Area Caused by Pumping Under Junior Ground Water Rights Constitutes Material Injury.

Classifying the southwest portion of the project as a "bottleneck in the system," the *Recommended Order* states that "the conditions in the southwest area that make the recovery of water from the wells difficult do not justify curtailment or other mitigation." *RO* at 34. This treatment of the southwest area is inconsistent, however, with the watermaster's duty to distribute water to A&B's senior water right. *See* Idaho Code § 42-602 & -607.

"Well deepening is likely to be successful in the north portion of the project and ***relatively low in parts of the southern portion of the project***." *RO* at 14 (emphasis added). Indeed, ground water levels have depleted so far in some areas that rectification is difficult and "in some instances ***impossible***." *RO* at 36 (emphasis added). Notwithstanding this recognition, the *Recommended Order* erroneously seeks to compel A&B to "reach water from those wells or to import it from other wells." *Id.* The *Recommended Order* fails to consider A&B's abandoned wells in that area and the fact that it cannot feasibly move water within its project as discussed above. Moreover, the *Recommended Order* erroneously interprets the license proceeding before IDWR as suggesting that BOR originally "envisioned" moving water within the project at some later date and that somehow justifies forcing A&B to interconnect today. *RO* at 19.

The *Recommended Order* draws support for this conclusion from historical documents addressing the development of wells in the southwest area. *See RO* at 13-15. It claims that "the need to import water to areas of low well production was considered early in the project," and that "the potential need to import water form more productive areas were foreseeable." *Id.* at 15. It claims that the A&B project "was a pioneering effort with some risks for shortages in the southwest portion of the project known." *Id.* at 14. Yet, these historical, pre-decree, documents

cannot dictate the Director's administration of A&B's *decreed* water right today. Rather than recognizing and affirming "the reality of the system as it was designed and utilized and partially decreed," *RO* at 18, the *Recommended Order* implies that the southwest area is not protected from injury by juniors because it is considered a "difficult area".

Furthermore, just because it was "foreseeable" that the water supply would be variable, does not mean that junior water rights should not be held responsible for their depletions to the water supply and injuries caused to senior rights. Indeed, the variability "foreseen" was based on the hydrogeology of the system, not due to impacts caused by pumping under junior priority rights. Such variability does not create an obligation to "self-mitigate" for material injury caused by junior ground water rights.[9] Accordingly, the geology of a particular area of the aquifer does not justify a "no-injury" finding to A&B's senior groundwater right.

Water right administration is not tempered by geography and geology. The Department cannot simply ignore a portion of A&B's water right just because the geology is different in part of the aquifer under its project. The law does not support any action that treats A&B's landowners in the southwest area differently from those in the north and east areas of the project. All landowners have a right to use a portion of the same senior water right and they all have the right to demand protection from out-of-priority ground water diversions that are materially injuring A&B's senior water right.

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[9] Similarly, across the ESPA, surface water users, with senior priority natural flow water rights have recognized that there is variability in the timing and availability of natural flow based upon climatic conditions. To compensate for the natural variability, they have acquired storage water rights in the various reservoirs along the Snake River and its tributaries. Importantly, as was made evident in the Surface Water Coalition call, this "foreseen" variability of the water supply – leading to the acquisition of storage water rights – does not forestall the Director's obligations to administer the water rights they acquired and does not create or impose an obligation to self- mitigate for material injury caused by interfering junior priority ground water rights.

Although water is not available to the same degree in the southwest area, A&B did operate and use successful wells in that area for over 30 years. *A&B Expert Rpt.* at 3-8; *Koreny Pre-Filed Testimony* at 5, ¶ 12. The fact that less water is available today does not excuse material injury. Rather, it triggers water right administration. *See* CM Rules 40, 42 & 43.[10]

The *Recommended Order* properly recognizes that the holder of a decreed water right cannot be forced to "re-adjudicate" or reprove that water right through the administrative process. *RO* at 7 (*citing AFRD#2 v. IDWR*, 143 Idaho at 878). Yet, despite that recognition, the *Recommended Order* uses historical information, including an interpretation of the manner in which the water right was licensed to limit A&B's decreed water right today. Historical documents do not and cannot change the material facts before the Hearing Officer. Water right #36-2080 was decreed with a specific priority date, individual points of diversion, diversion rate and acre limitation. The decree was issued with the understanding (deemed a "reality" by the *Recommended Order* at 18) that the individual well systems were not interconnected and that water <u>was not</u> imported between well systems. The *Recommended Order* recognizes that the development of these wells was reasonable. *RO* at 14 & 34. Furthermore, the facts show that A&B has essentially exhausted its options. It has spent significant amounts of money rectifying wells, it has been forced to abandon wells as the water level drops and it becomes "impossible"

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[10] The *Recommended Order* deems this a question of risk, asserting that

> When those decisions [i.e. the initial assumptions at the time of development] fall short of the desired results the question is whether Unit B should bear the burden of the costs of rectification or whether junior ground water users should bear the burden either through curtailment or contributing to the costs of rectification.

RO at 26. This question, however, has been answered by this Hearing Officer in a prior administrative hearing. *See Opinion Constituting Findings of Fact, Conclusions of Law & Recommendation* (Spring Users' Call) (Jan. 11, 2008) ("The Spring Users are entitled to curtailment to the extent that the junior ground water users interfere with the water the Spring Users would otherwise have under their water rights"). To the extent that material injury is caused by diversions under junior ground water rights, that injury must be rectified by curtailment or an approved mitigation plan. *See* CM Rules 40, 42 & 43.

to rectify those well, *see RO* at 36, and it has temporarily converted nearly 1,400 acres to a surface water supply. Yet, ground water levels continue to decline. The Director cannot overlook these facts merely because the southwest area is a "difficult" area.

Schodde v. Twin Falls Land & Water Co., 224 U.S. 107 (1912), does not support the conclusion that the material injury in the southwest area should be overlooked as a "bottleneck." *See RO* at 34-36. In that case, the water right was not a decreed water right. To the contrary, A&B's water right has been partially decreed in the SRBA Court. Accordingly, unlike *Schodde*, the "reality" of the development of A&B's water right – i.e. separate well systems that are not interconnected and that do not incorporate imported water, *RO* at 18 – has been affirmed by the SRBA Court. Second, the water user in *Schodde* was still able to obtain his water – albeit without the water wheel. Here, the *Recommended Order* has specifically recognized that it is "impossible" to rectify wells in certain areas of the project. *See RO* at 18.

In *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 397 (1929), the Idaho Supreme Court analyzed *Schodde* and emphasized why that decision cannot be interpreted as broadly as it is in the *Recommended Order*. In *Arkoosh*, the Court observed that "*Schodde* . . . is clearly distinguishable because therein the interference was ***not with a water right*** but the current. In other words, ***the same amount of water went to Schodde's place as before***." (Emphasis added). Unlike *Schodde*, this case involves interference with a decreed "water right" such that the amount of water is no longer available in "the same amount of water … as before." A&B should not be forced to self-mitigate for that material injury on the basis of the differences in the geology in the aquifer across its project.

VII. A&B has Exceeded a "Reasonable Pumping Level".

The *Recommended Order* confirms that, in some well systems, ground water levels have depleted to the point that rectification is difficult and "in some instances ***impossible***." *RO* at 36 (emphasis added); *see also RO* at 14 ("well deepening is likely to be successful in the north portion of the project and relatively low in parts of the southern portion of the project"). Yet, the *Recommended Order* insists that "the burden remains with A&B" to deepen its wells and chase its water. *Id.* It is unclear what more A&B could do if, as the Hearing Officer recognizes, it is "impossible" to rectify certain wells. Moreover, the fact A&B has abandoned several wells demonstrates a "reasonable pumping level" has been exceeded since those wells cannot produce sufficient water despite deepening.

The *Recommended Order* states that "A&B has not been required to exceed reasonable pumping levels." *RO* at 36. Yet, there is no evidence or an objective "reasonable pumping level" by which to judge this conclusion. In essence, it cannot be stated that A&B has not been required to exceed a reasonable pumping level unless that pumping level is actually set.[11]

The evidence, however, supports the opposite conclusion. The facts and evidence presented demonstrate that A&B has exceeded a reasonable ground water pumping level, particularly in those areas where wells have been abandoned. In fact, the *Recommended Order* specifically recognizes that rectification is "impossible" in some wells and that deepening the wells in the southwest area is unlikely to produce more water. *See RO* at 14 & 36. While A&B concurs that the Director should set a reasonable pumping level, the evidence does not support

[11] Indeed, during the hearing, Sean Vincent, the Department employee responsible for the statements regarding reasonable pumping levels, admitted there was no factual basis for the January 29, 2008 *Order's* conclusions on this matter. *See* Tr. P. at 1845-47. The *Recommended Order* apparently draws the same conclusion without any supporting facts.

the *Recommended Order's* conclusion that that level has not yet been reached without identifying a specific ground water level.

A&B requested the Hearing Officer to reconsider the finding that "A&B has not been required to exceed reasonable pumping levels." *A&B Petition for Reconsideration* at 24-25. Despite the acknowledged fact that the Department has failed to establish an objective "reasonable pumping level" in the ESPA by which to judge the Director's and Hearing Officer's conclusion, the finding was not reconsidered. *See Reconsideration Order* at 3, *Clarification Order* at 1.

As set forth in A&B's prior briefing and proposed findings in this case, the "reasonable pumping level" finding is not supported by any evidence in the record and should be set aside. *See A&B Memorandum in Support of Summary Judgment* at 28-31, *A&B Post-Hearing Memorandum and Proposed Findings* at 38-40.

Based upon the evidence in this case there is no factual basis to support the finding in paragraph 18 of the January 29, 2008 Order concerning the "reasonable ground water pumping level". Whereas the Director apparently set a "reasonable ground water pumping level" in his mind, it was not disclosed in this proceeding, thus prejudicing A&B.

Similarly, in the *Recommended Order* the Hearing Officer concluded that A&B has not been required to exceed reasonable pumping levels. *See Recommended Order* at 36. The basis for this finding was that past rectification efforts "have been largely successful, indicating that there is water available if the proper efforts to secure it are pursued." *Id.* However, no "ground water level" was identified as being "reasonable" by which to conclude that A&B has not exceeded that level. The Hearing Officer added to this finding in the *Reconsideration Order* by

noting that this conclusion is supported "by the fact that A&B currently utilizes fewer than the number of authorized wells to serve the project". *Reconsideration Order* at 2.

To the contrary, the finding that A&B "currently utilizes fewer than the number of authorized wells to serve the project" is inaccurate, particularly in the context it is found in the *Reconsideration Order*. First, although A&B has 188 authorized points of diversion, it is only capable of using 177 active production wells on the project. *See* Dan Temple Testimony, Tr. Vol. III, p. 467, lns. 1-7. At hearing, A&B's Manager Dan Temple explained that of the 11 "inactive" wells, seven of those were abandoned due to declining ground water levels. *See id.* p. 467, lns. 8-15. The remaining "inactive" wells were "originally injection wells", not wells that pumped water from the aquifer. *See id.* p. 467, lns. 8-15; *see also*, A&B Expert Report at 3-12. The "injection wells" were not active production wells that previously provided irrigation water to the project, but they were "repermitted as production wells so that if I ever needed those, I could develop those as production wells instead of drilling a whole new well". *See id.*, p. 467, lns. 15-18. Of the six "injection wells" listed as authorized points of diversion, A&B has only converted one to an active production well. *See* Tr. Vol. III, p. 610, lns. 2-4.

Accordingly, whether or not any of the remaining "injection wells" could be used as active production wells is unknown at this point. Every well that formerly injected water into the aquifer <u>has not</u> been proven to be a capable "production" well. On this point Mr. Temple clarified that before an "injection well" can be converted to an active production well it has to be re-drilled and cleaned. *See* Tr. Vol. III, p. 610, lns. 11-13; p. 635, lns. 7-10. In summary, the fact A&B currently only uses 177 active production wells out of the 188 "authorized" points of diversion on water right #36-2080 does not support the conclusion that A&B "has not been

required to exceed reasonable pumping levels". Just the opposite, the fact A&B has been forced to abandon 7 formerly active production wells shows that A&B has exceeded a reasonable pumping level since those wells no longer produce adequate water to irrigate the acres under those well systems. Stated another way, A&B has not purposely idled 11 "active production wells" that are capable of producing water to serve the project. As such, this does not support the "reasonable pumping level" finding in the *Recommended Order*.

Whereas the Hearing Officer failed to clarify what objective standards or criteria were applied to arrive at the conclusion that A&B has not exceeded a "reasonable ground water pumping level", the Director should set this finding aside. As the record stands there was no factual basis disclosed by the Department, hence the Director's original finding was not justified. The Hearing Officer's conclusion is apparently based upon A&B's past rectification efforts, the finding that "water is available" at undefined levels, and the fact A&B does not currently use all of its authorized points of diversion. As explained above, water is not available at all of A&B's wells since several wells have been abandoned. Moreover, no "reasonable pumping level" has been identified from which a reviewing court could judge the Hearing Officer's or the Director's original conclusion. Such a finding is not supported by the facts and prejudices A&B by requiring A&B to "drill deeper" without knowing where A&B will be protected at what ground water pumping level. The lack of objective criteria renders the finding unsupportable.

Although the Hearing Officer recommended the Director should set a "reasonable pumping level", which acknowledges no objective standard has been established, both the *Recommended Order* and *Reconsideration Order* conclude A&B has not exceeded such a level. Accordingly, the Hearing Officer's decision leaves A&B in the position of "guessing" at what

that pumping level currently is for purposes of this case. While the Director concluded that A&B has not exceeded a "reasonable pumping level", no factual information was disclosed to support that finding. Although the Hearing Officer reached the same conclusion, it may have been for different reasons. Given the lack of foundation for the Director's original finding and the Hearing Officer's recommendation, it should be set aside at this point.

VIII. Designation of a Ground Water Management Area is Vital to the Future Health and Vitality of the ESPA

A ground water management area ("GWMA") is not identical to a water district. The *Recommended Order*'s contrary conclusion, which is based on three factual underpinnings, is in error.

First, the *Recommended Order*, after citing Idaho Code section 42-233b, cites to the testimony of Tim Luke as stating that "I think anything that you do in a [GWMA] can also be done in a water district." *Id.* at 38. This testimony, and the resulting conclusion in the *Recommended Order*, fails to recognize the important differences between a GWMA and a Water District. For example, a water district is "considered an instrumentality of the state of Idaho ***for the purpose of performing the essential governmental function of distribution of water among appropriators***." Idaho Code § 42-604 (emphasis added). To that extent, a watermaster and the Director have a clear legal duty to ***distribute water*** "in accordance with the prior appropriation doctrine." Idaho Code §§ 42-602, 607.

Different than a water district, a GWMA designation provides the Director with additional authority aimed squarely at addressing issues related to protecting the aquifer, not just administration of existing water rights. *See* Idaho Code § 42-233b. While management of a GWMA may have implications and benefits for the administration of water rights within a water

district, its scope is much broader. For example, a GWMA designation protects the source through (i) the development of a "ground water management plan … provid[ing] for managing the effects of ground water withdrawals on the aquifer," (ii) the requirement of a more thorough and "individual" review by the Director of any applications for permits, and (iii) the potential requirement of annual reporting of "withdrawals of ground water and other necessary information" necessary to analyze the available water supply. *Id.* The designation of a GWMA forces the Director to protect the aquifer – not just administer existing water rights. It gives the Director authority to manage the aquifer outside of the water delivery call context – forcing the Director to protect the declining aquifer even if a call is denied. Tim Luke recognized that there are statutory limitations on the authority of the watermaster to protect the aquifer – and that the watermaster's duties are limited to administration of water rights. *See* Tr. Vol. VI, p. 1339, ln. 24 – p. 1340, ln. 6.

Mr. Luke further recognized that a GWMA and a water district are not synonymous, but that they can and do exist in tandem:

> Q. And based on your experience with familiarity with water districts and water distribution statutes, would you agree that there are different statutes governing water districts as to opposed to those statutes governing critical ground water areas, ground water management areas?
>
> A. Yes, there are different statutes.
>
> Q. And it's true that water districts in critical and ground water management areas can coexist or that their boundaries can overlap one another?
>
> A. Yes.
>
> Q. And you would agree that's the case for certain aquifers in areas in the ESPA?

A. Yes.

MR. THOMPSON: I'll mark this as 245. (Exhibit 245 marked.)

Q. (BY MR. THOMPSON): Would you identify this exhibit, Mr. Luke?

A. This is amended final order creating Water District 140.

Q. And is this an example where there are critical ground water areas that overlap with a water district?

A. Yes.

Q. And would you agree that those – so just because you have a water district doesn't mean you can't have a critical ground water area or a ground water management area within that district; is that correct?

A. Yes, I'd agree.

Tr. Vol. VI, pp. 1234-36.

Furthermore, the claim that there is "no tangible benefit" to designating the ESPA as a GWMA or that such a designation "does not add to the authority of the Director" is belied by the fact that the legislature adopted a ***separate*** statutory provision addressing GWMA designations. It is telling that, even with provisions addressing the creation, management and duties of water districts, the legislature adopted section 42-233b. Indeed, Courts must presume that the Legislature was aware of the law regarding water districts at the time that it adopted provisions regarding GWMA. *See Robinson v. Batemann-Hall, Inc.*, 139 Idaho 207, 212 (2003) ("[t]he legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits no other construction").

The second factual underpinning of the *Recommended Order's* conclusion that a GWMA is not necessary is the assertion that "the designation of a [GWMA] requires notice to cease or reduce withdrawal of water be give only before September 1. The Director may enter the same type of order within a water district but is not under the same time constraint." *RO* at 38. This conclusion fails to recognize that the Director's authority to manage a GWMA extends far beyond the administrative context – requiring management of the declining aquifer even if a call is denied. This will ensure that the available water supply in the aquifer is protected and not exhausted to the point that no water user can benefit.

In this case it is clear that ground water levels have declined and will continue to decline unless the Director takes action to protect the water supply. It is particularly important for this part of the aquifer, where "less water is coming into A&B than there is leaving the area around A&B". *RO* at 10. Given the continued ground water level declines the Director has a duty to protect the aquifer and create a groundwater management area based upon the evidence in this case.

The final factual underpinning is that "IDWR has not been processing applications for permits since 1992." *RO* at 39. Therefore, the *Recommended Order* concludes, "any significant reductions in the aquifer level will be a consequence of other facts than the ground water pumping subject to the moratorium." *Id.* Even assuming this is correct, this conclusion fails to address the need for a GWMA area due to the continued depletions of the aquifer – whatever the source. The evidence presented at heaing demonstrates that the aquifer levels continue to decline. *See* Tr. Vol. I at 127, lns. 14-20 (*Ralston Testimony*). Dr. Wylie testified that the water levels will continue to decline in the future. *See* Tr. Vol. VII, p. 1420, lns. 7-25, p. 1421, lns. 1-

5, 17-25, p. 1422, lns. 1-6. A&B's Expert Report shows a statistically significant trend for declining ground water levels throughout other areas of the ESPA. *See A&B Expert Report* at 5-3 to 5-5, Figures 5-7 and 5-8. Declining ground water levels have not only affected A&B, but they have also forced other water right holders to deepen their wells (about 160 private wells deepened after 1970 in the vicinity of A&B). *See id.* at 3-18. Declining ground water levels have resulted in declining reach gains and tributary spring flows to the Snake River. *See id.* at 5-5 to 5-6. Accordingly, the moratorium on new water rights has not stopped the resource from declining.

The *Recommended Order's* assertion that "any significant reductions in the aquifer level will be a consequence of other factors," *RO* at 39, is not dispositive of this issue. Indeed, the statutes provide no distinction between the sources of the decrease in water supply. Rather, the code provides designation as a GWMA when the area is "approaching the conditions of a critical ground water area" – which is defined as "any ground water basin … not having sufficient ground water to provide a reasonably safe supply for irrigation or cultivated lands, or other uses in the basin." *See* Idaho Code § 42-223a & 233b. There is no requirement that the cause of the insufficient ground water supply must be as a result of excessive ground water pumping.

As stated in A&B's *Post-Hearing Memorandum*, at a minimum, the southwestern portion of the ESPA qualifies for designation as a GWMA due to the fact that the rate of aquifer recharge (from all sources) is not sufficient to meet the rate of aquifer discharge (from all combined discharges). *See* A&B Expert Report at 5-9 to 5-11. This fact was confirmed by Dr. Wylie, who testified that the condition of a GWMA exists around A&B, since more water is discharged and is leaving the aquifer than is entering it in that area. *See* Tr. Vol. VII, p. 1520, ln.

18 – p. 1521, ln. 19.

Therefore, the *Recommended Order's* finding that a GWMA should not be established should be reversed.

IX. The Director Must Re-Evaluate the Findings in the January 29, 2008 Order.

As recognized in the *Reconsideration Order*, the record developed at hearing "should be considered and the findings of the Director's Order entered January 29, 2008, reconsidered in light of the additional evidence and the findings in the Hearing Officer's March 29, 2009, Opinion, as amended by this Order." *Reconsideration Order* at 2-3. Importantly, the evidence presented, and several of the findings by the Hearing Officer reveal that the bases relied upon by the Director for the January 29, 2008 "no-injury" finding are not justified.

First, the Director denied A&B's call on the erroneous assumption that 0.75 miner's inch per acre was the "maximum rate of delivery" to all landowners on the project and that A&B could deliver about 98% of that delivery rate when the water use was totaled and averaged across the project. *See* January 29, 2008 *Order* at 43-44, ¶ 23. The *Recommended Order* found there was no basis for this conclusion and that the BOR's statement in it 1985 Report was wrong and that acceptance of that conclusion "would in effect rewrite the water right down from 0.88 miner's inch rate of delivery to 0.75." *RO* at 24-25. Since the Director wrongly assumed 0.75 was a "maximum rate of delivery" and this was a foundational basis for his prior "no-injury" order, the January 29, 2008 Order should be re-evaluated accordingly. As demonstrated at hearing, 0.75 miner's inch per acre is not the "maximum rate of delivery" for the various well systems, and therefore A&B cannot delivery 98% of the Director's assumed delivery rate.

Second, the Director concluded that A&B used an "inefficient well and delivery system"

to find "no-injury" to its senior water right. *See Order* at 44, ¶ 23. Again, the evidence presented and the findings in the *Recommended Order* show otherwise. Importantly, the *Recommended Order* found that A&B operates its wells and delivery system in a highly efficient manner. *RO* at 21-22. The Director's prior decision is not supported by the evidence, therefore the "no-injury" decision should be re-evaluated accordingly.

Finally, the Director wrongly concluded that A&B was not injured because it failed to use "appropriate technology", "drilling techniques", and "reasonable well drilling standards." *See Order* at 44-45, ¶¶ 28 – 34. Again, this finding served as a foundational basis for the Director's January 29, 2008 "no-injury" Order. Whereas the *Recommended Order* concludes that "cable tool drilling was appropriate" and that A&B does use "acceptable drilling techniques" there is no basis for the Director's prior findings in this area. *RO* at 20-21.

Since the Director's reasons for denying A&B's call are not supported by the record in this case, the underlying bases for the January 29, 2008 Order are not justified. As such, the Director must reconsider the "no-injury" finding in light of the evidence and the findings made by the Hearing Officer and the evidence presented at hearing. As explained above, the Hearing Officer's ultimate recommendation supporting the Director's "no-injury" determination was in error and should be reversed in the final order.

X. The Director has No Authority to Shorten the Time to File Exceptions.

A&B objects to the Director's *Order Shortening Time to File Exceptions* issued on June 19, 2009. The *Order* constitutes an extreme deviation from the generally accepted procedural rules governing the time for filing motions and other documents, was entered without any supportable basis and raises serious due process concerns.

The Director relies on Department Procedural Rule 52 to support his decision to shorten time to file exceptions. *See* IDAPA 37.01.01.52. According to the Director, Rule 52 gives the Department the power to ignore its own rules and deviate in any way it sees fit within the Director's sole discretion. Rule 52 also states that "the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested cases proceedings conducted before the agency." It is a generally accepted principle of the rules of civil procedure that while the time for filing a motion or taking some other action prescribed by the rules to be accomplished within a certain time, may be enlarged upon the agreement of the parties or by the court on its own, there is no concomitant rule that allows time to be shortened without a motion and leave of the court being granted. ID. R. CIV. P. 6(b).

Additionally, it is a commonly held principle of law that the more specific or recent statute governs over the more general. *Farber v. Idaho State Ins. Fund*, 208 P.3d 289 (2009), *citing Shay v. Cesler*, 132 Idaho 585, 588, 977 P.2d 199, 202 (1999). In this case, Rule 720.02.b, stating that <u>there shall be allowed 14 days from the entry of a final recommended order</u> within which any party may file exceptions, is certainly more specific than Rule 52. The Director's Order substantially deviates from generally accepted legal principles relating to the time for filing of motions and other documents, and for this reason A&B objects to the Director's shortening of time to file exceptions.

The Director also cites his impending retirement on June 30, 2009, as the reason necessitating the shortened time, so that within the two business days following the submission of the exceptions he can, apparently, take whatever action he chooses to take – including issuing a *Final Order*. He states that "[b]ased on the Director's knowledge of this proceeding and for

purposes of economy, it is proper for the Director to review any exceptions that are filed" because if he were to defer the matter to his successor "it would not provide the parties with a 'just, speedy and economical determination of all issues presented to the agency.'" *Order Shortening Time* at 2, *citing* IDAPA 37.01.01.052. This reasoning is faulty for two reasons.

First, the A&B call proceedings were initiated on July 26, 1994, when R. Keith Higginson was the Director. On March 19, 2007 A&B filed its Motion to Proceed with the call proceedings initiated in 1994, at which time the current Director had become the interim Director. Approximately 8 months after the Motion to Proceed was filed, the Director assigned Hearing Officer Schroeder to preside over the matter. Given the 15-year history of the call proceedings, the Director's self-serving assertion that he is the only appropriate person to enter a final order after exceptions have been filed is unconvincing. Moreover, shortening the time to file exceptions and issue a final order within mere days of receiving the exceptions brief clearly demonstrates that the Director does not intend to give A&B's exceptions any meaningful review. This is particularly evident where Idaho's APA and the Department's Rules provide the Director with 56 days to issue a final order. *See* I.C. § 67-5244(2)(a); Rule 720.02.c.

Moreover, although the Director took 61 days to issue a final order in the *Blue Lakes and Clear Springs Delivery Call Case* and 73 days to issue a final order in the *Surface Water Coalition Delivery Call Case* from the time when exceptions were filed, the Director proposes to take less than 2 business days to issue a final order in A&B's case so that he can issue a decision prior to leaving IDWR. This is despite the Director's claim that the case is a "technically complex matter". *Order Shortening Time* at 2. Whereas the Director gave all the parties in the

other delivery call cases the time required by the Rules, he has provided no justifiable reason for purposely ignoring the Rules and prejudicing A&B here.

Second, Department Rule 720.02(c), governing the procedure related to recommended orders states:

> Written briefs in support of or taking exceptions to the recommended order shall be filed with the agency head (or designee of the agency head.) *Opposing parties shall have fourteen (14) days to respond.* The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

The Director cannot justify the revocation of the parties' right to respond to exceptions briefing, yet he is doing just that in this case. Given the *Recommended Order's* decision to support the Director's original "no-injury" determination, it's likely the Director does not anticipate any responses to A&B's exceptions.

Furthermore, Rules 720.02(b) and (c) contemplate that the Director undertake a deliberative process after receipt of exceptions briefing that is not capable of completion within two business days – as the Director anticipates. The time within which the Director expects to receive the written exceptions and issue a final order suggests that the Director does not anticipate even contemplating the possibility of holding a hearing related to the exceptions or to remand for further evidentiary hearings. This shortened process indicates that the Director does not intend to undertake a deliberative process with respect to the exceptions that have yet to be filed, but rather has predetermined the action he will take upon receipt of the exceptions, which

fails satisfy the tenets of the Rule. Finally, the shortening of time and the failure to provide any meaningful review in this matter clearly violates A&B's constitutional right to due process.

CONCLUSION

A&B takes exception to the Hearing Officer's *Recommended Order* as identified above and requests the Director to enter a final order consistent with the evidence presented and find injury to A&B's senior groundwater right #36-2080.

DATED this 26th day of June, 2009.

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